LexisNexis

Date and Time: Wednesday, September 27, 2023 12:56:00 PM CST

Job Number: 206715419

Documents (100)

1. *West Texas Utilities Co. v. Texas Electric Service Co., 470 F. Supp. 798*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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2. *Armstrong v. O'Connell, 463 F. Supp. 1295*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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3. *Missouri v. National Organization for Women, Inc., 467 F. Supp. 289*

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

4. *North American Soccer League v. National Football League, 465 F. Supp. 665*

Client/Matter: -None-

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5. *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n, 440 U.S. 69*

Client/Matter: -None-

Search Terms: "antitrust law"

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6. *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205*

Client/Matter: -None-

Search Terms: "antitrust law"

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7. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179*

Client/Matter: -None-

Search Terms: "antitrust law"

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8. *Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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9. *Huron Valley Hospital, Inc. v. Pontiac, 466 F. Supp. 1301*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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10. *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841*

Client/Matter: -None-

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Search Type: Natural Language

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

11. *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 1979 U.S. Dist. LEXIS 14003*

Client/Matter: -None-

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12. *Mullins v. Kaiser Steel Corp., 466 F. Supp. 911*

Client/Matter: -None-

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13. *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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14. *Pireno v. New York State Chiropratic Asso., 1979 U.S. Dist. LEXIS 13729*

Client/Matter: -None-

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15. *United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471*

Client/Matter: -None-

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

16. [Knutson v. Daily Review, Inc., 468 F. Supp. 226]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
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17. [Paceco, Inc. v. Ishikawajima-Harima Heavy Industries Co., 468 F. Supp. 256]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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18. [Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573]

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

19. [Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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20. [Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287]

Client/Matter: -None-

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21. [Fradette v. American Service Corp., 1979 U.S. Dist. LEXIS 13220]

Client/Matter: -None-

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22. Mason City Center Associates v. Mason City, 468 F. Supp. 737

Client/Matter: -None-

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23. Consolidated Express, Inc. v. New York Shipping Asso., 602 F.2d 494

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

24. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1

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

25. In re Armored Car Antitrust Litigation, 472 F. Supp. 1357

Client/Matter: -None-

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26. Caribe Trailers Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711

Client/Matter: -None-

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Search Type: Natural Language

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27. United States v. Foley, 598 F.2d 1323

Client/Matter: -None-

Search Terms: "antitrust law"

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28. Industrial Inv. Dev. Corp. v. Mitsui & Co., 594 F.2d 48

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Search Terms: "antitrust law"

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

29. In re Uranium Antitrust Litig., 473 F. Supp. 393

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30. Mac Adjustment, Inc. v. General Adjustment Bureau, Inc., 597 F.2d 1318

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

31. Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc., 597 F.2d 133

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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32. *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986*

Client/Matter: -None-

Search Terms: "antitrust law"

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33. *Newspaper Printing Corp. v. Galbreath, 580 S.W.2d 777*

Client/Matter: -None-

Search Terms: "antitrust law"

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34. *People ex rel. Freitas v. City and County of San Francisco, 92 Cal. App. 3d 913*

Client/Matter: -None-

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35. *Hecht Co. v. Southern Union Co., 474 F. Supp. 1022*

Client/Matter: -None-

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36. *In re Ampicillin Antitrust Litig., 82 F.R.D. 652*

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37. [McCourt v. California Sports, Inc., 600 F.2d 1193]

Client/Matter: -None-

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38. [Shapiro v. General Motors Corp., 472 F. Supp. 636]

Client/Matter: -None-

Search Terms: "antitrust law"

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39. [In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40]

Client/Matter: -None-

Search Terms: "antitrust law"

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40. [Connecticut v. Levi Strauss & Co., 471 F. Supp. 363]

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Search Terms: "antitrust law"

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41. [Minnesota by Spannaus v. American Crystal Sugar Co., 1979 U.S. Dist. LEXIS 12044]

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

42. [Optivision, Inc. v. Syracuse Shopping Center Associates, 472 F. Supp. 665]

Client/Matter: -None-

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

43. Far Eastern Coconut Co. v. Sun Ripe Coconut Corp., 1979 U.S. Dist. LEXIS 12013

Client/Matter: -None-

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44. Arizona v. Maricopa County Medical Soc., 1979 U.S. Dist. LEXIS 11918

Client/Matter: -None-

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45. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889

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46. Reiter v. Sonotone Corp., 442 U.S. 330

Client/Matter: -None-

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

47. LK Productions, Inc. v. American Federation of Television & Radio Artists, 475 F. Supp. 251

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48. [Times Mirror Co. v. Federal Trade Com., 1979 U.S. Dist. LEXIS 11738]

Client/Matter: -None-

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49. [California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727]

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50. [Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168]

Client/Matter: -None-

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51. [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263]

Client/Matter: -None-

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52. [Neugebauer v. A. S. Abell Co., 474 F. Supp. 1053]

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53. *GRAMS v. BOSS, 91 Wis. 2d 845*

Client/Matter: -None-

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54. *Fruehauf Corp. v. Federal Trade Com., 603 F.2d 345*

Client/Matter: -None-

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55. *McNulty v. Borden, Inc., 474 F. Supp. 1111*

Client/Matter: -None-

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56. *Central Iowa Power Cooperative v. Federal Energy Regulatory Com., 606 F.2d 1156*

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57. *Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962*

Client/Matter: -None-

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58. *Larry v. Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council, 609 F.2d 1368*

Client/Matter: -None-

Search Terms: "antitrust law"

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59. *United States v. Continental Group, Inc., 603 F.2d 444*

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Search Terms: "antitrust law"

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

60. *Sherman v. British Leyland Motors, Ltd., 601 F.2d 429*

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61. *Juneau Square Corp. v. First Wisconsin Nat'l Bank, 475 F. Supp. 451*

Client/Matter: -None-

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62. *Mannington Mills, Inc. v. Congoleum Indus., 610 F.2d 1059*

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Search Terms: "antitrust law"

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63. *N. Am. Soccer League v. Nfl, 1979 U.S. Dist. LEXIS 10637*

Client/Matter: -None-

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64. *Amalgamated Clothing & Textile Workers Union v. J. P. Stevens & Co., 475 F. Supp. 482*

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65. *People v. Roth, 100 Misc. 2d 542*

Client/Matter: -None-

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66. *In re Beef Industry Antitrust Litigation, 600 F.2d 1148*

Client/Matter: -None-

Search Terms: "antitrust law"

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67. *Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097*

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68. *People v. Mobile Magic Sales, Inc., 96 Cal. App. 3d 1*

Client/Matter: -None-

Search Terms: "antitrust law"

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69. Card v. National Life Ins. Co., 603 F.2d 828

Client/Matter: -None-

Search Terms: "antitrust law"

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70. Jennings Oil Co. v. Mobil Oil Corp., 1979 U.S. Dist. LEXIS 10226

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71. Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc., 475 F. Supp. 973

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72. Penne v. Greater Minneapolis Area Board of Realtors, 604 F.2d 1143

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73. Las Vegas Drive-In Theatre, Inc. v. National General Theatres, Inc., 1979 U.S. Dist. LEXIS 9958

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74. Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co., 586 S.W.2d 310

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75. State v. Heritage Realty, 137 Vt. 425

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76. In re Fertilizer Antitrust Litigation, 1979 U.S. Dist. LEXIS 9818

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Search Terms: "antitrust law"

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77. United States v. Tracinda Inv. Corp., 477 F. Supp. 1093

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Search Terms: "antitrust law"

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78. International Asso. of Machinists & Aerospace Workers, ("IAM") v. Organization of Petroleum Exporting Countries ("OPEC"), 477 F. Supp. 553

Client/Matter: -None-

Search Terms: "antitrust law"

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79. [Photovest Corp. v. Fotomat Corp., 606 F.2d 704]

Client/Matter: -None-

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80. [Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., 479 F. Supp. 281]

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

81. [Reading Indus. v. Kennecott Copper Corp., 477 F. Supp. 1150]

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

82. [Encoder Communications, Inc. v. Telegen, Inc., 1979 U.S. Dist. LEXIS 9517]

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

83. [Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107]

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

84. *Bass v. Boston Five Cent Sav. Bank, 478 F. Supp. 741*

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

85. *In re Fine Paper Antitrust Litigation, 1979 U.S. Dist. LEXIS 9414*

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

86. *Oleksy v. Sisters of Mercy, 92 Mich. App. 770*

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

87. *Citicorp v. Interbank Card Asso., 478 F. Supp. 756*

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

88. *Duryea v. Third Northwestern Nat'l Bank, 606 F.2d 823*

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

89. *Hometowne Builders v. Atlantic Nat'l Bank, 477 F. Supp. 717*

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. *H. J. Hodes & Co. v. Triangle Brass & Specialties Co., 1979 U.S. Dist. LEXIS 9249*

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. *Byars v. Bluff City News Co., 609 F.2d 843*

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. *Open Pantry Food Marts, Inc. v. Falcone, 92 Wis. 2d 807*

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. *Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc., 604 F.2d 897*

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. *In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965*

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. [Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc., 97 Cal. App. 3d 932]

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. [Arnott v. American Oil Co., 609 F.2d 873]

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. [Ambook Enterprises v. Time, Inc., 612 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

98. [Essential Communications Systems, Inc. v. American Tel. & Tel. Co., 610 F.2d 1114]

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. [Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369]

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

100. *Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Asso., 480 F. Supp. 640*

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

West Texas Utilities Co. v. Texas Electric Service Co.

United States District Court for the Northern District of Texas, Dallas Division

January 30, 1979

No. CA3-76-633-F

Reporter

470 F. Supp. 798 *; 1979 U.S. Dist. LEXIS 14771 **; 1979-2 Trade Cas. (CCH) P62,851

WEST TEXAS UTILITIES COMPANY and Central Power and Light Company v. TEXAS ELECTRIC SERVICE COMPANY and Houston Lighting and Power Company

Core Terms

interconnection, electricity, customers, plaintiffs', interstate, intrastate, synchronous, electric utility, reliability, generation, interstate commerce, savings, holding company, costs, Sherman Act, disconnect, studies, mode of operation, contracts, parties, prices, subsidiaries, defendants', cooperate, wholesale, plants, plans, intrastate commerce, group boycott, anticompetitive

Counsel: **[**1]** Richard E. Powell, Richard G. Ferguson, Michael I. Miller, Thomas G. Ryan, David M. Stahl, Isham, Lincoln & Beale, Chicago, Ill., Stan McMurry, Rain Harrell Emery Young & Doke, Dallas, Tex., for plaintiffs.

M. D. Sampels, Robert Woolridge, F. K. Slicker, Worsham, Forsythe & Sampels, Dallas, Tex., J. A. Gooch, Cantey, Hanger, Gooch, Collins & Munn, Fort Worth, Tex., for defendant Texas Elec. Service Co.

H. Dudley Chambers, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., E. W. Barnett, T. F. Weiss, Jr., J. G. Copeland, Baker & Botts, Houston, Tex., for defendant Houston Lighting and Power.

Opinion by: PORTER

Opinion

[*804] MEMORANDUM OPINION

This case involves the interconnected group of electric utilities companies serving the vast majority of the electric consumers in the State of Texas. Plaintiffs, two intrastate [1] Texas electric utility companies which are part of a

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[1] Definition of terms used in this opinion:

Bulk transmission system : higher voltage and higher capacity lines tying together power plants and serving major loads going to interconnections

Closed connection : switch is closed and power can flow over the interconnection between the two systems

Distribution line : serves local loads

Generation : the production of electricity

Intrastate : electric utilities operating in such a manner that electric energy does not cross state lines

Interstate : electric utilities operating in such a manner that electric energy is either transmitted or received across state lines holding company that also owns other interstate electric utility companies, have sued under *§ 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*, two other Texas intrastate electric utilities with whom plaintiffs are interconnected claiming that the defendants conspired to restrict their transmission **[**2]** of electric power to intrastate commerce. This conspiracy allegedly prevented plaintiffs from exchanging power with their interstate holding company counterparts through the use of defendants' transmission lines, at an estimated loss to the holding company of 2.2 billion dollars over the next twenty years. Plaintiffs seek an injunction permanently restraining this alleged conspiracy, restraining any enforcement of any written or oral contractual provision prohibiting the flow of electric energy in interstate commerce, and restraining defendants from disconnecting **[*805]** their systems from the plaintiffs' systems.

[3]** Defendants have asserted a number of defenses, including: (1) the intrastate method of operation is specifically permitted by Federal Power Act *16 U.S.C. § 824(b)*; (2) defendants had no anticompetitive intent; (3) any actions by defendants had no anticompetitive effect upon the plaintiffs; (4) defendants' conduct was reasonable; and (5) defendants acted independently and not in conspiracy. Defendants also question plaintiffs' motive for filing this suit in an effort to undermine the credibility of the testimony presented by the plaintiffs. Defendants introduced evidence suggesting that plaintiffs filed this suit to ensure the interstate exchange of power between the members of plaintiffs' holding company. This exchange of power is required by federal law which permits utility holding companies only if they are integrated systems. The SEC, charged with enforcing this provision, had permitted the holding company to operate without continuous interstate flow of power until 1974, when various municipal power companies filed a suit with the SEC challenging the holding company status of plaintiffs' holding company. Defendants note that this proceeding is only one of a number of proceedings **[**4]** instituted by the plaintiffs or which involve similar issues. These proceedings include:

FPC Docket # E-9558 CSW's request to FPC to order maintenance of interstate operations with ERCOT;

PUC Docket # 14 Request by Defendants and others to PUC to have PUC order reestablishment of pre-May 4, 1976, mode of operation;

U.S. District Court, Western District Texas, Austin Division Suit filed by CPL/WTU objecting to PUC interim order under Docket # 14 reestablishing interconnections in Texas as they were before May 4, 1976;

SEC Docket # 3-4951 Oklahoma cities filed motion with SEC requesting SEC review CSW holding company status;

NRC Docket Nos. 50-498-A and 50-499-A CPL's request to NRC to conduct antitrust hearing as part of construction permit proceedings before NRC involving South Texas Nuclear Project; and

FPC (FERC) Docket Nos. E-9593 and E-9578 CSW's request for joint hearings with PUC and proceeding to determine if TPL engages in interstate commerce.

The Court held a seven week non-jury trial commencing October 2, 1978. The Court renders the following memorandum decision, supplemented with additional findings contained in an appendix.

[5]** THE PARTIES

Open interconnection : switch at the interconnection is open with no power or energy being able to flow over the interconnection

Parallel operation : virtually the same as synchronous operation

Radial line : "single feed" one electric line to a town; two transmission lines to a town would be "dual feed"

Reserve : two types of electric energy reserve

Spinning reserve reserve that a utility has on line at any time

Capacity reserve total generation of the capacity of the utility system less expected peak demand (the maximum amount of energy demand on the system during the year), or reserve above the peak demand of generation

Synchronous operation : means two or more electric utilities systems interconnected with the generators operating in synchronism with each other

Transmission line : serves bulk power supply

All of the parties to this proceeding are electric utilities engaged in the generation, transmission, distribution and sale of electric energy. None of the parties' facilities used in the generation, transmission, distribution or sale of electric energy are located outside the State of Texas.

PLAINTIFFS

West Texas Utilities Company (WTU) and Central Power & Light (CPL) are wholly owned subsidiaries of Central and South West Corporation (CSW), a registered public utility holding company under the provisions of the Public Utility Holding Company Act of 1935. *15 U.S.C. § 79 et seq.* CSW also owns all of the capital stock of Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Co. (SWEPCO), electric utilities operating in the States of Oklahoma, Arkansas, Louisiana and portions of East Texas.

WTU provides electric service to customers of central West Texas, an area including 167 communities, farms, ranches, and 18 electric cooperatives located in 53 counties. The cities of Abilene and San Angelo are the largest metropolitan centers served by WTU, and the company serves a total population of approximately 520,000. In 1977 WTU owned and operated 10 electric **[**6]** generating plants having a total net generating capability of 1,054 megawatts. That year the WTU system experienced a peak load of **[*806]** 758 megawatts for a reserve of 296 megawatts (see appendix C for a map of the WTU service area).

CPL provides electric service to customers in the Rio Grande Valley and the Gulf Coast regions of Texas in an area that includes 212 communities and adjacent and rural areas, seven rural electric cooperatives and two municipal electric systems in 45 counties. The cities of Corpus Christi, Laredo and Victoria are the largest metropolitan centers served by CPL and the company serves a total population of 1,200,000. In 1977 CPL owned and operated nine electric generating plants having a total net generating capability of 3,044 megawatts. That year the CPL system experienced a peak load of 2,323 megawatts for a reserve of 721 megawatts (see appendix B for map of the CPL service area).

WTU has historically operated its system as two divisions, with the "Northern Division" being interconnected with PSO, operating in the State of Oklahoma and the "Southern Division" interconnected with TESCO and other members of the Texas Interconnected Systems (TIS) **[**7]** and the Electric Reliability Council of Texas (ERCOT).

The TIS is a voluntary membership organization consisting of the major bulk electric power suppliers in Texas, including DPL, TESCO, TPL, HLP, CPL, Austin, CPSB, LCRA, TMPA and WTU. [2.] The primary purpose of TIS is to ensure maximum reliable electric service through coordination of planning of operations.

ERCOT was created in July, 1970 and is one of nine regional electric reliability councils forming the National Electric Reliability Council (NERC) (see appendix D).

The northern division of WTU, through its interconnection with PSO, operated in electric synchronism with PSO and other members of the Southwest Power Pool (SWPP). The two divisions were designed so as to permit occasional interchange of power, in part to permit CSW to satisfy the provisions of the 1935 Holding Company Act.

DEFENDANTS

Texas Electric Service Co. (TESCO) is a wholly owned subsidiary of Texas Utilities (TU), a holding **[**8]** company which also owns all of the capital stock of Texas Power & Light (TPL) and 99.6% Of the capital stock of Dallas Power & Light (DPL). TESCO provides electric service in North Central and West Texas, including the Cities of Fort Worth, Wichita Falls, Midland, Odessa, Arlington, Grand Prairie and 68 other incorporated municipalities, with a total population of approximately 4,000,000.

TPL, not a party to this suit, provides electric service in portions of 51 counties in North Central and East Texas, including the Cities of Irving, Waco, Tyler, Mesquite, Richardson, Killeen, Temple, Sherman, Denison, Paris, Lufkin,

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[2.] Definitions of abbreviations used in this opinion:

Brownwood and 249 other incorporated municipalities. DPL provides electric service primarily in Dallas County. TESCO, TPL and DPL are separate corporate entities with their own officers and boards of directors (see appendix B for a map of the TESCO, TPL and DPL service territories, and Appendix C for a more accurate depiction).

Houston Lighting and Power (HLP) is a wholly owned subsidiary of Houston Industries, Inc., and serves an area of approximately 5,000 square miles in the Texas Gulf **[*807]** Coast region in which are located Houston, Galveston and 152 smaller **[**9]** cities and towns. In 1977, the peak load for the HLP system was 8,645 megawatts, with a total net generating capacity of 10,170 megawatts for a reserve of 1,525 megawatts (see appendix B for a map of the HLP service territory).

ELECTRICITY

Electricity is consumed the instant it is produced, and electric generators are designed to respond instantaneously to changes on demand. For example, each time an electric appliance is turned on, demand for electricity increases; and, conversely, every time an electric appliance is turned off, demand decreases. Each minute increase or decrease in demand requires the generators producing the electricity to produce more or less electricity as required.

Once electricity is produced the producer loses all effective control over it, since electricity moves by the forces of physics over wires connected from the generator to its point of consumption following the path of least resistance and in total disregard for who owns the path or who produced the electricity. Electricity is unique as a commodity because it cannot be seen, branded, traced, accumulated, stored or confined and is consumed the instant it is produced. Electric utility companies are **[**10]** also unique in that they must be ready to meet demand for services continuously, although electricity cannot be stored or inventoried. To provide this service, electric utilities must maintain reserve generating capacity in the form of both installed capacity and spinning reserve.

While this reserve can be maintained by each individual company, the electric utilities in the United States have developed interconnections between each other in order to assure greater reliability in the case of sudden emergencies, to permit the reduction of the total amount of installed reserves among the interconnected companies and to permit the exchange of electric power between interconnected or adjacent utilities. Electric interconnections between non-affiliated companies is an accepted industry wide practice but requires careful study and evaluation before they are installed. Interconnections between non-affiliated electric utilities give added assurance to both systems that an adequate, efficient and reliable source of electric power will exist, particularly in times of electrical emergency.

When two or more electric generators are electrically connected with each other, the laws of science require **[**11]** each generator to spin at exactly the same speed or frequency. Generators so connected are said to be operating in synchronism or in parallel with each other. This is true no matter who owns the generators and whether the generators are located adjacent to each other or are physically separated by several hundred miles. An important characteristic of electricity is man cannot force electricity to follow any specific path without disconnecting all undesired paths from the generator; thus, when interconnections are closed, electrical disturbances in one generator or transmission line instantaneously impact upon all interconnected generators. Also, the only effective assurance that power will not flow across Texas state lines, if Texas companies wish to preserve their intrastate status, is to either have no interconnections with any utilities that operate in interstate electrical transmissions (which would include severing ties with Texas electric utilities that transmit or receive power across state lines) or make sure that any points of interconnection between intrastate Texas electric utilities and interstate electric utilities remain open, preventing power flow between the two systems.

[12]** Various types of electric energy exchanges may be agreed to by interconnected utilities. These exchanges include:

(1) "Economy Energy" : Electric energy which one utility sells to another utility at a cost less than the receiving utility can generate its own electricity;

(2) "Emergency Energy" : Electric energy which one utility receives from another when the receiving utility is unable to provide its own system needs due to an unforeseeable failure of equipment, or "outage" on its system; and

[*808] (3) "Wheeled Energy" : Electric energy which one utility transmits to another utility (or to itself) over the transmission lines of a third, intermediate utility which charges a fee for such services.

INTERCONNECTIONS BETWEEN THE PARTIES

Interconnections between electric utilities in Texas began as early as 1924 with interconnections between TESCO and WTU. These two companies, along with TPL and DPL, later formed the North Texas Interconnected System (NTIS).

An emergency interconnection between HLP and Gulf States Utilities (GSU) was first made in 1928 (the Huffman tie), but this interconnection did not operate closed as a matter of normal operation until World War II, at **[**13]** which time HLP began operating continuously interconnected with CPL, LCRA, City of Austin and the CPSB to help alleviate capacity shortages brought on by the war. This action lead to the formation of the South Texas Interconnected System (STIS). While defendants were indirectly interconnected with each other in the 1940's, there was little, if any, coordination between the systems and STIS and NTIS until the 1960's. On or about August 26, 1935, solely because of the passage of the Federal Power Act, and solely to avoid becoming subject to FPC jurisdiction, WTU opened its interconnections with PSO. Both TESCO and WTU then believed that operation in interstate commerce in a manner which would subject them to the consequences of FPC jurisdiction was not in the best interest of their customers. There is no evidence in the record to suggest that TESCO and HLP reached any agreement or were even interconnected in 1935, or that DPL, TPL and TESCO reached any agreement when TESCO made its determination to avoid interstate commerce. TESCO's determination in 1935 was its unilateral effort to serve its customers in the most advantageous manner.

Interconnections were reestablished between TESCO **[**14]** and WTU pursuant to a written agreement which, as amended from time to time, was continued in effect until cancelled on May 11, 1976. This agreement required both WTU and TESCO to give prior notice in the event either wished to commence operation in interstate commerce so as to permit the other to choose the type of operation in which it desired to engage that is, in intrastate or interstate commerce.

In 1962, HLP and TPL built a direct tie to connect their systems as the next major step in the evolution toward interdependence and cooperation. Soon thereafter, NTIS and STIS were joined into the Texas Interconnected Systems (TIS) in 1967. At the time TIS was formed, all of its members operated and wished to continue operating on an intrastate basis (see appendix E).

In 1970 ERCOT was formed, consisting of the members of TIS as well as various municipalities and rural electric cooperatives; although the names "ERCOT" and "TIS" are sometimes used interchangeably, the two groups do have functional differences. TIS consists of only the bulk power systems whereas ERCOT includes all of the members of TIS and small municipal and REA cooperatives. ERCOT reports to NERC, while TIS coordinates **[**15]** bulk power systems. Membership in ERCOT is available to any electric utility which owns, controls or operates an electric power system in Texas, and ERCOT promotes reliable operations of power systems in Texas by providing a means to communicate and coordinate the planning and operation of its members.

TIS is operationally coordinated with all of the generators in TIS operating in synchronism with each other so that if there is a loss of any individual generator, all of the other generators in TIS respond automatically to compensate for the loss. Historically, all members of TIS and ERCOT, while maintaining interconnections among themselves, have not, except in times of emergency, maintained interconnections with electric utilities operating outside of the State of Texas.

The maintenance of interconnections among WTU, CPL, TESCO and HLP and **[*809]** other systems in Texas was mutually beneficial and permitted the interconnected parties to reduce the total amount of installed reserves and to exchange electric power in times of sudden emergencies. These interconnections also assured a greater degree of electric reliability for all participating companies. The interconnecting electric **[**16]** systems comprising TIS and

ERCOT are large enough to take advantage of all economies of scale and at the same time not too large to be unmanageable. The larger an interconnected system becomes, the greater the opportunity for cascading blackout and other operating difficulties.

The interconnection agreements between WTU and TESCO preserved the right of system self-determination, that is, the right to decide whether to operate in interstate commerce subject to the consequences of FPC jurisdiction or to operate in intrastate commerce subject only to state and local regulatory authority. The interconnection agreement between WTU and TESCO did not require either party to continue to operate in intrastate commerce, to maintain interconnections with each other or any TIS or ERCOT member and was cancellable at any time by either party for any reason without penalty. It also did not restrict either WTU or TESCO from providing electric service anywhere.

It has been the common understanding among the members of TIS and ERCOT that each individual system member believed it to be in the best interest of its customers to operate solely in Texas. It was also commonly understood among the members **[**17]** of TIS and ERCOT that if a system chose to engage in interstate commerce, it would give prior notice to all other members in order to permit each other system the right to choose whether to operate solely in Texas or to operate in interstate commerce as it determined was in the best interest of the customers. The coordination in TIS and ERCOT has resulted in perhaps the most reliable and lowest cost electric power in the nation. The president of plaintiff company CPL, R. W. Hardy, believes ERCOT and TIS have been and are models of efficiency and reliability.

INTRASTATE OPERATION

Since August 31, 1935, when Title 2 of the Federal Power Act became effective, any electric utility which owns or operates facilities used for the transmission of electric energy in interstate commerce has been subject to the regulatory powers of the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC) (as used hereinafter FPC shall include FERC), set forth in Title 2 of the Federal Power Act, *16 U.S.C. §§ 824 to 828C*. Generally these regulatory powers include the power to order an electric utility to interconnect with another electric utility under certain circumstances (*16 **[**18]** U.S.C. § 824a*), the power to oversee the disposition of certain utility assets (*16 U.S.C. § 824b*), the power to regulate the issuance of an electric utility securities (*16 U.S.C. § 824c*), and the power to regulate rates for the transmission and sale of electric energy at wholesale in interstate commerce (*16 U.S.C. § 824d*).

The record indicates that the defendants began consulting with each other regarding their intrastate operations in the 1960's. These consultations were necessitated by a variety of factors. First, HLP and TESCO's affiliate TPL built a direct interconnection in 1962. Second, the standards of jurisdiction under the Federal Power Act changed drastically during the 1960's so that defendants became concerned with jurisdiction even though they had no facilities crossing state lines. Third, these concerns were confirmed when the FPC advised the defendants in the 1960's that they were in fact subject to the FPC jurisdiction under the Federal Power Act. The FPC's effort to assert jurisdiction was followed by its continuing effort through the early 1970's to promote the interconnection of TIS with the South West Power Pool (SWPP), which is the group of utilities operating **[**19]** to the north and east of TIS.

The only means to ensure freedom from federal regulation and the adverse electrical, economic, operational and administrative **[*810]** consequences flowing therefrom is not to operate interconnected with any facility used for the transmission or sale of electricity in interstate commerce. As a result of the events listed above HLP and TESCO have, from time to time, consulted with each other to determine whether there were points of interconnection which presented the potential for the interstate flow of electricity. Defendants were particularly concerned for many years with the points of interconnection between WTU and its affiliate PSO because of the very peculiar nature of the interconnection. Mr. Hardy, the current chief executive officer of CPL and previously the president of WTU, testified that these interconnections were designed to give CSW the ability to transfer power between its subsidiaries in order to qualify under an exemption under the Public Utility Holding Company Act. Defendants had in fact expressed concern over these interconnections through the years but were reassured by CSW that it desired to operate its two Texas subsidiaries **[**20]** on an intrastate basis and that the operational split of its subsidiaries presented no threat to its holding company status.

There were installed over the years at strategic locations between the northern and southern divisions of WTU various devices to prevent interstate flow of electricity under circumstances which would render TESCO jurisdictional and to protect against synchronous operation of TESCO with WTU's northern division, PSO and other members of SWPP. There was never any dispute between WTU and TESCO as to the object of avoiding synchronous operation. Some disputes did develop with respect to the use of interlocks as opposed to power flow relays in order to make certain that the FPC could not order synchronous interconnections of TESCO with SWPP, but these differences were always resolved to the mutual satisfaction of the parties.

In order to insure the validity of the securities issued by TESCO and others, the interlock devices which were owned by TESCO were inspected and tested periodically through the years. These inspections and tests did not interfere with the operations of WTU even though the testing of the interlock device did result in an annual flicker of certain **[**21]** loads on WTU's northern division. It would take the annual testing of the interlocks for 240 years for any loads on WTU's northern division, however, to be interrupted for a total of one minute.

It has been the common understanding and agreement among all the electric utilities and TIS that if one of the members of the TIS decided to commence interstate operations, it would provide prior notice to the other members so that each could independently decide whether to exercise its unilateral right to disconnect and remain in an intrastate mode. This understanding was, for example, reflected in the WTU-TESCO contract which was subject to immediate cancellation by telephonic notice. Plaintiff gave no notice prior to their commencement of interstate operation on May 4, 1976, because they feared defendants would exercise their right to disconnect.

Each defendant has indicated that it will engage in an interstate mode of operation when there is shown to be advantages to the customers of the defendants that outweigh the advantages of the present intrastate system of operation. There is considerable evidence of each defendant's past and present efforts to evaluate the benefits and costs of **[**22]** an interstate mode of operation. In fact, one of plaintiffs' own witnesses, Mr. Arey, was retained by TESCO and its affiliates in 1966 to study interconnection with SWPP, and he concluded that TESCO and all the other members of TIS would be better off operating on an intrastate basis. In contrast to plaintiffs' assertion that the defendants have acted unreasonably in operating intrastate, Mr. Arey testified that it would not have been unreasonable for defendants to continue intrastate operations based on the results of his study.

The wisdom of TESCO's determination to avoid synchronous interstate operations is illustrated repeatedly by the failure of all attempts by the Texas companies to operate in synchronism with the vast electrical system **[*811]** outside Texas. Synchronous operation of the Texas utilities and interstate utilities during 1942 to 1945 resulted in numerous system outages both in Texas and in other states. Some of these outages occurred because of trouble as far away as Alabama, Tennessee and Mississippi. Synchronous operations of the Texas utilities in interstate commerce during 1942 to 1945 were unsatisfactory and were tolerated only because of the emergencies **[**23]** of World War II.

In 1957, HLP and GSU tested whether their systems could operate in synchronism. The resulting electrical disturbances were so severe that the test had to be abandoned. In 1968, the FPC encouraged HLP, TPL and GSU to test synchronous operations through the GSU-HLP Huffman tie. The 1968 test also proved totally unacceptable and was abandoned.

From August 28, 1976, to January 22, 1977, plaintiffs attempted to operate in synchronism with the SWPP. Such operations resulted in serious reliability problems and at least nine system separations, two of which occurred because of generation difficulties in Mexico. Moreover, CSW has publicly acknowledged in a prospectus filed with the SEC that the TIS, including WTU and CPL, cannot operate in synchronism with PSO and SWEPCO and other members of SWPP without critical operating problems.

TESCO and HLP have stated that while they believe that intrastate operation is in their best interest and in the best interest of their customers, if it appeared advantageous to commence synchronous operation with SWPP, they would be among the first to undertake that mode of operation. Until such time as there is advantage to their customers **[**24]** from interstate operation, defendants prefer to avoid the cost of regulation which would inevitably result from interstate operation. This preference can hardly be regarded as unreasonable since defendants obviously received no benefits from any such regulation. Indeed, plaintiffs' economic expert admitted that it was in defendants' own best interest to avoid FERC regulations.

Events Leading to Filing of Plaintiffs' Complaint

Both plaintiffs, WTU and CPL, told the Department of Justice in 1973 that they did not want to interconnect with SWPP because the interconnection would degrade the reliability of TIS. Moreover, plaintiffs have admitted that intrastate operation was in their best interest until 1974. Plaintiffs' change in attitude in 1974 coincides with the date of the filing of the complaint against plaintiffs' parent holding company, CSW, in the Securities and Exchange Commission (SEC).

Five months after WTU and CPL advised the Department of Justice that they did not wish to interconnect with PSO and other members of SWPP and after advising the Department of Justice of their continued desire to limit their business to the State of Texas and intrastate commerce, a complaint **[**25]** was filed with the SEC alleging that CSW was not a single integrated electric utility system within the meaning of the 1935 Act. In response to this petition, CSW hired Power Technologies, Inc. (PTI) to perform a study concerning alternate modes of integrating the holding company. In the summer of 1974, Mr. S. B. Phillips, Jr., chairman of the board of CSW, invited TU to participate in the study. Mr. Phillips informed TU that the study would include modes of operation which integrated the CSW companies with synchronous operation with the SWPP. At such meeting the chief executive officer of CSW told the chief executive officer of TU that if he did not cooperate in proceeding with synchronous operation between ERCOT and SWPP, CSW would force such mode of operation upon ERCOT companies, including TESCO and HLP, against their will.

TU declined to participate in the study commissioned by CSW because the CSW study was limited to examining how best to integrate the CSW companies for the purpose of complying with the 1935 Act and would not include examination of whether ERCOT should be connected with SWPP.

[*812] The preliminary results of the PTI study were presented to the CSW board **[**26]** of directors at a meeting on October 16, 1975. At that meeting, CSW, on the advice of its counsel, adopted a policy to integrate its affairs by causing its four subsidiaries to operate in synchronism while at the same time maintaining all interconnections with non-affiliated companies, including TESCO and HLP. At the time such decision was made by CSW, no reliability studies had been conducted, the economic study was not complete and no effort was made to evaluate the impact of synchronous operation on other companies in SWPP or TIS/ERCOT.

Following completion of the PTI report, it was personally delivered by CSW to TU. Again, CSW advised TU that TU would either cooperate in the implementation of synchronous operation with SWPP, or it would be forced upon TU against its will. At no time did WTU or CPL or their parent, CSW, approach TESCO or HLP on the basis of conducting studies to determine the best mode of operation for electric utility systems in Texas or elsewhere but on the contrary, continuously insisted that synchronous operation would be instituted whether it was in their best interest or not.

In late December, 1975, CSW's chairman of the board delivered a copy of the PTI **[**27]** report to the president of HLP, inviting HLP's cooperation in the implementation by CSW of a Mode 4 operation, but stated that CSW was committed to an interstate mode of operation and CSW would force HLP's cooperation if HLP's cooperation was not voluntarily forthcoming.

On December 31, 1975, CSW filed the PTI report with the SEC and advised the SEC that it was committed to proceeding with the integration of its four subsidiaries by sewing together the electric systems comprising ERCOT and SWPP. CSW advised the SEC that Mode 4, the preferred mode of operation, would permit the CSW companies to utilize the transmission system of other member companies of ERCOT, which, in turn, would integrate the four CSW companies in a manner required by the 1935 Act. CSW further advised the SEC on December 31, 1975, that if defendants did not cooperate in such an interconnection, other options for securing the necessary cooperation would be considered. This representation was consistent with the other threats made by CSW against the defendants prior to such stay. Prior to December 31, 1975, the plaintiffs never advocated nor did they desire to operate in interstate commerce in synchronism with SWPP. **[**28]** Prior to the attack on CSW's holding company status, neither WTU nor CPL attempted to or desired to undertake synchronous operations with PSO or other members of the SWPP.

For 40 years prior to December 31, 1975, WTU, CPL and CSW believed that the nature of their operations, including the maintenance by WTU of its northern division electrically isolated from the southern division, was in their best interest and in the best interest of their customers. On January 30, 1976, the SEC ordered that an evidentiary hearing be held to consider, among other things, whether the electric utility facilities of the subsidiaries of CSW were capable of being economically operated as a single integrated and coordinated system within the meaning of the 1935 Act. TU and HLP intervened in the SEC proceeding announced by the January 30, 1976 notice, and a pretrial hearing was scheduled for May 12, 1976.

TESCO advised the SEC that the mode of operation proposed by CSW would radically alter the mode of operation of TU and the other members of TIS and would pose a threat to reliability of service and would impose unreasonable and uneconomic burdens upon TU and TIS customers and investors. Such a change **[**29]** in mode of operation would result in an unjustifiable risk to such customers and investors. TESCO further advised the SEC that it appeared that CSW's proposal was being made merely as a scheme by CSW to save its holding company.

CSW embarked on a secret and clandestine maneuver on May 4, 1976 to save its holding company status by utilizing the facilities of the defendants against their will. **[*813]** At a secret meeting of CSW executives and attorneys in the latter part of April, 1976, CSW's vice president and chief engineer memorialized a legal plan to save CSW's holding company and confirmed the lack of any other motivation for the action subsequently taken on May 4, 1976.

In the darkness of night on May 4, 1976, WTU performed a midnight wiring of electrical circuits charged with 69,000 volts of electricity between WTU and PSO, a procedure which placed WTU, and therefore all members of TIS and ERCOT, in interstate commerce. At trial WTU attempted to justify the establishment of this new radial line as part of its plan to implement Mode 4 operation. In fact, plaintiffs' own witnesses testified that the existence of this radial line was not in any way contemplated nor a necessary **[**30]** part of any plan to implement Mode 4 and although some of plaintiffs' witnesses stated that the radial line was necessary in order to ensure reliable electric service to the communities in Oklahoma, I find that the evidence is to the contrary and that the midnight wiring was done without any legitimate business purpose. By installing the radial line, often referred to as the "midnight wiring", WTU maliciously and willfully violated its long standing agreement with TESCO by failing to notify TESCO of the commencement of interstate operation and for the purpose of requiring TESCO and HLP to operate in synchronism with SWPP. This is also evidenced by the fact that this suit was filed on May 3, 1976, along with an application for a temporary restraining order, in an attempt to force the defendants into interstate operations without the defendants' voluntary consent.

At the time of the midnight wiring, defendants had evaluated the PTI report. Upon being notified of the midnight wiring TESCO concluded independently that it was done in furtherance of a plan to force the synchronous interconnection of ERCOT and SWPP against their will and in furtherance of the threats earlier made. TESCO **[**31]** had concluded that the implementation of Mode 4 would downgrade its reliability and would cost a significant amount of money with no corresponding benefits to it or to its customers. Based upon TESCO's prior evaluation of the mode of operation which was in its best interest and the best interest of its customers, the threats made, the purpose of the PTI study and its knowledge with respect to the adverse effects of interconnected operation gained over a long period of time, it had no reasonable alternative other than to disconnect from the plaintiff and from other electric utilities if it was going to be in a position of exercising its own choice as to the best mode of operation in the future. HLP had also reached the same conclusion, although independent of TESCO. Both defendants had to act quickly after the midnight wiring of May 4, 1976 occurred if they were to preserve their intrastate mode of operation. The longer the defendants remained interconnected with WTU, with the plaintiffs and other utilities which were connected in interstate commerce, the more likely it would be that the FPC would assert jurisdiction over the companies.

In severing connections with plaintiffs on May **[**32]** 4, 1976, defendants acted independently and defensively in pursuing the only action that would allow them to preserve their ability to decide for themselves the manner in which they would conduct their operations. The purpose of the actions of WTU and PSO on May 4, 1976 was to force TESCO and HLP into interstate commerce and subject TESCO and HLP to federal regulation against their will. The motive behind the actions of WTU and PSO on May 4, 1976 was to preserve CSW's corporate structure and CSW's status as a regulated holding company under the 1935 Act. Any economic benefit realized by WTU as a result of the establishment of the radial feed into Oklahoma on May 4, 1976 was minimal at best, and was not a justification in itself for establishing the radial tie.

THE COURT'S DECISION

The Court has spent the last eight weeks reviewing both the record in this case, which is over 3,500 pages of testimony and about 1,000 exhibits, the court's notes and **[*814]** recollections and the law that applies to this case, and I think I have a pretty fair understanding of what this case is all about. Plaintiffs have advanced a number of theories of recovery, and there is a lot of evidence, so **[**33]** from that standpoint it is a complicated case; but I think many of the key questions in this case are simply questions of law.

This case, as it has been presented over the past two and one-half years, really boils down to a single, preliminary question of law, that is, whether or not it is a violation of *§ 1* of the Sherman Act for an electric utility to exercise the freedom of choice provided by Congress in § 201(b) of the Federal Power Act (*16 U.S.C. § 824(b)*) and decide to confine its facilities and operations solely within a single state. Plaintiffs have made much of the argument that this is a group boycott, that they are not talking about just one electric utility deciding to operate in intrastate commerce, but a group of utilities, and the defendants' concerted action means that interstate utilities cannot connect to them, specifically that the plaintiffs cannot connect to the defendants and remain in interstate commerce.

In this context I do not perceive a difference between one utility deciding to operate intrastate, or a group of utilities, independently or even in concert, deciding to operate intrastate. Congress must have been aware of the unique characteristics of **[**34]** the electric utility industry at the time it adopted the Federal Power Act and must have been aware that the operation of a totally intrastate electric utility system could have potential antitrust considerations. Congress gave the electric utilities a choice: intrastate operation or interstate operation. If taking advantage of the intrastate option violates the Sherman Act, then the provision of the Federal Power Act becomes meaningless. Congress can rewrite the Federal Power Act and eliminate that provision; I cannot. Therefore, I do not think that the actions of the defendants violate the Sherman Act, *§ 1*.

I want to emphasize one factor which I took into account in evaluating the credibility of the witnesses, which I must do in this case as the trier of fact. I mentioned that this case turns primarily on questions of law, but I certainly recognize that there are significant factual issues in this case, particularly the testimony concerning the alleged economic savings and increased reliability to CSW if Mode 4 is implemented. I think it is a fair statement of the law that when a court considers an antitrust case, the focus of the court's inquiries should be upon the actions of **[**35]** the defendants, not the plaintiffs. Stated another way, for purposes of determining whether or not the defendants have violated the Sherman Act, the motive of the plaintiffs in bringing the suit is irrelevant to a determination of the plaintiffs' claim.

There has been a lot of testimony in this case concerning CSW and the plaintiffs' bad motives in bringing this case, and I think that I should make clear that I have not considered that testimony in making my determination on the merits. On the other hand, I do think that that testimony can be relevant to my evaluation of the credibility of the witnesses, particularly when that testimony is essential to plaintiffs' factual support for the Sherman Act claims, such as the testimony regarding competition and the alleged savings to the plaintiffs from Mode 4 operation. In the same regard, I think I must carefully consider testimony that was given in documents that were prepared after the SEC challenged CSW's holding company status and after the May 4, 1976 wiring into Oklahoma. Certainly the plaintiffs' alleged motive in bringing this case merely to integrate CSW's holding company and avoid divestiture is not conclusive in my evaluation **[**36]** of the credibility of certain witnesses, but I think that the defendants have amply demonstrated in this record, as I have found earlier in this opinion, that the plaintiffs had this motive available to them, and used it, other than the motives plaintiffs have advanced, for filing this lawsuit, and, more particularly, for developing testimony that would support the alleged Sherman Act violations.

[*815] Group Boycotts

Concerted refusals to deal, or "group boycotts", are per se illegal under the *Sherman **Antitrust Law**. Fashion Originators Guild of America, Inc. v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941)*. The principle of the group boycott cases is that where businessmen concert their actions to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct, because exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied in the Sherman Act that we will not consider any alleged justification. *United States v. General Motors, 384 U.S. 127, 146, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

"Group **[**37]** boycotts . . . have not been saved by allegations that they were reasonable in the specific circumstances, nor by failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality' ". *Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)* (Quoting from, *Fashion Originators, 312 U.S. at 466-468, 61 S. Ct. 703, 85 L. Ed. 949*). It is of no consequence under the Sherman Act that each party acted in its own lawful interest and it is unnecessary to find an explicit agreement to find the Sherman Act conspiracy. *United States v. General Motors, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

It is the intent to eliminate competition that determines the illegality of a joint refusal to deal. The court must examine the purpose and intent of the alleged conspirators, not to determine whether or not the defendants engaged in a refusal to deal to achieve purported beneficial results brought about through the elimination of competition, but rather to discover whether or not the purpose and intent was anticompetitive.

For example, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S.* ***[**38]*** *211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)* the court stated, quoting from *United States v. Socony Vacuum Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129*:

> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price(s) of a commodity in interstate or foreign commerce is illegal per se";

and in *Eastern States Retail Lumber Dealers Association v. United States, 234 U.S. 600, 606, 34 S. Ct. 951, 952, 58 L. Ed. 1490 (1914)* the Court stated:

> ". . . it appears that the defendant associations have for their object, among other things, the adoption of ways and means to protect such trade and to prevent the wholesale dealers from intruding therein."

Other group boycott cases also indicate that the Court must consider whether or not the alleged group boycott had the requisite anticompetitive purpose. *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)* (holding that a bylaw was "plainly designed in the interest of preventing competition"); *Radiant Burners Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961)*; *United States* ***[**39]*** *v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Binderup v. Pathe Exchange, 263 U.S. 291, 44 S. Ct. 96, 68 L. Ed. 308 (1923)* ("(t)he alleged purpose and direct effect of the combination and conspiracy (were) to put an end to these contracts . . . and "restricts . . . the liberty of a trader to engage in business.' " at 312, *44 S. Ct. at 101*). The plaintiffs need not show specific intent on the part of the defendants to restrain trade; in an antitrust case, it is unlikely that there will be an express agreement in violation of the antitrust laws, and therefore circumstantial evidence assumes a heightened importance that may sustain a finding of a conspiracy. *Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978)*; *In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127 (5th Cir. 1976)*.

[*816] The Fifth Circuit has recognized three types of group boycotts that are per se violations of the antitrust laws; (1) horizontal combinations among traders at one level of distribution, whose purpose is to exclude direct competitors from the market (e.g., Eastern States Retail Lumber); (2) vertical combinations among traders at different marketing **[**40]** levels, designed to exclude from the market direct competitors of some members of the combination (e.g., Klors v. Broadway-Hale Stores, Inc.); and (3) combinations designed to influence coercively the trade practices of boycott victims rather than to eliminate them as competitors (e.g., Fashion Originators). *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manufacturing Co., 467 F.2d 178 (5th Cir. 1972)*. "In all of these cases, the touchstone of per se illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade' and have fallen victim to the per se rule. On the other hand, where these elements have been missing, the per se rule has not been applied to collective refusals to deal. *Id. at 186-7*. Where exclusionary or coercive conduct is not present, the court should apply the rule of reason test to determine whether there is a violation of the *Sherman Act. Hatley v. American Quarter Horse Association, 552 F.2d 646 (5th Cir. 1977)*.

I must exercise extreme caution in applying a per se label to conduct that allegedly violates the antitrust laws. "To **[**41]** outlaw certain types of business conduct merely by attaching the "group boycott' and "per se' labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed". *Worthen Bank & Trust v. National Bank Americard, Inc., 485 F.2d 119, 125 (8th Cir. 1973)*. While it is true that the Supreme Court has outlawed group boycotts as per se illegal, "a multitude of lower courts have continued to evaluate alleged boycotts under a "rule of reason' analysis rather than by the per se doctrine employed by the Supreme Court in the aforementioned cases. As one commentator has observed, "the law in Washington, however, is quite different from the law in the rest of the country.', Woolley, Is A Boycott A Per Se Violation of the Antitrust Laws, 27 Rutgers L.R. 773 (1974)", *Cullum Electric & Mechanical Inc. v. Mechanical Contractors Association of South Carolina, 436 F. Supp. 418, 428 (D.C.S.C.1976)*, and the Fifth Circuit closely scrutinizes group boycott allegations. See *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Mfg. Co., 467 F.2d 178 (5th Cir. 1972)*; *Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975)*; *Hatley v. American Quarter Horse Association, 552* ***[**42]*** *F.2d 646 (5th Cir. 1977)*; *Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978)*; *Pinder v. Hudgins Fish Co., Inc., 570 F.2d 1209 (5th Cir. 1978)*.

As I read them, then, there are three types of group boycott cases recognized by the Fifth Circuit, and a requirement that the alleged boycott have an anticompetitive purpose, with exclusionary or coercive conduct; I don't think this case fits any of those descriptions.

First, there has been ample testimony in the record (for instance, the testimony of Hardy and Price) that there is no direct competition between CPL and either HLP or TESCO, and no direct competition between TESCO and HLP with WTU, except de minimis competition in certain areas duly certified to TESCO and WTU. So this case does not fit within the first two McQuade categories of group boycotts that involve direct competition.

Second, the key to the third category of group boycott cases cited in McQuade was the "coercion practiced indirectly on a rival method of competition . . ." *467 F.2d at 187*. In Fashion Originators, cited by McQuade as an example of this third category, a group of garment manufacturers refused to sell original designs to stores that stocked copies **[**43]** of those designs made by other manufacturers, and thus there was a conspiracy to eliminate the copiers from the market. Here, except in certain multiply certified areas I mentioned earlier, there is no direct competition between **[*817]** plaintiffs and defendants. Defendants can't conspire to deprive plaintiffs of a market they do not share and, under the Public Utility Commission of Texas' (PUC's) certification procedure, they cannot share since utilities are certified for only certain areas. I will discuss this competitive aspect of the case in more detail later in this opinion.

Third, I must examine the purpose of the alleged boycott. HLP and TESCO's purpose in remaining in intrastate commerce was to avoid FPC jurisdiction. The second purpose was to serve the best interests of their customers by providing reliable, economical power. On this record after hearing all the testimony, I do not find that the purpose was in any way anticompetitive or coercive because plaintiffs do not meet their burden of showing any anticompetitive or coercive intent.

If I am to find a Sherman Act violation in this case, I must also find a contract, combination, agreement or conspiracy in restraint **[**44]** of trade. As I understand the pleadings and the evidence, the plaintiffs are claiming that over a period of some 40 plus years, at least since the adoption of the Federal Power Act in 1935, the defendants have been engaged in a combination and conspiracy, the essence of which is recorded in certain contracts between the defendants, to restrict the flow of power in the defendant companies to intrastate commerce.

To analyze this allegation properly, it is important to understand that unilateral refusals to deal, without more and "in the absence of any purpose to create or maintain a monopoly", are lawful under the *Sherman Act. United States v. Colgate, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992, 997*, (1919); *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*. A manufacturer has a right to select its customers and to refuse to sell its goods to anyone for reasons sufficient to itself, and "inherent in this right is the opportunity to show unilateral as opposed to conspiratorial conduct at trial." *Coughlin v. Capitol Cement Co., 571 F.2d 290, 301 (5th Cir. 1978)*.

I recognize, as did the Fifth Circuit in Coughlin, that the so-called Colgate **[**45]** Doctrine has been carefully circumscribed by the Supreme Court. *571 F.2d at 301 n.22*. The doctrine does not apply to a case where there is an agreement between the seller and a purchaser to maintain resale prices, *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)*, and *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, and a producer secures adherence to prices by means which go beyond his mere declination to sell to a customer who will not observe this announced policy. See *Parke, Davis, & Co. and Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307*. "However, the post-Colgate decisions of the Supreme Court do not in any way limit a manufacturer's right to attempt to disprove the existence of concerted action." *Coughlin, 571 F.2d at 301, n.22*.

I do not think that the plaintiffs have proved concerted action in this case. They have established that both HLP and TESCO want to remain in intrastate commerce and that they both wish to do so to avoid FPC regulations. Plaintiffs also established that TESCO and HLP took measures, such as flying the Red River (as Mr. Robinson **[**46]** testified), or checking the power flow relays and points of interconnection, to protect against inadvertent interstate flows of electricity. I think the evidence, however, shows that each of the companies, including the plaintiff companies, who, interestingly enough, did not object to this intrastate arrangement and apparently wanted to participate in that type of operation until around 1974-75, decided that for one reason or another, the intrastate method of operation which would avoid FPC jurisdiction was the method of operation that each wanted to pursue. Plaintiff companies apparently did this because they saw high immediate costs of interconnecting interstate rather than remaining intrastate (see Px 19) although plaintiffs apparently made no long range study, as they now have, to determine the long range economic costs **[*818]** and savings of interstate vs. intrastate operations.

The evidence also shows that each of the companies, including plaintiffs and defendants, have always had the opportunity for withdrawing from the intrastate method of operation in connecting interstate. None had elected to do so until May 4, 1976 (except in the war years, and other unusual situations), **[**47]** and there was ample evidence that the only objection defendants had to plaintiffs' withdrawal from intrastate operations and connection to interstate operation on May 4, was that the defendants were not permitted to make their own independent decision about whether or not to join the plaintiffs in that decision; the decision was forced upon them. For a period of time on that day defendants were involuntarily drawn into interstate operation because of the midnight wiring.

I think one of the most damaging pieces of evidence to plaintiffs' conspiracy theory is the fact that when, on May 4, the defendants were involuntarily placed in interstate commerce, they each disconnected from all other utilities, not just WTU and CPL, in order to isolate their systems because they were not sure whether or not these other utilities, who had not participated in the midnight wiring, would remain in interstate commerce. If there was an agreement, combination or conspiracy by defendants among themselves to remain in intrastate commerce, it certainly would not have been necessary to disconnect from everyone and isolate their systems. TESCO clearly did not know whether HLP would remain in interstate commerce; **[**48]** and HLP did not know whether TESCO would remain in interstate commerce either. Even though up to May 4, 1976, each defendant thought the other defendant was committed to intrastate operation, there was clearly not a firm understanding or a joint conspiracy to that effect or the disconnections would have been unnecessary, as between the defendants.

A lot of contracts have been introduced in this case, and the plaintiffs claim that these contracts evidence the agreement by the defendants to remain in intrastate commerce. Some of the contracts have clear indications of intention that the parties will remain in intrastate commerce; others have clauses which indicate that the contracts are cancellable on certain notice if the parties wish to enter interstate commerce. The plaintiffs were parties to some of these contracts and never complained about them, perceiving them to be in their own best interest for nearly forty years before suddenly objecting to their character.

Justice Brandeis once observed that all contracts were really restraints of trade and thus violated the Sherman Act, if the Act were carried to illogical extremes. These contracts do restrict the flow of electricity to **[**49]** intrastate commerce, but I do not find that they force the plaintiffs to remain in intrastate commerce. Plaintiffs have the choice of abiding by the contracts and remaining in intrastate commerce, or deciding to go into interstate commerce and cancelling the contracts. I think it is significant that different contracts were negotiated between the different parties with different provisions relating to the intrastate flow of electricity over the years.

Here I think is a situation that is covered by the Supreme Court's ruling in Colgate : None of the defendants are doing anything more, and have done nothing more, than decline to sell to any utility, not just plaintiffs, who are engaged in interstate electrical operations, or to connect with that type of utility. No one has forced the plaintiffs to remain in intrastate commerce; they are free to leave that mode of operation whenever they choose to do so. And each of the defendants is free to do so, also. The contracts do not limit that freedom; they merely make clear to the parties to the contract that the exchange of electricity provided for in the contract is premised on the intrastate character of that electricity. The contract provisions **[**50]** only preserve each party's right to operate on an intrastate basis. See *16 U.S.C. § 824(b)*. An effort to avoid FPC regulation is "not unlawful, is indeed not immoral not even if it fails." *Hartford Electric Light Co. v. FPC, 131 F.2d 953, 960* ***[*819]*** *(2d Cir. 1942)*. See also *Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 518-19, 65 S. Ct. 749, 89 L. Ed. 1150 (1925)*, and on remand, *Connecticut Power & Light Co., 6 F.P.C. 104, 110 (1947)*.

Competition

The Sherman Act requires that the Court find, when evaluating this case under the rule of reason, anticompetitive effect, and when looking at this case as a group boycott or one of the other per se theories, I must look to see if there was an anticompetitive purpose. In addition, the Court must look at the competitive impact of the alleged Sherman Act violations to determine the scope of the requested injunctive relief. *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

To determine an agreement or act's anticompetitive purpose or its impact on competitive conditions, the court must have a thorough understanding of the competition between plaintiffs and defendants, including the geographic **[**51]** and product market in which they compete. *Northwest Power Products, Inc. v. Omark Industries, 576 F.2d 83 (5th Cir. 1978)*; *Dougherty v. Continental Oil Co., 579 F.2d 954 (5th Cir. 1978)*. Although decided in a slightly different context, the cases decided under § 7 of the Clayton Act are helpful in identifying the types of competitive interests which are protected by the antitrust laws.

In *United States v. General Dynamics Corp., 415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)* the Supreme Court affirmed the District Court's decision that the economic reality of the coal industry at the critical time was such that United Electric Coal Co. was not in a position to compete with anyone because its reserves were limited and were also totally committed to long term contracts with utilities. In addition, in *United States v. Marine Bancorporation, Inc., 418 U.S. 602, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)* the Supreme Court held that NBC (a Seattle bank) was not a competitor of WTB (a Spokane bank) because NBC did not market goods and services in the Spokane bank's area of operation. The Court held that the "relevant geographical market" was the area in which the relevant product was, **[**52]** in fact, marketed by the alleged competitor.

"The proper question to be asked . . . is not (whether) the parties . . . do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. (citations omitted) This depends upon "the geographic structure of (the) supplier-customer relations' . . ." *United States v. Philadelphia National Bank, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*. Where two department stores sold entirely different types of merchandise and only 2%-5% Of the merchandise was sold by those stores, the two stores were not competitors, and to hold that they were "competitors" would be to ignore the realities of the situation. *Evans v. S. S. Kresge Co., 544 F.2d 1184 (3rd Cir. 1976)*.

The definition of market under *§ 1* of the Sherman Act is different from the definition under § 2. *Columbia Metal etc. v. Kaiser Aluminum & Chemical Co., 579 F.2d 20 (3rd Cir. 1978)*. "The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. *§ 1*, in contrast, is concerned with patterns of competition as a **[**53]** means of judging whether a restraint of trade is unreasonable". *Id. at 27 n.11*. "Prohibition of conspiracies in restraint of trade, except where practices fall under a judicially crafted per se ban, a finding of illegality presupposes the determination in any given case that the "effect upon competition in the marketplace is substantially adverse.' " *Id. at 26*. The inquiry must focus on the percentage of business controlled, the strength of the remaining competition, and whether the actions spring from business requirements or purpose to monopolize. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615, 73 S. Ct. 872, 884, 97 L. Ed. 1277, 1294 (1953)*; Columbia. In drawing the narrow circle around the relevant product market, **[*820]** care must be taken to exclude any product to which, within reasonable variation and price, only a limited number of buyers will turn. Id. Analysis of the market may reveal well defined sub-markets for antitrust purposes whose boundaries can be determined by examining industry or public recognition, or the sub-market as a separate economic entity, the products' peculiar characteristics or uses, unique production facilities, distinct customers, **[**54]** distinct prices, sensitivity of price changes, and specialized vendors. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510, 535-36 (1962)*.

I can find no evidence of competition between plaintiffs and defendants for purposes of the Sherman Act. First, there is no direct competition between the plaintiffs and defendants except in the limited dual certification areas or fringe areas of WTU and TESCO, which is only determined competition. The Texas Legislature expressly recognized the absence of meaningful competition among electric utilities by stating:

> ". . . the legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and therefore utility rates, operations, and services are regulated by public agencies, with the objective that such regulation shall operate as a substitute for such competition . . ." *Tex.Rev.Civ.Stat.Ann. Art. 1446(c)*.

Electric utilities in Texas are required to serve all customers in their certified service territory. They are permitted to operate only within **[**55]** and are prohibited from serving beyond the geographic limits of their service territory as approved by the PUC. They are also required to sell electricity at rates established either by the PUC or by an incorporated municipality, and are prohibited from offering a special rate to customers.

Plaintiffs have admitted to the U. S. Department of Justice, which was then conducting an antitrust review in connection with licensing of the construction of nuclear powered generation plants, that there exists no competition between plaintiffs and defendants and that the defendants' maintenance of their intrastate status did not injure plaintiffs' ability to compete with others. Retail competition exists only among utilities within dually certified areas, and HLP has no dually certified areas with WTU or CPL. TESCO has no dually certified areas with CPL and the areas which are dually certified between WTU and TESCO are so insignificant that the revenue to TESCO in 1977 from customers located in those areas constituted less than one-half of 1% Of its total revenues. Consequently, actual and potential direct competition among WTU and TESCO is de minimis. In addition, there exists no consequential **[**56]** competition in the fringe areas between the service areas of plaintiffs and defendants. These areas are sparsely populated, with no consequential economic growth and no economic incentive for WTU or TESCO to engage in competition in these areas. Plaintiffs rely primarily on examples of indirect competition, therefore, to establish that defendants and plaintiffs really compete.

As I understand the evidence, the areas of indirect competition supposedly include: (1) competition between the plaintiffs and other electric utilities, not necessarily the defendants, in areas that are multiply certified by the PUC in certain fringe areas located between the two utilities; (2) competition between plaintiffs and other utilities including defendants to attract new customers (including industrial, commercial and residential, though primarily industrial) to locate in their service territory; (3) competition to retain current customers by providing low cost reliable electric service that outperforms alternative methods available to the industrial, commercial or residential user; and (4) competition for wholesale customers.

Some of plaintiffs' witnesses said that two utilities are in competition **[**57]** when one utility takes some action that will affect, in some way, the price charged by the other **[*821]** utility for its electric power. Thus, the defendants alleged refusal to operate electrically interstate has an effect on plaintiffs' prices, as evidenced allegedly from plaintiffs' economic testimony, and therefore plaintiffs are in competition with the defendants. The theory is that if defendants' actions raise (or restrict the lowering of) plaintiffs' price it charges its customers for electricity, then plaintiffs will be unable to compete effectively for new industrial customers, existing customers, or wholesale customers of plaintiffs' power since those customers may be lost to cheaper forms of electricity or other forms of power. Competition to the plaintiffs means a choice (see Mr. Price's testimony). Plaintiffs are in competition with all of those choices, and if the defendants affect that choice in any manner that affects plaintiffs' price of electricity, plaintiffs and defendants are in competition.

I will confine my remarks here to a discussion of plaintiffs' witnesses on competition; my views on how defendants' affect the price of plaintiffs' electricity are discussed **[**58]** later. First, though, I should point out that if plaintiffs' view of competition is correct, then every Sherman Act case is really a price fixing case. If we accept plaintiffs' view of competition, then every purchaser has an ultimate choice of whether to buy a particular product, and every manufacturer in some way (significant or insignificant) affects the price of every commodity, thus there are no geographic limitations (and probably few product limitations) to the competitive market in an antitrust case. Dr. Wenders admitted that the geographic extent of the market for new industrial customers could be nation-wide or even world-wide. This is an incredibly broad market, and plaintiffs made absolutely no effort to measure the impact on competition which would occur in this market as a result of defendants' alleged antitrust violations. The case law also does not support such a broad reading of the term market in a *Section 1* case, or for that matter, in a Section 2 case either.

Dr. Wenders' definition of competition in an economic sense, as I understand it, was that if a customer had a reasonable alternative choice (and he never did adequately define exactly what he meant by reasonable **[**59]** alternative choice) to buying electric power from the defendants, then there was competition with the defendants. The same would be true with the plaintiffs. Thus, for example, when an industrial customer considered locating in the HLP service territory and other territories around the country, including CPL, HLP would be competing with those territories including CPL even though HLP did not seek the customer, did not want the business, did not know it was being considered by the customer as a possible location, did not know about the alternative choices being considered and electricity rates and reliability were not of any consequence in a customer's decision to locate in one service territory or another. Dr. Wenders also testified that as to product market, all types of fuel were reasonable alternatives or could be reasonable alternatives to electricity, and were thus in competition with electricity, including batteries, wood, gas, windmills and solar power. Under the Sherman ***Antitrust Law***, I cannot accept these definitions of competition either. They are far too broad, and in fact, I am not aware of any court that has accepted these broad definitions of either product or geographic **[**60]** market. If I were to accept these definitions, I would, it seems to me, be virtually eliminating the concepts of geographic and product market from consideration in an antitrust case.

Dr. Wenders testified about a coordinated services market which, on cross examination, he admitted was not really a market where competition occurred, but rather an area of cooperation. The competition occurred at markets, in his words, "downstream", of this coordinated services market, but the allegations in this antitrust case, he admitted, relate to an alleged violation of *Section 1* that resulted in failure of the defendants to Cooperate in this so-called coordinated services market which then had an indirect effect on the downstream markets.

[*822] I am not sure if plaintiffs are really advancing Dr. Wenders' theory or not; one of the problems I have had with this case has been that just when I understand all of the theories plaintiffs are advancing in their claim under *Section 1*, their theory of the case shifts to accommodate a change in case law or arguments by the defendants. Assuming Dr. Wenders is correct in his analysis of plaintiffs' case, however, it is certainly not a violation of **[**61]** *§ 1* of the Sherman Act to refuse to cooperate in an area where there is currently no competition between the parties.

It would rewrite the antitrust laws, which the plaintiffs seemed to be suggesting should be done in a number of areas, for this court to say that it was a violation of *§ 1* for the defendants To refuse to cooperate with the plaintiffs.

Plaintiffs failed to establish the size, scope or geographic limits to the downstream markets. Furthermore, plaintiffs did not show any threatened harm to competition in these markets. Specifically, there is no proof that even if plaintiffs' rates increased, they would lose business or be unable to attract new business because of some unidentified increase in their rates attributable to the inability to operate in Mode 4.

A review of the evidence demonstrates that plaintiffs failed to prove substantial effect on competition in any of the downstream markets. To begin with, plaintiffs assert that there is competition for franchises to serve retail load in the cities and towns within Texas. There is no evidence that HLP has ever lost a franchise or that another utility has ever been franchised in a town in which HLP had a franchise. No **[**62]** HLP franchise will expire before the year 2007 and no CPL franchises will expire for many years. There was no evidence that plaintiffs and defendants have ever competed for franchises and no evidence that they will in the future. Dr. Wenders admitted that defendants would have no economic incentive to disadvantage plaintiffs in regard to franchise competition. Finally, plaintiffs made no effort to measure the amount of competition involved with franchises.

Plaintiffs also contend that they will be disadvantaged in interfuel competition. The interfuel market, as described by Dr. Wenders, includes virtually every conceivable energy source which could serve as a substitute for electric energy. As I have stated, this is an extremely large market, and plaintiffs made no attempt to measure the amount of competition in this market. Likewise, plaintiffs made absolutely no effort to measure the impact on competition within this market as of the time of defendants' disconnections on May 4, 1976. Finally, plaintiffs' economic expert admitted that the defendants would have no economic incentive to try to affect such competition.

Plaintiff next advanced a competitive theory of self-generation **[**63]** with respect to the choice that their customers have to generate their own supplies of electricity. Dr. Wenders admitted that the feasibility of self-generation of electricity usually depends upon the availability of waste steam. With respect to its customers who have waste steam available, however, HLP encourages self-generation. As with interfuel competition, plaintiffs made no effort to define the size, scope or geographic limit of this market. Moreover, plaintiffs totally failed to demonstrate how decisions by their customers to commence self-generation would have any effect on competition among the electric utilities, including plaintiffs and defendants.

Again, with respect to wholesale competition, plaintiffs failed to define the size, scope and geographical limits of such market. Dr. Wenders even volunteered that while he thought wholesale competition related primarily to TIS, the geographic extent of this market was limited only by the distance at which electricity could be transferred economically. Plaintiffs made no effort to establish this distance, and again it must be presumed that this market would be extremely broad since plaintiffs are themselves planning to transmit **[**64]** power to their affiliated companies in Oklahoma, Arkansas and Louisiana under CSW's interconnection proposals. There was no attempt **[*823]** by plaintiffs to show that competition in the wholesale market would be restrained by plaintiffs' inability to implement Mode 4. More specifically, there was no showing that even if plaintiffs' rates were increased, they would lose existing wholesale customers or would be disadvantaged in competing for new wholesale loads. At most, plaintiffs showed that there were a few situations in which wholesale customers in Texas switched suppliers for reasons that may or may not have been related to differences in electric rates, but there was no evidence of competition between plaintiffs and defendants for wholesale customers. Mr. Jordan, president of HLP, testified that HLP had only one wholesale customer and that HLP did not want any more wholesale customers.

With respect to retail customers, direct competition among electric utilities in Texas is possible only in areas where the PUC has certified two or more utilities to provide service. There is affirmative evidence that there is no dual certification of territories served by plaintiffs and defendant **[**65]** HLP. The amount of load served by TESCO in areas dually certified with WTU amount to approximately one-half of 1% Of TESCO's total load. Accordingly, the potential for retail competition among the parties is so minimal as to be virtually non-existent.

Plaintiffs have attempted to bolster their theory of retail competition with assertions that the parties compete for the location of new industrial customers in their service areas. While there appears to be evidence that all the parties have made efforts to attract new industrial customers in the past, the changing economic conditions for electric utilities in Texas during the 1970's, including rising costs and fuel shortages, have reduced, if not eliminated the incentives these utilities might have in seeking to obtain industrial or wholesale customers. HLP had abolished its area development department by 1973.

There was ample testimony that although there had been industrial company inquiries to the plaintiffs concerning electric rates in their area, electricity is not really a significant factor, except perhaps in one or two industries that are not well represented in Texas, in a decision to locate a plant in one location or another. **[**66]** Corporations deciding on the location of new industrial plants normally consider a wide range of factors, including availability of raw materials, location of markets, transportation costs and taxes. Compared with other factors, the cost and availability of electricity have had little or no significance in influencing corporate decisions concerning locations of industrial plants in Texas. Plaintiffs in fact failed to show a single instance where a decision to locate a new plant was based primarily on electric rates. Added to this is the fact that plaintiffs did not cite a single situation in which both plaintiffs and defendants were actively attempting to induce the same industrial customer to locate in their respective service areas.

Plaintiffs' Exhibit 733, which represents dually certified areas in the WTU system, shows very few towns that are dually certified with very small populations. Finally, and these are just a few examples of many instances that I can cite, WTU told the Justice Department (TESCO 296, DHX 68 and DHX 156) that TESCO and WTU did not compete, at a time that the Justice Department was investigating to determine whether or not possible antitrust violations had **[**67]** occurred in the Commanche Peak project; CPL made the same admission. (DHX 199, DHX 200). Apparently WTU's and CPL's definition of competition, for antitrust purposes, has changed since the time of that response.

I also did not find Dr. Wenders to be a very credible or qualified witness, and I will outline in brief some of the reasons I reached that judgment. Dr. Wenders based his testimony on the record in this case and on the depositions on file in this case, as well as his own investigation. Dr. Wenders unqualifiedly relied on the depositions on file in this case, and subsequently qualified that statement in a very significant respect, when on cross examination he said he did not agree with everything Dr. Gols had said, including a definition of competition **[*824]** offered by Dr. Gols that differed from Dr. Wender's definition. And, although he said he based his testimony on the actual transcript of this case, it appears that Dr. Wenders had read selected portions of the transcript, and in some instances had only read the direct examination of some witnesses, excluding the cross examination. His outside preparation to determine the proper market analysis also appeared to me **[**68]** to be rather selective. In short, Dr. Wenders impressed me as an expert who selected material favorable to an analysis of this case that favored the theories advanced by the plaintiffs, ignored the evidence or theories produced by the defendants and chose not to make a complete review of the record or evidence available, leading me to view his conclusions with grave suspicion.

I think, from the record, and considering what I have said so far, that if any product and geographic market has been shown, the correct product market should be limited to electricity and the relevant geographic market should be limited to the physical service areas of the plaintiffs and defendants because that is where the direct competition, if there is any, and I think there either is none or de minimis competition, occurs. *United States v. Marine Bancorporation, Inc., 418 U.S. 602, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*.

Aside from plaintiffs' failure to show any meaningful or significant competition among electric utilities in Texas, they totally failed to prove that defendants were motivated to any degree whatsoever by any anticompetitive intent in their decisions to disconnect from plaintiffs on May **[**69]** 4, 1976. In fact, plaintiffs did not show that defendants even considered possible effects on competition prior to the disconnections on May 4, 1976. Defendants' representatives testified that they decided to disconnect because interconnection with the Southwest Power Pool, which could result from a failure to sever connections with plaintiffs, would produce a heavy economic burden for their customers without offsetting advantages, would degrade the reliability of their electric systems and would impose additional costs associated with federal regulation. Plaintiffs presented no evidence to the contrary and do not even assert that defendants had an anticompetitive purpose in deciding to disconnect and preserve their right to decide for themselves whether to commence interstate operations.

Plaintiffs' theory of the competitive impact resulting from defendants' disconnections on May 4, 1976 proceeds indirectly through several steps. First, plaintiffs contend that the disconnections precluded them from implementing Mode 4 which would reduce their costs and revenue requirements. Second, higher costs and revenue requirements would presumably cause plaintiffs to have higher rates. Third, **[**70]** assuming plaintiffs had higher rates, they would theoretically be hampered in their ability to compete in various "downstream" retail and wholesale markets for electric service. Contrary to this multi- faceted theory, plaintiffs' company witnesses admitted that they had no knowledge of any lost customers or other competitive disadvantages suffered by plaintiffs as a result of defendants' disconnections. Moreover, plaintiffs' economic expert, Dr. Wenders, admitted that if plaintiffs could obtain greater economic benefits from intrastate operation as opposed to interconnection with the other CSW subsidiaries in interstate commerce, plaintiffs' whole theory of competitive impact would fail. On this record I think plaintiffs are better off remaining in intrastate commerce or Mode 2 interstate commerce, when compared to Mode 4. Finally, despite all of his testimony concerning theories of competition and competitive impact, Dr. Wenders had "no idea" whether it was reasonable or unreasonable for defendants to disconnect from plaintiffs under the circumstances of May 4, 1976. In Dr. Wenders' words "May 4th, to me, is a matter of sideshow."

Price Fixing

An agreement that interferes with the **[**71]** setting of price by free market forces is illegal on its face. *United States v. Container Corp., 393 U.S. 333, 89 S. Ct. **[*825]** 510, 21 L. Ed. 2d 526 (1969)*. The per se rule applies even when the restraint on prices is somewhat indirect. *Simpson v. Union Oil Co., 377 U.S. 13, 16-22, 84 S. Ct. 1051, 1054-57, 12 L. Ed. 2d 98, 101-105 (1964)*; *United States v. General Motors Corp., 384 U.S. 127, 147, 86 S. Ct. 1321, 1331-32, 16 L. Ed. 2d 415, 427-28 (1966)*. The court must examine the purpose of any alleged agreement to fix prices, however, just as it examines the purpose of any alleged group boycott. Id.

> "If a manufacturer is unwilling to rely on individual self interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition free wrapping a valuable feature in itself by virtue of concerted action induced by the manufacturer. **[**72]** The manufacturer is thus the organizer of a price maintenance combination or conspiracy in violation of the Sherman Act."

United States v. Parke, Davis & Co., 362 U.S. 29, 46-47, 80 S. Ct. 503, 513, 4 L. Ed. 2d 505, 517 (1960).

> "(A) combination formed for the purpose . . . of raising, 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, 233, 60 S. Ct. 811, 844, 84 L. Ed. 1129, 1168 (1940).

There are a number of examples of typical price fixing cases, such as the exchange of price fixing information with an agreement to adhere to a price schedule, *Sugar Institute v. United States, 297 U.S. 553, 56 S. Ct. 629, 80 L. Ed. 859 (1936)*, *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; agreements to eliminate sales of a product by competitors in order to protect against real or apparent price competition, *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; and refusal to deal with wholesalers who did not cooperate with the company's goal of obtaining adherence to suggested minimum **[**73]** retail prices, *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, *United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*. When per se treatment is inappropriate, the court should examine the allegations under the rule of reason standard. In *Re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978)*. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. *United States v. Trenton Potteries Co., 273 U.S. 392, 397, 47 S. Ct. 377, 379, 71 L. Ed. 700, 705 (1927)*.

Plaintiffs have evaluated several modes of future operation of their systems. Under one mode (Mode 4), WTU and CPL will allegedly engage in completely interconnected interstate operation with PSO and SWEP, have their generating plants centrally dispatched with those of PSO and SWEP and retain their interconnections with the other

TIS companies, including TESCO and HLP, placing the latter companies in interstate commerce. Under another mode (Mode 2), WTU and CPL will engage in completely interconnected centrally dispatched interstate operation with PSO and SWEP, but will **[**74]** not retain their interconnections with any TIS companies including TESCO and HLP and those latter companies will remain in intrastate operation. Plaintiffs also evaluated another mode of operation (Mode 1) which refers to that mode of operation in which all ERCOT member companies are interconnected, directly or indirectly, but have no direct or indirect interconnections with electric utilities operating in interstate commerce.

I think I have already indicated that I do not think this case falls within the traditional concept of a price fixing case. There has been no effort by the defendants to set either minimum or maximum prices, or to exchange price information or to in **[*826]** any way protect prices. The only relation this case has to prices is plaintiffs' argument that because defendants' actions allegedly affect or will affect over the next 20 years the prices the plaintiffs charge for electricity and these charges, being higher than if Mode 4 were implemented, will affect plaintiffs' competition in the electric industry with the defendants. I have already rejected that broad theory of price fixing as transforming all antitrust cases into price fixing cases, and I find no **[**75]** interference in this case by the defendants with the free market forces at work in the business world. "A manufacturer's refusal to deal with a distributor or dealer does not violate the antitrust laws merely because it adversely affects the entity refused." *Marquis v. Chrysler Corp., 577 F.2d 624, 640 (9th Cir. 1978)*. These effects are immaterial if the refusal is for business reasons which are sufficient to the manufacturer as long as there is no arrangement restraining trade. Id.; *Joseph & Sons, Inc. v. Hawaiian Inc. Oaks and Liquors Ltd., 416 F.2d 71 (9th Cir. 1969)*.

Plaintiffs' evidence concerning the defendants' effect on plaintiffs' prices of electricity due to the refusal to interconnect into interstate commerce and integrate the CSW system is not persuasive to me. The existence of a threatened injury to the plaintiff companies is also a requirement for the extreme injunctive relief sought by the plaintiffs. Zenith.

Plaintiffs' first evidence of the injury to the plaintiffs by this alleged violation of *§ 1* was a study conducted by Power Technologies, Inc. "This particular study was triggered by specific questions raised before the Securities & Exchange Commission involving **[**76]** C&SW's present operating pattern. The possibility of changing this pattern raises the broad question of the possibility of altering the basic operating pattern of the entire region to one where all utilities in ERCOT and SWPP are interconnected. This study does not attempt to examine and answer directly this broader question but instead evaluates the three alternative possibilities in terms of the potential economic impact on each of the customers of C&SW." (Page vii-viii PTI study, Px 671). Thus the study was commissioned not because plaintiffs had long desired to enter interstate commerce nor because they felt defendants were boycotting them, but rather it was done in response to the SEC proceedings in which a group of utilities challenged CSW's holding company status. This, in my mind, throws into serious doubt the credibility of the studies that were conducted by CSW, some of which were going on and were completed only after the beginning of this trial. The PTI study had a definite purpose in mind: to examine the cost of integrating the CSW system and it did not consider the impact on ERCOT in terms of cost or alleged savings, and in fact did not break out the savings for the plaintiffs **[**77]** in this case.

The PTI study did not undertake to evaluate the best mode of operation for WTU and CPL nor the best mode of operation for PSO and SWEPCO nor the best mode of operation for utilities operating in the State of Texas or in SWPP. I am not able to place much faith in such a dictated study, and the other studies introduced into evidence by the plaintiff following the PTI study are also, I believe, tainted with the same questionable motive. I discussed earlier plaintiffs' motive which I have taken into account, so I will not expand on this point any further.

I will note a few things about this study and the other studies. For example, in the PTI report Dr. Wood relied on CSW's operating committee to get his information on fuel availability for power plants put in the generation plant, and the CSW planning subcommittee for load forecast and fuel cost. These two factors were very important in the study, but rather than making an independent analysis (or being permitted to make that analysis) he principally relied on CSW for the information. In Mode 1, Plan One, which I recognize has supposedly been abandoned by the plaintiffs now, its base case application in comparison to Mode **[**78]** 4, Plan 11 was seriously hampered by the fact that Mode 1, Plan One contained a **[*827]** large number of very small generating units as compared with the preferred plan. While Mode 4 was developed by PTI, the economic results were compared to Mode 1, which was developed by CSW personnel.

No plans were drawn by Plaintiffs which "optimized" (to use the term of the witnesses) ERCOT with centralized dispatch for comparative purposes, although that could have easily been done. The PTI report did not include costs for wheeling, line losses or off-system economy sales (except those PSO had under contract), even though PSO has historically engaged in massive off-system opportunity sales. None of the defendants were ever offered by the plaintiffs any compensation for the cost of installation of Mode 4. The PTI transmission system was a broad brush treatment and no reliability study was conducted. "It is planned to conduct a reliability study in order to consider the interrelation of interconnection capability, generating unit size and type with the reserve requirements necessary to hold a given, objective standard of service reliability calculated using probability methods." (PTI at 8).

[79]** The economic benefits shown on the study supporting the plan submitted to the SEC are clearly speculative in nature and provide no basis for a finding of competitive injury:

(a) There are no savings to CSW from Mode 4 until 1986;

(b) 50% Of the savings come in the last three years of the 20 year study and there is no provision for sites or fuel for any of the plants planned for any of those three years;

(c) After 1986, 12 of the 22 new power plants to be built by CSW are lignite-fuel plants for which CSW has no assured supply of fuel;

(d) 90% Of the alleged savings come from differences in fuel costs. The fuel costs used in these studies are very speculative, and in fact, certain of the fuel cost assumptions changed drastically in the short time between preparation of the PTI report and the SEC study;

(e) If Mode 4 is not implemented by 1982, the studies would have to be reevaluated and there are numerous regulatory hurdles that CSW must clear before it can begin implementation of Mode 4.

Dr. Wood admitted that his cost calculations should but did not, include costs that would be imposed on defendants and other members of TIS as a result of the proposed power transfers between **[**80]** CSW subsidiaries. The omission of these records has been justified by CSW's position that the interconnection between CPL and SWEPCO would serve as a "contract path" (a term that no expert in the electric utilities industry had heard before it was proposed as a conceptual idea by the plaintiffs in this and related litigation), the cost of which would supposedly approximate the cost of wheeling power through TIS. Plaintiffs' transmission design expert, Mr. Arey, admitted that notwithstanding the existence of this "contract path" up to 70% Of the CSW transfers would still go over the transmission lines of defendants and other members of TIS. The evidence shows that the "contract path" was not in any way designed to compensate defendants. In his deposition, Mr. Arey admitted that he was told to include the direct tie between CPL and SWEPCO in his transmission design because of CSW's legal problems at the SEC. Mr. Arey also admitted that CSW would be using the TIS transmission system and that the ability to use the TIS system represented the difference in cost to CSW between Mode 4 and Mode 2. Nonetheless, plaintiffs have never offered to pay defendants for either the use of their systems **[**81]** or the cost imposed on them, but have in fact insisted that defendants should bear part of the costs of the interconnections.

Dr. Wood admitted that either Mode 2 or Mode 4 would achieve integration of CSW and that Mode 4 would save only 1.1% To 1.6% More than Mode 2 for all four subsidiaries combined, over a 20 year period. This difference is without the penalty which should be charged against Mode 4 for wheeling and internal costs that would be imposed on the non-CSW members of TIS. **[*828]** Dr. Wood also admitted that he was not able to make any allocation of the Mode 4 savings among the four CSW subsidiaries. He further admitted that the actual allocation of savings would ultimately depend on the outcome of regulatory hearings in the States of Texas, Oklahoma, Arkansas and Louisiana.

And yet, this is the study, with all of its weaknesses (including the fact that the PTI study became outmoded to some extent with the inclusion in the study of generation based primarily on coal resources which had not been contracted for), that the CSW Board used to base its decision to enter interstate operations and upon which it based its conclusion that an antitrust case should be filed in **[**82]** this court because plaintiffs were being boycotted by defendants, and this would have a terrible impact upon the price of plaintiffs' electricity in the future.

I recognize, as I think counsel for plaintiffs pointed out during the testimony, that just because the initial figures were wrong and that new, more accurate figures are provided, that that fact alone does not negate the existence of an antitrust violation. But in this case I think it clearly goes to the credibility of the plaintiffs' case an apparently hasty decision was made on incomplete data, which included some broad brush studies of transmission, and no reliability studies. If plaintiffs were seriously concerned about procuring the alleged savings and pursuing the most economical mode for CSW, their actions would seem, at best, hasty, and the fact that those decisions were hasty and were apparently primarily motivated by the SEC proceedings and preservation of the holding company, rather than by concern over antitrust violations, makes me seriously question the correctness of the PTI study and all studies thereafter as they relate to this litigation. That skepticism is heightened by my recollection of the testimony, **[**83]** and review of it over the past few weeks, because serious holes and erroneous assumptions were built into the various studies and restudies of the economics of the situation.

Another of plaintiffs' witnesses, Mr. Bruggeman, attempted to update Dr. Wood's work in studies completed after the trial of this lawsuit had begun. These CSW plans, proposed without Dr. Wood's assistance, projected for a twenty year period, with losses for the first ten years of the study. There was no evidence that CSW had any fuel resources for generators for the second ten years of the study period, and there was no competent evidence upon which Mr. Bruggeman could rely in projecting the fuel cost for plants during the second half of the study period. Coal contracts had not been secured, lignite leases not developed nor plant locations determined.

These studies, based almost entirely on hearsay, were not even admitted in evidence for the truth of the information they contain. Nevertheless, in reliance on its studies, Mr. Bruggeman sought to make an arbitrary allocation of the savings to show the possibility that plaintiffs would share in them, even though he was not qualified as an expert on allocation of **[**84]** savings within a power pool. That allocation depends on future decisions by regulatory authorities, so there is no basis for determination on this record that plaintiffs will share in any portion of the savings attributable to Mode 4. Any savings projected without any competent evidence with respect to cost are purely conjectural and speculative.

CSW has apparently decided to implement the generation plans proposed by Mr. Bruggeman's study, (R. 2332-33 (Bruggeman)), and has apparently abandoned the PTI and other generation plans. (R. 2404 (Bruggeman)). Mr. Bruggeman assembled new generation plans which were completed after two weeks of trial. I might add, in passing, that I had no real idea, most of the time, what Mr. Bruggeman was talking about, and after rereading his testimony, I still find it very confusing and not any more enlightening. I think the plaintiffs had a duty to present the evidence to the court in a comprehensible form I don't know too many judges that are electrical engineers or system planners, and when it **[*829]** came to Mr. Bruggeman, the plaintiffs failed in that respect.

I found Mr. Scarth's testimony the most enlightening of all, and, despite plaintiffs' **[**85]** cross examination, I believe his exhibits and testimony about Bruggeman's figures showing alleged savings to CSW, and not Bruggeman's testimony, at least what I understood Bruggeman to say.

The Bruggeman studies which were completed after this trial began were illogical and biased in favor of Mode 4 as compared with Mode 1B:

(a) Bruggeman's Mode 1B generation plan assumes three more expensive 400 megawatt coal units at Lake Diversion and two less expensive 640 megawatt coal units at Lake Diversion in Mode Four. The same assumption in both modes reduces the alleged savings of Mode 4 over Mode 1B;

(b) Bruggeman's studies do not include off-system opportunity sales even though PSO has historically had extensive off-system opportunity sales. Off-system sales reduces the alleged savings of Mode 4 over Mode 1B;

(c) Bruggeman's studies do not include any charge for wheeling even though such costs will be required for the massive amounts of power proposed to move over transmission lines of the TU companies and other non-CSW companies. The inclusion for wheeling costs reduces the alleged savings of Mode 4 over Mode 1B;

(d) Bruggeman's studies do not include a charge for line losses or **[**86]** other essential transmission lines for non-CSW companies. The inclusion of costs for line losses and minimum additional transmission lines just for the TU system reduces the savings of Mode 4 over Mode 1B.

Even using the same assumptions and date, Mode 1B results in a savings not a loss as compared to Mode 4 if only these reasonable changes and costs are included.

The conclusions and opinions of Mr. Bruggeman were based upon fuel costs and other estimates which are not in evidence and upon which there was no evidentiary predicate laid. Mr. Bruggeman was not qualified to opine as a fuel expert. Consequently, those conclusions were admitted into evidence only for the fact that he made such conclusions and not to the truth thereof.

The opinions of Dr. Wenders concerning the nature and extent of competition among electric utilities in Texas is based entirely upon the conclusions of Mr. Bruggeman (see R. 2702 (Wenders)) and upon the realization of net savings in a Mode 4 configuration. Since Mr. Bruggeman's conclusions have not been established by competent evidence for the truth thereof, the opinions of Dr. Wenders do not support their conclusions. Indeed, the implementation of Mode **[**87]** 4 is likely to result in substantial net cost rather than any savings.

Cascading blackouts can and do occur on electric systems at a time when the systems on "paper" appear reliable. The northeast blackout is an example of this. Electric systems in Texas form a peninsula and are capable of being interconnected with just one other Reliability Council. Human error impacts the reliability of an electric system, and the larger the interconnected system becomes, the more complicated communication among system members and the chance for human error creating a cascading type blackout is greater. From the testimony, the plaintiffs have not established that the interconnection of TIS/ERCOT with SWPP would be as reliable as the current intrastate operation, or even a reliable network.

Even assuming that plaintiffs had proved a violation of the antitrust laws by defendants, there is no evidence that they are threatened with harm as a result of such violation. Plaintiffs' parent holding company has not yet obtained approval from the SEC which would result in a synchronous, interstate mode of operation for the four CSW subsidiaries. In addition, plaintiffs have not even submitted plans for interstate **[**88]** operations to the Texas PUC for approval. Under the latest Mode 4 plans presented by CSW at the SEC, no savings would be realized by plaintiffs until at least **[*830]** 1986, and under the evidence in the record, savings that far in the future are speculative at best. Apart from Mode 4, plaintiffs have the option of interconnecting with SWPP in a Mode 2 configuration which defendants do not oppose. Under these circumstances, plaintiffs have failed to prove threatened loss or damage sufficient to support their claim for permanent and injunctive relief.

To summarize, "recovery and damages under the ***antitrust law*** is (sic) available to those who have been Directly injured by the lessening of competition and is withheld from those who seek the windfall of treble damages because of incidental harm." *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 at 271 (5th Cir. 1978)*, (emphasis added) (Robinson-Patman Act case). Here there is only an incidental, if any, effect on prices, and plaintiffs are not entitled to a windfall of injunctive relief because of incidental harm.

Vertical and Horizontal Restraints

When this case was originally filed in 1976, certain territorial restrictions **[**89]** were per se illegal under the *Sherman Act. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)*. "Under the Sherman Act it is unreasonable without more for a manufacturer to restrict and confine areas (for) persons with whom an article may be traded after the manufacturer has parted with dominion over it." *Id. at 379, 87 S. Ct. at 1865, 18 L. Ed. 2d at 1260*, but when a "manufacturer retains title, dominion and risk with respect to the product and the position and function of the dealer in question are, in fact indistinguishable from those of an agent or salesman of the manufacturer" then the rule of reason governs. *Id. at 380, 87 S. Ct. at 1866*. The per se rule applied in Schwinn to territorial restriction was overruled in *Continental TV Inc. v. GTE Sylvania, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, although the Court left the door slightly ajar for applying per se illegality to particular applications of vertical restrictions if they were based upon demonstrable economic effect, rather than Schwinn's formalistic line drawing. *Id. at 58, 97 S. Ct. 2549, 53 L. Ed. 2d at 585*.

> "(T)here are certain agreements or practices which **[**90]** 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 v. U. S., 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545, 549 (1958). Horizontal markets divisions, as opposed to the vertical restrictions discussed in Schwinn and Continental are per se illegal under the *Sherman Act. Timken Roller Bearing Co. v. U. S., 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*; *Dougherty v. Continental Oil Co., 579 F.2d 954 (5th Cir. 1978)*, and entities in a seemingly vertical relationship may be deemed capable of horizontal restraints if they are actual or potential competitors. Id.

Horizontal agreements are those in which the participants in the normal course of things will be competing among themselves. *Arnold, Schwinn & Co., 388 U.S. at 372, 87 S. Ct. at 1862, 18 L. Ed. 2d at 1256*. As stated in *United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, it is a per se violation of *§ 1* of the Sherman Act when there is an agreement **[**91]** between competitors of the same level of the market structure to allocate territories in order to minimize competition, or, a horizontal restraint.

Again, I must consider whether or not plaintiffs and defendants are competitors, and I reach the same conclusion: for purposes of *§ 1*, and horizontal restraints, they are not, and therefore the per se approach should not apply, but rather the rule of reason analysis. In addition, I cannot see any way that the plaintiffs can argue that the defendants have allocated territories in order to minimize competition. The PUC in Texas allocates geographic territories for the electrical market in Texas, and while defendants have some influence in the PUC as do the plaintiffs, they have no **[*831]** open control over those decisions. For these reasons also, I do not see how this is a horizontal restraint case.

Plaintiffs have cited a recent Fifth Circuit case involving electric utilities as authority for per se treatment, *Gainesville Utilities Dept. v. Florida Power & Light Co., 573 F.2d 292 (5th Cir. 1978)*. In Gainesville, unlike the factual circumstances in this case, the plaintiffs were able to show opportunities for one utility to "invade" **[**92]** the service territory of another utility, a history of consultation between two neighboring utilities and the allocation of new wholesale customers between utilities as requests for service arose. In Gainesville there was an agreement to allocate customers which was obviously anticompetitive in effect and intent; no similar agreement exists in this case.

If this is a vertical restraint case, and I am not sure that it is, (the Fifth Circuit has found it difficult on occasions, (see Dougherty) to determine which pigeonhole the facts in this case belong) it would be governed by the rule of reason.

Rule of Reason

Justice Brandeis articulated the basis for the so-called "rule of reason" test in the Sherman Act cases in *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683, 687 (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 (and) even destroy competition. To determine the question the court must originally consider the facts peculiar to the business to which the restraint is applied; its condition before and after the **[**93]** 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 the intent may help the court to interpret facts and to (prevent) consequences."

The rule of reason does not permit the court to consider any argument in favor of a challenged restraint that could be labeled reasonable; rather the court must focus on the challenged restraints impact on competitive conditions. *National Society of Professional Engineers v. U. S., 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. The test prescribed by the Supreme Court in *Standard Oil v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1910)* is that the challenged contracts or acts may be unreasonable if that determination is based either on the nature or the character of the contracts or the surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and **[**94]** enhance prices. National Society. Again, the intent or purpose of the contract must be considered when the court decides whether or not a Sherman Act violation has occurred. *Standard Oil, 221 U.S. at 58, 31 S. Ct. 502, 55 L. Ed. at 644*; *Chicago Board, 246 U.S. at 238, 38 S. Ct. 242, 62 L. Ed. at 687*; National Society. The key inquiry, however, is whether or not the challenged agreement (if one is found) merely regulates and promotes competition or suppresses it. *National Society, supra.* Absent anticompetitive effect, an unlawful intent will not establish a rule of reason violation, nor will the use of unfair methods of competition. *H&B Equipment Co., Inc. v. International Harvester, 577 F.2d 239 (5th Cir. 1978)*.

As of May 4, 1976, defendants had been advised that CSW was going to integrate its four subsidiaries to avoid legal problems at the SEC. CSW had clearly threatened to take action against defendants to force them to participate in CSW's scheme to integrate its system. When defendants learned of the radial tie into Oklahoma, and the legal actions associated therewith, it is clear they had to either disconnect or surrender to CSW's plan of coercion.

Defendants have established **[**95]** a long history of examination of the question of the **[*832]** benefits of interconnection with SWPP, and they have always concluded that they were better off operating in their intrastate mode. Defendants concluded early in 1976 that the PTI report provided absolutely no basis for a change in their view. The PTI report, which was the only study given defendants before May 4, 1976, does not even address the benefits or costs for non-CSW systems resulting from the proposed interconnection. Accordingly, as of May 4, 1976, defendants had no basis upon which to change their prior convictions that interconnection with SWPP would degrade their reliability and would impose substantial costs upon their customers with no resultant benefits.

As of the time of this trial, defendants have exhibited willingness to continue their past history of examining the costs and benefits associated with interstate connection with SWPP. Defendants have shown a reasonable belief that interconnection with SWPP would not be economical and would degrade their reliability. Plaintiffs have presented no evidence showing that defendants would benefit from the interconnection, other than some rank speculation by **[**96]** Mr. Arey about the ability to sell some power to SWPP. Mr. Arey conceded, however, that it is not the normal industry practice to build interconnections to make such opportunity sales. There is absolutely no evidence suggesting that the companies in SWPP would desire interconnection or would desire to purchase any such power. The only other potential benefit from interconnection, a reduction in reserve capacity, would not be economically practical according to Dr. Wood.

Plaintiffs themselves conceded that TIS is one of the most reliable interconnected systems in the United States. In addition, plaintiffs' expert, Mr. Arey, admitted that TIS was a reliable system and that there was no need for interconnection with SWPP from a reliability standpoint. Defendants have shown that TIS has an outstanding record of success in responding to emergencies, and they believe that their method of operation accounts for the high reliability of TIS. Interconnection with SWPP would necessarily alter this method of operation and thus lead to degradation in reliability.

Defendants also believe that interconnection with SWPP would greatly complicate management and communication problems within the interconnected **[**97]** group. Mr. Arey admitted that the most recent blackout of New York City was attributable in part to such communication problems. None of the voluminous reliability studies conducted by plaintiffs addressed these concerns voiced by the defendants.

As of May 4, 1976, defendants had reason to believe that interconnection with SWPP would degrade their reliability and increase their cost of operation with no significant offsetting benefits. Plaintiffs had presented them with absolutely no evidence to the contrary as of that date. Notwithstanding this fact, HLP was still evaluating the question of whether it would participate in an interconnection with TIS and SWPP. Thus, when HLP learned of the midnight wiring, it elected to disconnect in order to preserve for itself the right to make unilateral decisions as to the desirability of such interconnections. Both defendants were concerned that the FPC might take steps to order the interconnection of TIS and SWPP over the objection of defendants in light of the long history of efforts by the FPC to bring about such an interconnection despite the opposition of defendants and the other members of TIS. Defendants believe they are pursuing the best **[**98]** course of action for their customers and had no anticompetitive intent or purpose in disconnecting from plaintiffs. I also believe from the testimony presented at the trial that defendants are pursuing the best course of action for their customers.

There is absolutely no evidence of any prior agreement by defendants to disconnect from any member of TIS which commenced interstate operations. Mr. Jordan, president and chief executive officer of HLP, testified that as of May 4, 1976, he had never even talked with anyone from TU or its subsidiaries about the issue of **[*833]** intrastate operations. In fact, if there had been a prior agreement to disconnect between defendants, there would have been no need for them to have disconnected from each other. The absence of any preexisting agreement to disconnect is further confirmed by the extended negotiations that were required before defendants restored their interconnections on May 10, 1976.

The evidence clearly establishes that at the time TIS was formed, all of its members were committed to the proposition that it was in their mutual best interest to operate on an intrastate basis. Nonetheless, if any member of TIS chose to withdraw **[**99]** from TIS, it was free to do so. The other members were to be given notice of such a decision and were to be given an opportunity to decide for themselves whether they would go interstate as well or remain intrastate. Given the defendants' reasonable opposition to interconnection with SWPP and threats by CSW to force both of them into such an interconnection, it is not surprising that they both elected to disconnect from plaintiffs on May 4, 1976. Defendants acted unilaterally and took the only course of action open to them if they were to avoid the adverse effects of interstate operations.

I think it is clear from the evidence that there was no anticompetitive effect by the alleged actions of the defendants and therefore no violation of *§ 1*. In addition, again I must look to the competition between plaintiffs and defendants, and again, for the reasons stated before, I find it non-existent or de minimis.

Finally, considering the purpose of defendants to avoid FPC jurisdiction and the reason for adopting the intrastate mode to avoid FPC jurisdiction, as well as my belief that the effect of defendants' actions on the plaintiffs is highly speculative and questionable, I believe plaintiffs **[**100]** have failed to show a violation of *§ 1* of the Sherman Act under the rule of reason. For the reasons set forth above, and in the appendix, I find no violation of *§ 1* of the Sherman Act and I deny plaintiffs' request for injunctive relief.

HLP's Counterclaim

HLP, CPL, City of Austin and the City of San Antonio are all participants in the construction of a nuclear power and generation facility known as the South Texas Project. The South Texas Project (STP) involves the construction and operation of two 1250 megawatt nuclear generating stations in Matagorda County, Texas. The participants all signed a document, executed as of July 1st, 1973, known as the participation agreement, which HLP alleges that CPL breached. The estimated cost of the project exceeds one billion dollars.

HLP alleges that CPL, under pressure from CSW, breached § 8.2 of the South Texas Participation Agreement, which provides:

> "8.2. Each participant shall design, construct, own, operate and maintain the transmission facilities necessary to connect its system to the South Texas project switch yard, with the objective of permitting each participant to transmit under normal operating conditions its generation **[**101]** entitlement share from units of the South Texas Project to assist in a manner which will not unreasonably affect the operation of electric systems of the other participants or the interconnected system of others . . ." (HLP Ex. # 208)

CPL's participation in the May 4, 1976, interstate interconnection, plus the August 27, 1976, commencement of CPL/WTU operation in synchronism with the Southwest Power Pool allegedly created a situation in which the South

Texas project could not be planned, constructed or operated as originally contemplated. If CPL establishes interstate interconnections and/or operates in synchronism with the Southwest Power Pool, HLP alleges in its complaint that it would incur enormous expense in redesigning and reconstructing its entire transmission system in order to operate in a synchronous AC mode or, by the construction of a direct current (DC) interconnect which would allow any entity operating in synchronism with the Southwest Power Pool to remove its power entitlement from the **[*834]** South Texas Project by direct rather than alternating current. These costs allegedly amount to over one billion dollars and HLP asks for recovery of this sum plus entry **[**102]** of a permanent injunction commanding CPL, WTU and CSW to refrain from taking any action which would require any participant in the South Texas Project to transmit its power and entitlement under abnormal operating conditions in a manner which would unreasonably affect the operation of the electric systems of the various participants in the South Texas Project or the other interconnected systems of others.

At the time the STP participation agreement was signed, it was not contemplated that any participant in STP would unilaterally commence synchronous operation with systems outside of the TIS while remaining a member of TIS. In August, 1976, CPL and WTU commenced synchronous operation with SWPP, and on December 14, 1976, CSW advised the SEC that it was going to make permanent the synchronous interconnection of its four subsidiaries. Evidence presented in this record indicates that this synchronous operation created substantial operating problems for plaintiffs until it was terminated by CSW in January, 1977, following the filing of HLP's counterclaim. The evidence is undisputed that had CPL continued to operate in this manner, both CPL and HLP could not have both obtained their power **[**103]** from STP absent a physical separation of the two plants with the installation of DC transmission equipment, neither of which have been planned for at this time. The testimony is also undisputed that had CSW and CPL informed HLP that they wished to operate in interstate commerce when the project was originally conceived, it would have been possible to design the STP in a different manner so that CPL and HLP/TIS could both get power from STP without there being a connection between the two systems.

While plaintiffs are now constrained by the terms of the orders of the Texas Public Utility Commission, CSW is nonetheless committed to the establishment of synchronous ties between its four companies, notwithstanding the fact that CPL is still participating in STP. This problem is compounded by the fact that CPL and WTU are refusing to make future plans on any basis other than an assumption that they will be operating on a synchronous basis with their affiliates in SWPP. CSW has demonstrated a past history of causing precipitate operating changes among its subsidiaries despite the problems created by such changes and without any prior study of the anticipated effect.

HLP has also shown **[**104]** that if CSW was able to force its mode 4 plan of operation on the STP participants, and the systems with whom they are interconnected, this mode of operation will unreasonably interfere with the operation of its electric system. First, the interconnection may require an upgrading of existing transmission lines because of the additional flows that will come into HLP's system in the event of an emergency. Second, to the extent existing lines are adequate for the power flows under mode 4, the capacity of these lines will be used by CSW for their proposed transfers and as a backup in emergencies within the proposed CSW powerpool. The net effect, therefore, is to use capacity planned by HLP and other systems for their use in transmitting power from STP and other plants on their systems. Since the TIS transmission system is not presently designed to act in synchronism with SWPP, it could not have been contemplated that CPL would unilaterally bring about the kind of drastic operating changes in TIS that necessarily would follow from any form of synchronous interconnection with SWPP as long as CPL remained a member of STP. This is a clear cut example of action by one participant which would **[**105]** interfere with the electric systems of the other participants in the systems with which they are presently connected.

I find that CSW and CPL's commitment to the establishment of synchronous operation between WTU, CPL, PSO and SWEP violates § 8.2 of the South Texas Participation Agreement because that commitment is an "objective" which will **[*835]** "unreasonably affect the operation of electric systems of other participants", specifically HLP. While CPL/CSW's operation in synchronism will not affect the participant's ability to get electricity until the STP actually begins operation (it is still under construction), HLP need not wait for fission before seeking an injunction prohibiting violation of § 8.2. I find that under the evidence in this case plaintiff CPL's conduct threatens a violation of Section 8.2 of the STP agreement and CPL is hereby permanently enjoined from permitting power it receives from STP to enter interstate commerce as long as CPL remains a participant in the STP Agreement and as long as § 8.2 of that Agreement remains in force.

Costs and Attorneys Fees

While both sides have vigorously contended that they are protecting the public interest by attempting **[**106]** to preserve or eliminate the current intrastate electric utility system in Texas, both sides in this proceeding have ignored the impact on the public of the staggering costs and attorneys fees expended by the parties in this case and in the proceedings before the SEC, FPC, FERC, PUC, NRC, and other forums. It would be naive to assume that the companies will absorb these expenses by way of reductions of earned surplus; it is more reasonable to assume that these expenses will be passed along to the public in the rate structure.

I have no control over whether or not the costs and attorneys fees in this case, or any of the other proceedings involving these parties, can be passed along in the form of increased rates to the public. While the motive of CSW and the plaintiffs in bringing this antitrust action is irrelevant (except as I have otherwise noted) to a determination on the merits of plaintiffs' antitrust claims, I think it is very relevant to the question of whether or not the public should be forced to pay increased rates to cover the expenses of this action. [3.] CSW's apparent primary purpose for filing this lawsuit was to preserve its holding company status. [4.] I do not feel that **[**107]** the public should have to pay any of the expenses incurred in the attempt to preserve CSW as a holding company. I hope that the PUC seriously considers denying the inclusion of these expenses and those incurred by the parties in the related SEC, NRC, PUC, etc. hearings, in any rate request by these companies. [5.]

It is so Ordered.

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3. The PUC has deferred a ruling on issues similar to the issues presented in this case pending a ruling by this court on the merits of this suit. I therefore think it appropriate to comment on these attorneys fees, even though I cannot award attorneys fees, since the PUC will be relying on this court's view of the evidence.

4. This finding is limited only to this discussion concerning the propriety of passing through these legal expenses to the public in the rate structure.

5. The Defendants may have a valid argument that they should be able to pass through their costs to the public because they did not institute this litigation, and were forced to defend it.

Armstrong v. O'Connell

United States District Court for the Eastern District of Wisconsin

February 8, 1979

Civ. A. No. 65-C-173

Reporter

463 F. Supp. 1295 *; 1979 U.S. Dist. LEXIS 14562 **

Kevin ARMSTRONG et al., Plaintiffs, v. Donald J. O'CONNELL et al., Defendants. Milwaukee Teachers' Education Association, Undesignated Intervenor

Core Terms

segregative, defendants', schools, effects, school system, systemwide, teachers, housing, busing, violations, constitutional violation, residential, distance, taught, school board, intentionally, attitudinal, plaintiffs', decisions, curve, decay, black and white, Memorandum, simulation, witnesses, patterns, forces, public school system, district court, psychological

LexisNexis® Headnotes

Education Law > ... > Racial Discrimination > Desegregation > Faculty & Staff

Education Law > ... > Racial Discrimination > Desegregation > Racial Imbalances

Education Law > ... > Racial Discrimination > Desegregation > Remedies

HN1[] **Desegregation, Faculty & Staff**

The duty of both a federal district court and a federal court of appeals in a case where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of a school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. All parties should be free to introduce such additional testimony and other evidence as the district court may deem appropriate. If such violations are found, the district court in the first instance, subject to review by the court of appeals, must determine how much incremental segregative effect those violations had on the racial distribution of the school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

Education Law > ... > Racial Discrimination > Desegregation > Racial Imbalances

Evidence > Burdens of Proof > General Overview

Education Law > ... > Racial Discrimination > Desegregation > Faculty & Staff

Evidence > Inferences & Presumptions > General Overview

HN2[] Desegregation, Racial Imbalances

Where certain plaintiffs prove that school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. In the absence of such a determination (that the geographical structure of, or the natural boundaries within, a school district have the effect of dividing the district into separate, identifiable and unrelated units), proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by a trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty to effectuate a transition to a racially nondiscriminatory school system. A finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

Education Law > ... > Racial Discrimination > Desegregation > De Jure Segregation

Evidence > Burdens of Proof > General Overview

Education Law > ... > Racial Discrimination > Desegregation > Racial Imbalances

HN3[] Desegregation, De Jure Segregation

With reference to the present effects of systemwide past intentional discrimination by a school board, at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention. However, a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if the school board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.

Education Law > ... > Racial Discrimination > Desegregation > Remedies

Evidence > Burdens of Proof > General Overview

HN4[] Desegregation, Remedies

After a showing of past intentional segregation having a systemwide effect is made, and the further showing of present systemwide segregation is made, then the defendants must show that their past segregative acts did not create or contribute to the current segregated condition of the city schools if they wish to escape the imposition of a systemwide remedy. A district court must determine how much incremental segregative effect those violations had on the racial distribution of the school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.

Education Law > ... > Racial Discrimination > Desegregation > Remedies

HN5[] **Desegregation, Remedies**

Once a finding is made of state-imposed segregation in a substantial portion of a school district, a school board has an affirmative duty to effectuate a transition to a racially nondiscriminatory school system.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Education Law > ... > Racial Discrimination > Desegregation > Remedies

HN6[] **Preliminary Considerations, Equity**

In desegregation cases, a district court possesses broad and flexible equity powers. Depending on the circumstances present in each case, pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation. The remedy should be commensurate to the scope of the violations. Thus, if the evidence shows that the present effects of the defendants' past intentional segregative actions include negative psychological attitudinal effects, there is no reason why the district court should not, to the extent, if any, that it is appropriate, fashion a remedy to cure those effects.

Education Law > ... > Racial Discrimination > Desegregation > Facilities Selection

Evidence > Burdens of Proof > General Overview

HN7[] **Desegregation, Facilities Selection**

Where a trial court has made a finding of segregative intent, the trial court is then required to make a determination of what are the present effects of the defendants' past intentional segregative actions. Once the defendants are found to have engaged in intentionally segregative conduct in a meaningful portion of the school system, the burden shifts to the defendants to show that the present segregated condition of the school system would have occurred even absent the defendants' intentionally segregative conduct.

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

Civil Procedure > Remedies > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

A wrongdoer cannot invoke the complexity of his wrong to avoid answering for it. For example, in ***antitrust law*** the very success of a violation may make it impossible to compute damages as, for instance, when a monopolist drives a competitor out of business. The violator's success, however, is not a reason for allowing him to retain the fruits of his misdeeds. The violator must accept, as part of the cost of his violation, the fact that the remedy may be less precise than would be necessary in a world of perfect information.

Counsel: [1]** Lloyd A. Barbee, Milwaukee, Wis., for named plaintiffs.

Irvin B. Charne, Milwaukee, Wis., for the absent members of the plaintiff classes.

L. C. Hammond, Jr., Patrick W. Schmidt and Ronald E. Klipsch, Milwaukee, Wis., for defendants.

Curry First, Milwaukee, Wis., for Milwaukee Teachers' Ed. Ass'n, undesignated intervenor.

Opinion by: REYNOLDS

Opinion

[*1297] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

On June 28, 1977, in *Brennan v. Armstrong, 433 U.S. 672, 97 S. Ct. 2907, 53 L. Ed. 2d 1044 (1977)*, the United States Supreme Court vacated the judgment of the United States Supreme Court of Appeals issued July 23, 1976, in *Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976)*, wherein the court of appeals had affirmed the finding of liability made by this court on January 19, 1976, in the above-entitled action. See *Amos v. Board of School Directors of the City of Milwaukee, 408 F. Supp. 765 (E.D.Wis.1976)*. The Supreme Court remanded the case to the court of appeals for reconsideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)*, and *Dayton Board of Education v. Brinkman, 433* ***[**2]*** *U.S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977)*, and the court of appeals thereafter remanded the case to this court for proceedings consistent with the Supreme Court's mandate. *Armstrong v. Brennan, 566 F.2d 1175 (7th Cir. 1977)*.

In *Dayton, supra, 433 U.S. at 420, 97 S. Ct. at 2775*, the Supreme Court had held:

> ***HN1***[] "The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. Washington v. Davis, supra (426 U.S. 229, (96 S. Ct. 2040, 48 L. Ed. 2d 597) (1976)). All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution **[**3]** is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. Keyes (V. School District No. 1, Denver, Colorado), 413 U.S. (189 (1973)), at 213, (*413 U.S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548*)."

Accordingly, after discussion with counsel and over the objection of defendants' counsel, the Court took additional evidence on the issue of past intentional discrimination. On June 1, 1978, the Court found:

> " * * * that the defendants discriminated against the plaintiffs with segregative intent * * * and in so doing violated the *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution* and the Civil Rights Act of 1871, *42 U.S.C. § 1983*." *Armstrong v. O'Connell, 451 F. Supp. 817, 820 (E.D.Wis.1978)*.

The Court also found:

> "F-89. The objective evidence previously described in detail demonstrates that defendants' decisions, at least since 1950, with respect to teacher assignment and transfers, student bussing, student transfers, school siting, leasing and constructing of school **[**4]** facilities, use of substandard classrooms, and boundary changes were undertaken with an intent to segregate students and teachers by race. In making these decisions, defendants did not believe they were shortchanging black students. Defendants, however, viewed racially-mixed schools as problem schools, likely to be plagued by racial incidents, poor teacher morale, and declining academic standards. Moreover, the prevailing belief of the School Board was that any large influx of blacks into white schools would lower the quality of education available to white students there and would eventually cause the white students to leave those schools. Accordingly, defendants undertook a systematic program designed to prevent **[*1298]** whites from being required to attend classes with large numbers of blacks." *Armstrong v. O'Connell, supra, at 866*.

Finally, the Court found that defendants

> " * * * deliberately separated most of the whites from most of the blacks, and this the Constitution forbids." *Armstrong v. O'Connell, supra, at 866*.

On July 10, 1978 through July 14, 1978, and on October 23, 1978 through October 25, 1978, the Court took evidence on the issue of the present **[**5]** effects of defendants' past segregative acts. The parties in December 1978 submitted to the court proposed findings of fact and conclusions of law and comments on each other's submissions. The decision which follows draws on those submissions, and it constitutes the Court's findings of fact and conclusions of law on the issue of the present effects on the Milwaukee public school system of the defendants' past intentional segregative acts.

There are two preliminary matters which are determinative of the outcome of this case and which the Court will discuss before making its findings of fact and conclusions of law. First is the impact of the Dayton decision on Keyes and its application to the retrial of this action. Second is the manner in which the Court has viewed the expert testimony which it heard in the second phase of the retrial of this action.

In *Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973)*, the Supreme Court examined the principles applicable in a school desegregation case not involving a statutory dual school system. It stated that:

> ***HN2***[] " * * * where plaintiffs prove that the school authorities have carried out a **[**6]** systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. * * * " *413 U.S. at 201, 93 S. Ct. at 2694*.

It also stated:

> " * * * In the absence of such a determination (that the geographical structure of, or the natural boundaries within, a school district have the effect of dividing the district into separate, identifiable and unrelated units), proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system.' Brown II (*Brown v. Board of Education, 349 U.S. 294, (75 S. Ct. 753, 99 L. Ed. 1083) (1955))*, *Supra, at 301*." *413 U.S. at 203, 93 S. Ct. at 2695*.

The Court held:

> " * * * that a finding of intentionally segregative school board actions in a meaningful **[**7]** portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious * * * and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. * * * " *413 U.S. at 208, 93 S. Ct. at 2697*.

HN3[] With reference to the present effects of systemwide past intentional discrimination by the school board:

> "This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did. In *Swann (V. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, (91 S. Ct. 1267, 28 L. Ed. 2d 554) (1971))*, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of De jure segregation warranting judicial intervention. *402 U.S. at 31-32, (91 S. Ct. 1267*) (Citation omitted.) We made it clear, however, that a connection **[*1299]** between past segregative acts and **[**8]** present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools." *413 U.S. at 211, 93 S. Ct. at 2698*.

The defendants suggest that Keyes did not deal with the present effects issue discussed in Dayton and, therefore, that the presumptions created in Keyes are not applicable in this phase of the retrial. In the alternative, they argue that Dayton and other post-Keyes decisions, see, e. g., *Austin Independent School District v. United States, 429 U.S. 990, 97 S. Ct. 517, 50 L. Ed. 2d 603 (1976)* (Powell, J., concurring); *Pasadena City Board of Education v. Spangler, 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976)*, have modified the analysis required and demand factual proof on a school-by-school basis of the present effects **[**9]** of defendants' past intentional segregative acts.

The plaintiffs and the United States, which has filed a brief as amicus curiae, argue that, as witnessed by the citation to Keyes in Dayton at *433 U.S. at 420, 97 S. Ct. 2766*, Dayton did not work any fundamental change in the law, and the burden rests on the defendants to show that the segregation in the Milwaukee school system as of the 1975-76 school year did not result from their segregative conduct. In the alternative, plaintiffs submit that they have established by factual proof that defendants' past segregative conduct had a systemwide impact on the Milwaukee school system in the 1975-76 school year.

After reviewing the Keyes and the Dayton decisions, as well as the decisions of the many district courts and courts of appeal which have studied the interrelationship of those decisions since June of 1977, [1.] the Court is persuaded that the Keyes decision does have application to the issue of present effects and also that Dayton does not bear the weight which defendants would have it bear as an instrument for overruling Keyes. The Court in Keyes directed its attention specifically to "the relationship between past segregative acts **[**10]** and present segregation," *413 U.S. at 211, 93 S. Ct. at 2699*, and it held that ***HN4***[] after a showing of past intentional segregation having a systemwide effect is made, and the further showing of present systemwide segregation is made, then the defendants must show that their "past segregative acts did not create or contribute to the current segregated condition of the * * * city schools" if they wish to escape the imposition of a systemwide remedy. *413 U.S. at 211, 93 S. Ct. at 2699*. The Court in Dayton stated at *433 U.S. 420, 97* S. Ct. at -- - that:

[11]**

> " * * * the District Court * * * must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. * * * "

In Dayton, however, the district court found only three isolated instances of intentional segregative conduct. Consequently, none of the predicates for the application of the presumptions discussed in Keyes were present, and plaintiffs retained the burden **[*1300]** of presenting factual proof of the specific effect of each of the defendants' intentionally segregative actions. Whether or not Dayton is a "foreshadowing" of the demise of the Keyes presumptions at least in the area of present effects, see *Austin, supra*; *Pasadena City Board of Education, supra*; and "Defendants' Post Trial Memorandum of Law, Memorandum on Proposed Findings of Fact and Conclusions of Law, and Proposed Findings of Fact and Conclusions of Law as to the Issue of Present Effects" filed December 8, 1978, at 5, n. 4, the Supreme Court has not yet arrived at that result. Unless and until it **[**12]** does so, in language more precise than anything contained in the Dayton decision, this Court considers itself bound by the principles set forth in the Keyes decision.

In addition to its significance on the issues of presumptions and burden of proof, Keyes has a second application to this phase of the retrial. In the original decision and order issued in this case on January 19, 1976, *Amos v. Board of School Directors of the City of Milwaukee, 408 F. Supp. 765 (E.D.Wis.1976)*, it was held at 821:

[1.] See, e. g., *Brinkman v. Gilligan, 583 F.2d 243 (6th Cir. 1978)*, cert. granted ***439 U.S. 1066, 99 S. Ct. 831, 59 L. Ed. 2d 31 (1979)***; *Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978)*, cert. granted ***439 U.S. 1066, 99 S. Ct. 831, 59 L. Ed. 2d 31***, (1979); *Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978)*; *United States v. Texas Education Agency, 579 F.2d 910 (5th Cir. 1978)* (en banc); *Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978)*; *United States v. School District of Omaha, 565 F.2d 127 (8th Cir. 1977)* (en banc); *Booker v. Special School District No. 1, Minneapolis, Minnesota, 451 F. Supp. 659 (D.Minn.1978)*; *Berry v. School District of Benton Harbor, 442 F. Supp. 1280 (W.D.Mich.1977)*.

"The Court concludes that the defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities, and have intentionally brought about and maintained a dual school system. * * * "

While the Court did not specifically reiterate its finding of a dual school system in the June 1, 1978, decision, it did make the finding that:

" * * * defendants undertook a systematic program designed to prevent whites from being required to attend classes with large numbers of blacks," *Armstrong v. O'Connell, 451 F. Supp. 817, 866 (E.D.Wis.1978)*,

and in addition that defendants:

" * * * deliberately separated **[**13]** most of the whites from most of the blacks * * *." *451 F. Supp. at 866*.

HN5[] Once a finding is made of "state-imposed segregation in a substantial portion of the district," *Keyes, 413 U.S. at 203, 93 S. Ct. at 2695*, the school board has an affirmative duty " 'to effectuate a transition to a racially nondiscriminatory school system.' " *Keyes at 203, 93 S. Ct. at 2695*; *Brown v. Board of Education, 349 U.S. 294, 301, 75 S. Ct. 753, 99 L. Ed. 1083 (1955)*; *Green v. County School Board, 391 U.S. 430, 437-438, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968)*.

Defendants have agreed that the Milwaukee school system is "as segregative" "or as integrative" now as it was in 1950. See "Defendants' Post Trial Memorandum of Law, Memorandum on Proposed Findings of Fact and Conclusions of Law, and Proposed Findings of Fact and Conclusions of Law as to the Issue of Present Effects" filed December 8, 1978, at 31-32. Keyes imposes on the defendants the duty to show that the degree of segregation in the Milwaukee school system in 1975-76 would have existed even absent their intentional segregative actions. *413 U.S. at 211, 93 S. Ct. 2686*. If the evidence which they present to explain those conditions fails **[**14]** to show that the conditions would have existed even absent their past actions, then the Court believes, following Keyes, that it can make the finding that the degree of present segregation in the Milwaukee school system arises out of the defendants' failure to perform the affirmative duty imposed on them in Keyes to effect a transition to a racially neutral system and is itself a significant present effect of the defendants' past intentional segregative actions.

The defendants also argue that even if the Keyes presumptions survive Dayton, they must be deemed rebutted and have no further application "if * * * a reasonable jury Could find the contrary of the presumed fact more probable than not." "Defendants' Post Trial Memorandum of Law, Memorandum on Proposed Findings of Fact and Conclusions of Law, and Proposed Findings of Fact and Conclusions of Law as to the Issue of Present Effects," filed December 8, 1978, at 8. Also they argue that Dayton requires that present segregative effects be measured on a school-by-school basis, that it requires that the present racial distribution of the school **[*1301]** population be compared to what it would have been absent the defendants' violations, **[**15]** and therefore that

" * * * (t)he untested claims of Drs. Green, Taeuber and Foster (plaintiffs' experts) with respect to psychological attitudinal effects transcend the bounds of the task assigned this Court. The only issue presented is what the racial distribution of the school population would be today, not what psychological harm might have been caused and not what attitudinal concepts might have been developed because of the violations. * * * " Defendants' Post Trial Memorandum filed December 8, 1978, at 10.

As stated above, the Court does not read Dayton as requiring a school-by-school analysis. Furthermore, in face of defendants' systematic program of intentional segregative action, a school-by-school analysis which fails to take into account that there may be ramifications of the action felt outside of the individual school or schools involved may fail to measure the "incremental" effect of an individual action or of the individual actions at issue when they are viewed in total. In Keyes, the Court noted at 433 U.S. at 203, 93 S. Ct. 2686 that school board actions have an impact beyond their impact on the individual school or schools at which they are directed. Similarly, **[**16]** in *Milliken v. Bradley, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977)*, the Court recognized ***HN6***[] "the broad and flexible equity powers" of the court, *433 U.S. at 288, 97 S. Ct. at 2761*, and noted that, depending on the circumstances present in each case, "pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation * * *." *433 U.S. at 287, 97 S. Ct. at 2761*. See also *Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971)*; *United States v.*

Montgomery County Board of Education, 395 U.S. 225, 89 S. Ct. 1670, 23 L. Ed. 2d 263 (1969). Even in Dayton, the Court noted that the remedy should be commensurate to the scope of the violations. *433 U.S. at 417, 97 S. Ct. 2766*. Thus, if the evidence shows that the present effects of the defendants' past intentional segregative actions include negative psychological attitudinal effects, the Court is unaware of any reason why it should not, to the extent, if any, that it is appropriate, fashion a remedy to cure those effects.

As for defendants' argument with respect to rebutting the Keyes presumptions, that argument presupposes that defendants have presented **[**17]** to the Court sufficient evidence to enable the Court, sitting as the finder of fact, to decide that the present segregated condition of the Milwaukee schools was not caused by the defendants' intentional segregative actions. The defendants limited their presentation of evidence to the schools as to which specific violations were found, and as to those schools, to a comparison of what the present population of each school would have been had the specific violations not occurred to what the population was at the time the violation occurred. For the reasons set forth below, the Court finds that the flaws in the defendants' analysis would preclude it as factfinder from relying on the evidence presented by defendants and therefore would not enable it to make the finding that it was more likely than not that defendants' actions did not contribute to the present segregated conditions in the Milwaukee public schools.

Both matters the use of evidence relating to psychological attitudinal effects and the analysis and use of evidence of incremental segregative effects as defined by the defendants raise the issue of the manner in which the Court has viewed the expert testimony presented during **[**18]** the second phase of the retrial of this case. That view is in turn determinative of the outcome of the case and thus will be discussed prior to the making of specific findings of fact and conclusions of law.

Initially, the Court notes that this second phase of the retrial the so-called "battle of the experts" has required the Court as factfinder to consider and to evaluate almost entirely contrary sociological and urban geographic theories. In so doing, the Court of necessity has had to rely on the qualifications and the persuasiveness of the expert witnesses in reaching its own conclusions **[*1302]** on the ultimate issue of present effects. Plaintiffs' witnesses were Dr. Robert P. Stuckert, formerly the director of the Milwaukee Fact Book Project; Dr. Robert L. Green, an educational psychologist and presently the dean of one of the colleges at Michigan State University; Dr. Karl Taeuber, a sociologist and urban demographer, presently at the University of Wisconsin-Madison; and Dr. Gordon Foster, presently a professor in the School of Education at the University of Miami. Defendants' witnesses were Dr. William Clark, an urban geographer presently from the University of California **[**19]** at Los Angeles, and Dr. David Armor, a sociologist, formerly from Harvard University and presently with the Rand Corporation.

The defendants have criticized plaintiffs' witnesses for failing to make detailed analyses of the Milwaukee urban area and residential living patterns and of the Milwaukee public school system. Also, defendants have criticized them for testifying as to the "psychological attitudinal effects" of defendants' past segregative actions rather than trying to quantify except by use of terms like "substantial" or "not minimal," the incremental effects of the defendants' constitutional violations. (Defendants' Memorandum filed December 8, 1978, at 10, 12-13.)

The Court has already determined that evidence of psychological attitudinal effects is relevant to its present inquiry and that a remedy can be predicated on a finding that such effects exist. With respect to the failure of plaintiffs' witnesses to quantify present effects mathematically, this Court is in agreement with the statement of the Court in *Booker v. Special School District No. 1, Minneapolis, Minnesota, 451 F. Supp. 659, 662 (D.Minn.1978)*, that the use of an " "alternative universe theory,' " i. e., **[**20]** a comparison of a universe where no violations occurred to what in fact exists, is fraught with difficulties and moreover is probably not what the Supreme Court intended in Dayton. As stated by the Court in Booker in note 5 at 663:

> " * * * (T)he many problems of the statistical approach defendants have used reinforces this Court's view that Dayton cannot be interpreted so "mathematically.' As another court has remarked, no court in any school case will ever be able to say with any assurance "where people would have lived, where schools would have been located (or) how much integration would have obtained' absent officially imposed discrimination. *U. S. v. Columbus Municipal Separate School Dist., 558 F.2d 228, 231 n. 11 (5th Cir. 1977)*, Cert. denied *434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978)*."

See also *Teamsters v. United States, 431 U.S. 324, 372, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)*. Any "alternative universe" created, whether by plaintiffs' or defendants' experts, will necessarily be an approximation of what in fact would have existed absent the defendants' constitutional violations. Consequently, use of a term like "substantial" to quantify the present **[**21]** effect of past actions by a person whose expertise qualifies him to make a judgment on present effects is all that is reasonably possible and all, in the opinion of this Court, that the law presently requires.

Finally, the defendants take too narrow a view of what their constitutional violations were as found by the Court in its June 1, 1978, decision. They have examined and used in this second phase of the trial the individual violations which the Court found but have ignored the Court's conclusion that:

> " * * * the defendants acted with a discriminatory intent in their decisions and actions respecting boundary changes, site selection, and school construction." *Armstrong v. O'Connell, 451 F. Supp. 817, 866 (E.D.Wis.1978)*.

They have also ignored the Court's conclusion that:

> "(t)he objective evidence previously described in detail demonstrates that defendants' decisions, at least since 1950, with respect to teacher assignment and transfers, student bussing, student transfers, school siting, leasing and constructing **[*1303]** of school facilities, use of substandard classrooms, and boundary changes were undertaken with an intent to segregate students and teachers **[**22]** by race. * * * Accordingly, defendants undertook a Systematic program designed to prevent whites from being required to attend classes with large numbers of blacks." Ibid., at 866. (Emphasis added.)

The Court concluded in the just-quoted findings that the defendants' violations occurred on a systemwide basis and not merely in the individual instances set forth earlier in the June 1, 1978, decision. By choosing to ignore the Court's conclusions, the defendants have also taken too narrow a view of the evidence on which the opinions of plaintiffs' witnesses were based. The criticism leveled at plaintiffs' witnesses of failing to make the proper analysis of the Milwaukee public school system could therefore better by leveled at defendants' witnesses who failed to take into account the most significant of the findings made by the Court on the issue of defendants' past intentional segregative acts.

Defendants' witness, Dr. William Clark, testified about the reciprocal effects of segregated schooling on residential patterns. In reliance on his testimony, the defendants have suggested that the Court adopt the following finding of fact:

> "40. The primary forces which influence residential **[**23]** patterns are economics, spatial forces, geographic barriers, choice and discrimination (Tr. II-37, Clark). All of these forces contribute to the way in which people behave with respect to residential selection, one aspect of which is that people tend to move shorter distances rather than longer ones (Tr. II-18-21, Clark). One way to measure this observed behavior is through the use of a scientific device called a "distance decay curve,' which itself represents the forces that go into the selection of new residences (Tr. II-21, Clark). By taking the distance decay curve and doing a scientific simulation based upon the probabilities of individuals moving particular distances, one can simulate where people would be expected to live if the forces which comprise the distance decay curve are valid (Tr. II-25-26, 27-29, Clark). If the simulated pattern one obtains from running the study is close to the actual pattern (based upon census information), then the simulation establishes that the forces which are at work in contributing to the distance decay curve are causing the actual pattern to develop (Tr. II-40, Clark).
>
> "Dr. Clark conducted a simulation study of the movements of black **[**24]** families for the City of Milwaukee for the period of 1960 to 1970 using a distance decay curve of the white population (Tr. II-44, Clark). By using this curve rather than the distance decay curve for blacks, the portion of observed behavior which is due to discrimination is eliminated and therefore whatever correlation this simulation has to the actual will reflect those factors which are part of the distance decay curve except for discrimination (Tr. II-44-5, Clark). The simulations which Dr. Clark ran produced a mathematical correlation of .81 and .83 which establishes that the distance decay curve was a good representation of the movements of black households (Tr. II-39, Clark). The difference between the correlation number received and the number one represents the factors which are left over that are not included in the distance decay formula, which factors include discrimination (Tr. II-102, Clark). Dr. Clark

has always tended to think that each of the factors, economics, barriers, spatial factors, choice and discrimination have about 20% Of the explanation for residential living patterns (Tr. II-121, Clark). The discrimination element, which is in the range of 15-20%, includes **[**25]** both individual and governmental discrimination (Tr. II-123, Clark). Since individual acts of discrimination and other governmental discrimination besides the School Board are part of the residual of 20% Which explain the black living patterns, the Court-found violations are far outweighed as having any influence on residential patterns (Tr. II-42, Clark). Dr. Clark testified that he did **[*1304]** not think that the School Board had an impact on the residential patterns and that there was no evidence in the literature that school boards have been a force in influencing the residential mosaic, and this Court agrees with that testimony and so finds (Tr. II-43, Clark)." (Defendants' memorandum filed December 8, 1978, at 35-36.)

The Court declines to adopt the finding. As stated within it, the finding assumes that "if the simulated pattern one obtains from running the study is close to the actual pattern * * *, then the simulation establishes that the forces which are at work in contributing to the distance decay curve are causing the actual pattern to develop * * *." What the forces are, however, is determined by the person conducting the study. No attempt was made by Dr. Clark **[**26]** to determine whether or not a set of other factors taken in conjunction, or several such sets, might have created the same pattern. Consequently, of course, no effort was made by him, and his study does not show, that the set of forces on which he chose to base the study was the only set which could have created the actual pattern.

Dr. Armor undertook to evaluate each individual discriminatory act which the Court found in its June 1, 1978, decision, and to predict, assuming an otherwise static situation, what the present population of the school or district involved would have been absent the single act of discrimination, or what the rate of contact between black and white students would be today absent the act of discrimination. The Court finds several fundamental flaws in his analysis. First, it fails to take into account that the individual violations set forth in the June 1, 1978, decision were not the only violations which the Court found to have occurred, but rather that the Court found, based on those individual acts, that systemwide violations had occurred. Second, the analysis assumes that had the individual intentionally discriminatory acts not occurred, no other neutral **[**27]** and nondiscriminatory actions would have been taken. Third, the analysis ignores the possible psychological and attitudinal effects of the acts, i. e., it measures integration on the basis of contact alone without regard for the nature of the contact. Finally, the analysis fails to take into account that a single act of discrimination may have an effect beyond that felt by the persons, or in the schools or districts of immediate impact. For other criticisms of Dr. Armor's work, see *United States v. Board of School Commissioners of the City of Indianapolis, Indiana, 503 F.2d 68, 85* and n. 21 at 85 (7th Cir. 1974); *Northcross v. Board of Education of Memphis, 466 F.2d 890, 894 (6th Cir. 1972)*.

The Court recognizes, as all courts which have looked at the problem have done, the difficulties of proof of cause and effect in the context of school segregation. Relying on the Keyes decision, the Court is of the opinion that its finding of systemwide intentional discrimination, in conjunction with defendants' failure to present satisfactory evidence that the present segregated condition of the Milwaukee public school system would have been the same even absent the acts of intentional discrimination, **[**28]** necessitates imposition of a systemwide remedy. As stated by the Court in *Booker v. Special School District No. 1, Minneapolis, Minnesota, 451 F. Supp. 659, 663-664 (D.Minn.1978)*:

"Indeed, at bottom, there is an inherent contradiction in attempting to apply either of defendants' views of Dayton to a systemic school segregation case. This Court's findings of a systemwide pattern of discrimination in the Minneapolis schools cannot now be challenged or relitigated and Dayton itself reemphasized that once systemwide impact is found, a systemwide remedy must be imposed. Dayton did not overrule the cases which have guided the district courts in formulating systemwide remedies the goal is to desegregate the entire system "root and branch,' *Keyes v. School District No. 1, 413 U.S. 189, 213, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973)*, Quoting *Green v. County School Board, 391 U.S. 430, 438, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968)*, and to achieve the "greatest possible degree of **[*1305]** actual desegregation, taking into account the practicalities of the situation,' *Davis v. Board of School Commissioners, 402 U.S. 33, 37, (91 S. Ct. 1289, 28 L. Ed. 2d 577) (1971)*. See *U. S. v. Columbus **[**29]** Municipal Separate School Dist., 558 F.2d 228, 230-31 (5th Cir. 1977)*,

> Cert. denied, *434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978)*. The concept of "incremental segregative effect,' however it may be interpreted or applied when a district court is faced in the first instance with isolated unconstitutional acts, has little application where the segregative effect has already been determined to have been pervasive and to require a systemwide remedy. * * * "

Nevertheless, even assuming that the Keyes presumptions should not be applied to the present effects analysis, the Court is persuaded that plaintiffs have presented sufficient evidence during the second phase of the retrial to justify imposition of a systemwide remedy.

The Court makes the following findings of fact and conclusions of law on the issue of the proper scope of the remedy to be imposed in this case. [2] These findings and conclusions are supplemental to, and generally in harmony with, those findings and conclusions on the same issue contained in the Court's original decision in this case, *Amos v. Board of School Directors of the City of Milwaukee, 408 F. Supp. 765 (E.D.Wis.1976)*. In case of a conflict, however, **[**30]** between the findings and conclusions of the original decision and the findings and conclusions of this decision, the later ones are intended as controlling. The findings of fact are numbered consecutively below, with each number being preceded by the designation "F," while the conclusions of law are numbered consecutively in a separate sequence, with each number being preceded by the designation "L."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

L-1. ***HN7***[] Where, as in this case, the trial court has made a finding of segregative intent, the Court is then required to make a determination of what are the present effects of the defendants' past intentional segregative actions. *Dayton Board of Education v. Brinkman, 433 U.S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977)*; *Brennan v. Armstrong, **[**31]** 433 U.S. 672, 97 S. Ct. 2907, 53 L. Ed. 2d 1044 (1977)*.

F-1. For the purposes of this case, "present effects" should be judged as of the 1975-76 school year, which was the last year prior to the phasing in of a court-ordered remedy in this case.

L-2. Once the defendants are found to have engaged in intentionally segregative conduct in a meaningful portion of the school system, see *Armstrong v. O'Connell, 451 F. Supp. 817, 866 (E.D.Wis.1978)*, the burden shifts to the defendants to show that the present segregated condition of the school system would have occurred even absent the defendants' intentionally segregative conduct, *Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 211, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973)*. In this case, however, even without the use of the Keyes presumption, the plaintiffs have established that the defendants' unconstitutional conduct had a substantial systemwide impact on the racial distribution of students and teachers in the Milwaukee public school system.

F-2. The Court previously found that defendants themselves fallaciously assumed that "educationally undesirable characteristics are common to all black children" and that "the influx **[**32]** of a large number of black students into a white school would lower the quality of education in that school." *Armstrong v. O'Connell, 451 F. Supp. 817, 866 (E.D.Wis.1978)*. As a result of defendants' unconstitutional decisionmaking, similar false assumptions were taught to Milwaukee school children and the Milwaukee community in general. Specifically, defendants' discriminatory conduct has taught school children and adults in Milwaukee **[*1306]** that racial separation is legitimate and desirable behavior. It has taught white children that this is a white-dominant society and that white children need not have more than token contact with black children or black professionals. It has taught whites that blacks are in some ways inferior and that interracial contact is detrimental and to be avoided. Defendants' conduct provided the same lessons to black children and black adults. Moreover, defendants' conduct was a message that a major government agency in Milwaukee formally and openly sanctioned racial discrimination and segregation. Defendants' deliberate separation of white and black children in a variety of ways, and their separation of white children from black teachers, thus had **[**33]** the effect of fostering general attitudes of prejudice and racial hostility throughout the Milwaukee area.

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[2] The Court has adapted its findings of fact and conclusions of law from the plaintiffs' proposed findings of fact and conclusions of law filed December 8, 1978, with such minor additions and deletions as the Court has considered proper.

F-3. Intact busing conveyed the message to whites that their children were being protected from blacks because even if it was necessary to bus largely black classes to predominantly white schools, there was nothing to fear because the busing would be temporary and the bused children would be kept reasonably separate at the white schools. Intact busing taught blacks that black children were not welcome in white schools, that black parents were not welcome at the white schools' P.T.A.'s, and that blacks were not likely to make friends in the white areas of Milwaukee. Milwaukee public school busing practices also taught both black and white students that blacks were inferior. Accordingly, the great efforts made by the school system through its busing practices to minimize contact between students from black and white schools reinforced defendants' general educational message that white contact with too many blacks is unfortunate and to be avoided.

F-4. The impact of intact busing is uncertain; however, a substantial number of parents and children had first-hand knowledge of intact **[**34]** busing. Moreover, in light of the community conflict over intact busing and the media coverage of the conflict, Milwaukeeans in general were aware of intact busing practices and the racial lessons they taught.

F-5. The deliberate concentration of black teachers in schools outside of the predominantly white areas of the city conveyed the message that an important government agency, the school board, did not want blacks in the white areas of the city. It also was a message to school children that whites are dominant and that blacks are to be kept apart in Milwaukee's public schools and in the city generally.

F-6. Defendants' free and open transfer policies let whites know that their children would be permitted to escape from schools becoming increasingly black, and facilitated defendants' policy of "deliberately separating most of the whites from most of the blacks," *Armstrong v. O'Connell, 451 F. Supp. 817, 866 (E.D.Wis.1978)*. These policies had the further effect of identifying certain neighborhoods in Milwaukee as being no longer suitable for whites.

F-7. The attitudinal effects resulting from defendants' intentionally segregative conduct have broad social consequences. These attitudinal **[**35]** effects influence the behavior of teachers and school administrators throughout the school system in carrying out their duties, and they affect other government officials in discharging their public responsibilities. They also influence the behavior of private citizens as members of the community and as actors in the housing market. In addition to being broad in scope, unless there is an extensive program of remediation, these attitudinal effects will last a lifetime. *Brown v. Board of Education, 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873 (1954)*.

F-8. In 1950, approximately 3 1/2 % Of Milwaukee's citizens were black. In that year, no census tracts were more than 90% Black, and only five tracts were majority black. Although in 1950 some blocks in Milwaukee were predominantly black, no black person lived more than four blocks from a majority white residential area. Thus, unlike in other large northern cities in 1950, as a result of the small percentage of black citizens, **[*1307]** Milwaukee blacks lived in relatively close geographic proximity to whites; on the other hand, the residential living pattern was extremely concentrated and there was a high degree of residential segregation.

[36]** F-9. From 1950 through 1970, Milwaukee's black population nearly quintupled, and by 1970 blacks constituted approximately 14 1/2 % Of the city's population. Milwaukee's ghetto, defined herein as a concentrated area of predominantly black residents, grew up since 1950, and principally in the 1960's. In 1970, seventeen census tracts were more than 90% Black and an additional twenty tracts were majority black.

F-10. Defendants' segregative decision-making thus occurred simultaneously with the growth of Milwaukee's black ghetto. An expert witness called by plaintiffs, Dr. Karl Taeuber, whom one of the defendants' experts described as a very well-known, renowned demographer best known for his work on race-related issues and on cities, testified that in Milwaukee "there was a continuing reciprocal interplay between schooling and housing, such that the highly concentrated black ghetto and the highly concentrated portions of the school system grew up together, and the reciprocal influence on the white areas produced solidly white resident and school areas." (Transcript of July 11, 1978, at 255) The Court, in its January 19, 1976, opinion, indicated that it did not doubt that schools had **[**37]** a reciprocal effect on housing, but that the evidence then in the record did not support such a finding. *Amos v. Board of School Directors of the City of Milwaukee, 408 F. Supp. 765, 821-822 (E.D.Wis.1976)*. Based on the evidence presented at the second phase of the retrial on present effects, a reciprocal effect finding, as stated in the above-quoted excerpt from Dr. Taeuber's testimony, is now justified. See also *Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971)*; *Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 202, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973)*.

F-11. It is an impossible task at least for this court and this judge to determine with any degree of specificity how substantial the reciprocal effect of schooling on housing in Milwaukee has been. There is credible evidence in the record to support the finding, which the Court now makes, that the factors of economics, choice, spatial factors, and discrimination also have a substantial role in creating residential segregation. Nevertheless, based on Dr. Taeuber's testimony, the Court is persuaded that the school board's actions also were one of the substantial **[**38]** causes of residential segregation in Milwaukee.

F-12. The Court, in its June 1, 1978, decision, found that defendants' decisions to deal with overcrowding in inner city schools, including the building and siting of new schools, building additions to existing schools, leasing or purchasing unused buildings for school purposes, utilizing substandard classrooms, changing district boundaries, and intact busing, "individually and in conjunction with each other had the effect of increasing racial imbalance." *Armstrong v. O'Connell, 451 F. Supp. 817 (E.D.Wis.1978)*. Together these actions formed a "pattern of boundary compression and facility expansion" which resulted in many instances in schools in contiguous districts being of one race or another. *Armstrong, at 859*. Thus, defendants' unlawful conduct increased the racial identifiability of schools. Moreover, the intentional concentration of black teachers in those schools attended by large numbers of black children perpetuated the racial identifiability of schools. Similarly, defendants' transfer policies facilitated a much more rapid transition in school racial identifiability than would come about simply through neighborhood residential **[**39]** change.

F-13. A school, as a principal and visible neighborhood entity, often acts as the central identifying institution for a neighborhood. Within an otherwise undifferentiated residential area, school boundaries tend to be the most meaningful boundaries in defining a neighborhood. Thus, the racial identifiability of a school helps to racially identify the neighborhood. This racial identifiability, in conjunction with the message **[*1308]** conveyed by defendants' unlawful conduct that contact between blacks and whites is to be avoided, had a substantial impact on the housing patterns in Milwaukee. It contributed to the drying up of the demand by whites for housing in areas which, in part as a result of defendants' wrongful acts, were racially earmarked as being for blacks. Similarly, defendants' conduct contributed to the black housing demand being channeled into the black residential areas of Milwaukee rather than being dispersed throughout the city.

F-14. *Dayton Board of Education v. Brinkman, 433 U.S. 406, 420, 97 S. Ct. 2766, 2775, 53 L. Ed. 2d 851 (1977)*, requires the Court to consider, as part of its "present effects" determination, what the "school population as presently **[**40]** constituted * * * would have been in the absence of such (defendants') constitutional violations." The record in this case demonstrates that the Milwaukee public school system would have been substantially less segregated in 1975-76 had defendants not engaged in the intentionally segregative conduct found by the Court in its June 1, 1978, decision. Milwaukee would have had substantially less housing segregation in 1975 and, as a result, substantially less school segregation had defendants administered the school system in a racially neutral manner.

F-15. Had defendants assigned teachers in a racially neutral manner and administered the rest of the system in such a manner, many more white students throughout the system would have had first-hand experiences with both black and white teachers. The school system, by example, would have taught these white students and white Milwaukeeans generally that blacks and whites were equally capable of educational attainment, of handling major responsibilities, and of working together harmoniously; black students and black Milwaukeeans generally would have been taught the same lesson and would have had the example of the school system practicing **[**41]** equal rights and ignoring racial prejudices. Schools would not have been racially identifiable on the basis of the racial composition of their staffs. There is a substantial probability that fewer Milwaukeeans would have engaged in discriminatory housing practices and that more would have sought out and resided in racially mixed residential areas.

F-16. Had defendants assigned teachers in a racially neutral manner, more black teachers would have been dispersed throughout the system. There is a substantial probability that some of the black teachers who would have been assigned to white schools outside the inner city would have chosen to live closer to their assigned school and to enroll their children in that school; that they would have demonstrated that blacks could be good neighbors; and that, as a result of this interracial contact, which defendants by their conduct discouraged, whites would have accepted other black families as their neighbors. Black demand for housing, therefore, would have been dispersed throughout the city rather than concentrated in one area.

F-17. Had defendants mixed bused students rather than intact bused students from majority black schools to majority **[**42]** white schools, thousands of black and white students would have had meaningful interracial contact. Social psychological evidence in the record indicates that persons who have had meaningful interracial experiences in school as children are more likely to seek out and live in integrated residential areas as adults. Moreover, had mixed busing been employed, Milwaukee public school busing practices would not have been perceived by the community as a device to protect white students from attending school with black students on an equal basis. Had defendants engaged in a racially neutral busing practice and administered the rest of the system in a neutral manner, students and citizens of Milwaukee would have been given a lesson in racial tolerance rather than racial intolerance. There is a substantial probability that more citizens would have sought racially mixed housing. Furthermore, many of the white and black students are now young adults. They are renting or buying homes and deciding where to send their own children to school. Had these students had meaningful interracial **[*1309]** contact, facilitated by mixed busing, there is a substantial probability that many more of them would **[**43]** seek out racially mixed rather than racially isolated residential areas.

F-18. Had defendants operated a racially neutral student transfer program and administered the rest of the system in a racially neutral manner, there is a substantial probability that housing in Milwaukee would have been less segregated; that there would have been fewer white transfers out of schools with increasing black student populations; that neighborhoods would not have been as identifiable and considered as no longer suitable for whites; and that the white demand for housing in those areas would not have dried up. Had there been a majority to minority transfer plan or some type of neutral transfer program, black parents seeking interracial education for their children would have been better able to secure it. These parents would have acquired a whole different set of attitudes that affect housing choices and, therefore, they would have made different housing choices.

F-19. Had defendants engaged in neutral policies relating to school siting, construction and boundary changes, and operated the rest of the system neutrally, schools would have been less racially identifiable. More students and parents would **[**44]** have been exposed to interracial education. There is a substantial probability that a greater number of Milwaukeeans would have chosen to live in interracial neighborhoods, and the development of the solid black ghetto would have been diminished.

L-2. Defendants' discriminatory conduct conveyed a clear message to the entire Milwaukee community that a governmental institution was intentionally protecting white students from attending schools with large numbers of black students and from being taught by black teachers. Milwaukeeans were taught lessons of racial prejudice and hostility which molded and reinforced prejudicial attitudes. These attitudes influenced the housing decisions of black and white Milwaukeeans. Had the defendants operated the school system in a racially neutral manner, Milwaukeeans would have received a different message that a governmental institution was approving treatment of blacks and whites on an equal basis. Defendants, by direct example, would have taught Milwaukeeans lessons of racial tolerance and acceptance which would have formed and reinforced positive racial attitudes. There is a substantial probability that more Milwaukeeans would have made housing **[**45]** choices which would have resulted in much greater housing desegregation and, in turn, much greater school desegregation. Thus, defendants' constitutional violations had an incremental segregative effect throughout the school system.

L-3. In order to redress the pervasive, systemwide impact of defendants' constitutional violations, a systemwide remedy encompassing both student population and teacher assignment is required.

L-4. Defendants contend that since plaintiffs were unable to prove with precision what the racial make-up of each school in the system would be in 1975-76 had defendants' constitutional violations not occurred, plaintiffs are not entitled to this remedy. Unfortunately, it is true that the overriding effect which defendants' unlawful conduct had on housing patterns makes it impossible to determine with precision how each school in the system would have looked had defendants not violated plaintiffs' constitutional rights. No court in any school case will ever be able to determine with statistical precision "where people would have lived, where schools would have been located (or) how much integration would have been obtained" in the absence of officially imposed discrimination. **[**46]** *United States v. Columbus Separate School District, 558 F.2d 228, 231 n. 11 (5th Cir. 1977)*, Cert. denied *434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978)*, and *Booker v. Special School District No. 1, Minneapolis, Minnesota, 451 F. Supp. 659, 663 n. 5 (D.Minn.1978)*.

In this case the special master previously reported:

> **[*1310]** " * * * It may be that we have no way of knowing what the Milwaukee Public School system would look like today had the defendants not violated the plaintiffs' constitutional rights. I would submit, however, that the defendants should not be permitted to profit from their wrongdoing by using such uncertainty as the basis for resisting imposition of an appropriate remedy." (Special Master's Progress Report and Recommendations, February 17, 1977, at 10.)

This view is jurisprudentially sound. Indeed, it is an accepted principle of law that ***HN8***[] a wrongdoer cannot invoke the complexity of his wrong to avoid answering for it. For example, in ***antitrust law*** the very success of a violation may make it impossible to compute damages as, for instance, when a monopolist drives a competitor out of business. The violator's success, however, is not a reason **[**47]** for allowing him to retain the fruits of his misdeeds. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. The violator must accept, as part of the cost of his violation, the fact that the remedy may be less precise than would be necessary in a world of perfect information. In any event, Dayton cannot be read to require the mathematical precision requested by defendants. *Booker, supra, 451 F. Supp. at 663 n. 5*. Moreover, since defendants have not themselves proven that the present segregated condition of the Milwaukee public school system would not have been the same even absent their constitutional violations, see *Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 211, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973)*, this court, sitting as a court of equity, cannot be "so callous as to accept the contention that although vestiges of De jure discrimination pervade to this day, it is helpless to fashion a remedy to root them out." *Evans v. Buchanan, 582 F.2d 750, 766 (3d Cir. 1978)* (en banc).

The Court will require the plaintiffs to prepare a proposed remedial plan designed to cure the present effects of the defendants' **[**48]** past constitutional violations. The defendants will have an opportunity to comment on the plan or to submit their own plan, and a hearing on the plan(s) will be held at the end of March 1979, as hereafter set forth:

ORDER

For the foregoing reasons,

IT IS ORDERED that this decision shall constitute the findings of fact and conclusions of law made pursuant to the remand of this action from the United States Court of Appeals for the Seventh Circuit on the issue of the present effects of the defendants' past constitutional violations.

IT IS FURTHER ORDERED that the parties shall observe the following scheduling dates:

1. On or before February 23, 1979, the plaintiffs shall serve and file a proposed remedial plan designed to cure the present effects, as found in this decision and order, of the defendants' past constitutional violations.

2. On or before March 9, 1979, the defendants shall serve and file their comments, if any, on the plaintiffs' proposed remedial plan or, if they choose, an alternative plan.

3. On or before March 16, 1979, the plaintiffs shall serve and file their response, if any, to the defendants' comments, or their comments on the defendants' plan.

4. A hearing **[**49]** on the proposed remedial plan(s) is scheduled for 9:30 A.M. on Friday, March 23, 1979, in Courtroom 425 of the Federal Building, 517 East Wisconsin Avenue, Milwaukee.

[Missouri v. National Organization for Women, Inc.](#)

United States District Court for the Western District of Missouri, Central Division

February 21, 1979

No. 78 4053 CV C

Reporter

467 F. Supp. 289 *; 1979 U.S. Dist. LEXIS 14312 **; 1979-1 Trade Cas. (CCH) P62,507

STATE OF MISSOURI, Plaintiff, v. NATIONAL ORGANIZATION FOR WOMEN, INC., Defendant

Subsequent History: [1]** Amended March 16, 1979.

Core Terms

boycott, convention, Sherman Act, campaign, organizations, ratification, unratified, patriae, sectors, dollars, cancellation, solicitation, urging, restraint of trade, revenue loss, antitrust, decisions, parties, anti trust law, generalized, railroads, bookings, site, injunctive relief, local chapter, concerted, telephone, estimate, appears, Rights

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

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

The United States Supreme Court has settled that a state does have standing to sue under the antitrust laws to protect its quasi-sovereign interest in the well being of its general economy and the welfare of its citizens.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

"Boycott" has been defined as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. From the very beginning of antitrust enforcement, the boycott or concerted refusal to deal has been held to be a combination in restraint of trade, in violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Counsel: John E. Vanderstar, Donna L. Kohansky, Covington & Burling, Washington, D. C., for defendant.

Roger Bern, Walter O. Theiss, Gregory D. Hoffmann, Nanette K. Laughrey, Asst. Attys. Gen., Jefferson City, Mo., for plaintiff.

Opinion by: HUNTER

Opinion

[*291] OPINION AND ORDER

The State of Missouri brings this action for injunctive relief against the National Organization for Women, Inc. (NOW) under § 16 of the Clayton Act, *15 U.S.C. § 26*. Missouri alleges that NOW has engaged in a combination and conspiracy in restraint of trade in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. Missouri also alleges that NOW's conduct violates the Missouri antitrust statute, *§ 416.031.1, RSMo*, and constitutes the tortious intentional infliction of economic harm without legal justification or excuse. This Court has jurisdiction over the federal antitrust claim under *28 U.S.C. § 1337* and pendent jurisdiction over the state law claims.

Missouri is a sovereign state of the United States and brings this action in that capacity and as Parens patriae. NOW is a nonprofit membership corporation organized under the laws of the District of Columbia. It has approximately **[**2]** 77,000 members nationwide, half of whom belong to 690 local chapters. These chapters and individual members are organized into a national federation with the stated purpose of bringing women "into full participation in the mainstream of American society."

I. Factual Findings

The factual basis for Missouri's Complaint can be supplied by this single stipulation of fact:

> NOW has sought to persuade and urge those organizations that support making equal rights for women a part of the Constitution to refrain from holding conferences, conventions, and meetings in unratified states.

It is necessary, however, to place NOW's activities within the broader series of occurrences leading to the filing of this action and therefore to set out a summary of the substantial record before the Court.

The proposed Equal Rights Amendment to the Constitution (ERA) was passed by both houses of Congress and submitted to the states for ratification on March 23, 1972. [1] The ERA has been ratified by the legislatures of thirty-five states, short of the thirty-eight required for the amendment to become a part of the Constitution. [2] Ratification of the ERA became a hotly-contested issue in many **[**3]** states, and, as is characteristic of the political system in this country, various individuals and organizations undertook lobbying efforts to influence legislators, both in support and in opposition. Such efforts have included giving testimony before legislative committees, personal contacts with legislators, letter writing campaigns, and solicitation of media attention. Many national membership organizations and associations, including NOW, have engaged in such lobbying.

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[1] H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972) provides:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

[2] *U.S.Const. art. V*.

As early as April of 1975, the National Federation of Business and Professional Women (BPW), a large national **[**4]** women's organization, retained a political consultant and consulting firm to advise the group on **[*292]** strategy for its efforts in support of ratification. The advice received was that a move by BPW, in conjunction with other national organizations, to cancel its national convention, scheduled for a state which had not ratified the ERA (Nevada), might be a powerful tool to influence legislators' votes on ratification. Also in April, 1975, the National Association of Women Deans, Administrators and Counselors adopted a resolution not to convene in unratified states. In May, 1975, the League of Women Voters adopted its resolution to urge the national political parties not to hold conventions in unratified states. Both BPW and the National Education Association took action in July, 1975, and resolved not to hold conventions in unratified states. The American Association of University Women passed its resolution in November, 1975. In September, 1976, the American Political Science Association adopted a similar resolution not to convene in unratified states. There is no evidence that any of these groups were contacted or influenced in any way by NOW. Some groups took this **[**5]** action believing that the convention boycott was an original idea. Others were aware that a convention boycott resolution had been adopted by another group or groups at an earlier time. Some groups made no effort to influence others to adopt boycott resolutions; some took active steps to communicate their decisions and to urge similar action by other groups.

The national NOW organization did not become involved with this movement until 1977. In January of that year, Eleanor Smeal, the current president of NOW, was in Nevada taking part in an effort to secure ratification of the ERA in the Nevada legislature. As a part of that effort, the League of Women Voters and the California state NOW organization sponsored an advertisement in the San Francisco Chronicle, a newspaper read by Nevada legislators, urging California residents to refrain from traveling to Nevada until that state ratified the ERA. From the reactions of the Nevada Governor and legislators to the advertisement, it was determined that the potential of such a boycott as long as a state remained unratified could have an effect on legislators' votes.

The then-president of NOW made telephone calls to members of several **[**6]** national organizations asking if any might be in a position to adopt and publicize a boycott resolution aimed at the state of Nevada in an effort to influence the upcoming vote on the ERA in the Nevada legislature. She discovered that it was difficult to secure immediate decisions due to the requirements of the formal decision-making processes in each group. As a result, before the Nevada legislature voted on the ERA, there was little activity of substance undertaken by NOW that was directed at a convention boycott of Nevada or other unratified states. The evidence shows that NOW officials were then of the impression that the convention boycott was an original idea and were unaware that some organizations had adopted boycott resolutions as much as one and one-half years earlier.

NOW adopted its own convention boycott resolution in February, 1977. At that February meeting, NOW decided to pursue a centralized convention boycott strategy. A committee was appointed to implement the new national strategy, but there is no evidence that much, if anything, was done in that regard during the first six months of 1977. NOW officers did complete studies of the legislative and political **[**7]** situation in each of the fifteen unratified states. Many organizations adopted convention boycott resolutions during the first half of 1977, but there is little evidence that NOW was actively soliciting such actions or coordinating a centralized convention boycott campaign during that period.

Dr. Frances Kolb was appointed to chair NOW's reconstituted Economic Sanctions Committee in July, 1977, after which NOW's role in furthering the convention boycott movement increased significantly. A paid staff person was retained by NOW in August, 1977, to work on the boycott campaign, among other things. Although there is evidence that much of the time of the individuals in question was expended to prepare for NOW's role in the International **[*293]** Women's Year meeting in Houston in November, 1977, NOW's active role in the convention boycott campaign began that summer.

As the parties have stipulated, from that time until the trial of this case in October-November, 1978, NOW actively engaged in an "economic boycott campaign" that has been a significant part of and shared common goals with a larger convention boycott movement directed at unratified states. The stipulated goal of NOW's **[**8]** economic boycott campaign and the end of all of NOW's activities relevant to this action is the ratification of the Equal Rights Amendment.

There are many facets to NOW's campaign. NOW set up a committee on the national level to centrally coordinate the convention boycott movement. For at least some period of time, NOW retained a full-time staff person to work on the boycott campaign. NOW sent a letter urging the adoption of a convention boycott resolution to hundreds of organizations and arranged for follow-up telephone contacts. NOW arranged for the printing and distribution of a boycott brochure [3.] which urges individuals to join the boycott campaign by working for a boycott resolution within their own organizations. This brochure incorporated a business reply card with which interested individuals could request further information on the boycott campaign. NOW also arranged for the manufacture of a campaign-style button identifying the wearer as a supporter of the convention boycott of unratified states.

[9]** NOW maintains an office in Washington, D. C., in which the mentioned boycott campaign work was done. The office served as a "clearinghouse" for information on the boycott. Individuals and groups were actively solicited to contact the NOW office for information and materials. For a period of time, NOW maintained a "Countdown House," utilizing a nationwide telephone campaign, in order to contact its local chapters concerning boycott activities and other projects. NOW officials and staff put together a "boycott kit" which was made available to individuals on request. In addition, this kit was sent to NOW members across the country who were taking leadership roles in local NOW activities. The kit contained various materials for use by individuals desiring to promote the boycott. [4.] NOW also prepared and distributed material suggesting that local governments be approached and urged to adopt boycott resolutions imposing limits on official travel to unratified states. This material contained tactical suggestions, including a sample resolution, whereby city and county legislators could be approached to solicit support for a boycott resolution. Materials provided to members of local **[**10]** NOW chapters also included tactical pointers for local boycott activities. Local chapters were urged to take an "inventory" of the organizational memberships of chapter members in order that local members could request boycott action of other organizations as members of those organizations and not as members of NOW.

Much of the boycott work carried on at NOW's Washington, D. C., office concerned NOW's effort to gather statistics on the boycott. NOW attempted to **[**11]** maintain an up-to-date list of organizations which had adopted a boycott resolution. It appears that maintenance of an accurate list was not a simple undertaking. The list required constant updating and checking for accuracy. Some of the information concerning **[*294]** boycott resolutions was provided to NOW as a result of NOW inquiries and general solicitation of information about the boycott; some was provided by groups or individuals on a completely voluntary basis. NOW took steps to ensure that the list of organizations was accurate. Procedures were adopted which required notification from an official of an organization and provided for subsequent telephone verification that an official action had been taken by a particular group. In addition to the list of organizations, NOW devised a statistical questionnaire which requested information on group size, convention attendance, and potential economic impact in terms of revenue loss due to a convention cancellation or site change.

NOW made a series of direct, personal contacts with many groups. Some of these personal contacts were part of specific assignments to NOW officials. Some of the contacts were more general in **[**12]** nature, consisting of telephone calls, letters, speeches, and personal appearances of NOW officials or members. Some personal contacts were directed specifically to the adoption of a boycott resolution; some were generally directed at generating support for the ERA, without specific mention of the boycott. NOW also made a concerted effort to generate media interest in the ratification effort generally and the convention boycott specifically. NOW officers arranged for press conferences, provided press releases to media, submitted to interviews, and made many personal appearances. NOW also included stories on the boycott in its internal publication, the National NOW

[3.] There were two printings of 20,000 copies each. Several thousand brochures were distributed at the International Women's Year Conference in Houston, Texas, in November, 1977. The small fraction of NOW's 1977 budget ($ 5,000) earmarked for the economic boycott campaign went mainly for printing expenses.

[4.] The kit contained the brochure and button described above, a list of the members of the national committee with their telephone numbers, a "guidelines for action" paper, a current list of organizations which had adopted a convention boycott resolution, a "position paper," a "boycott fact sheet," a list of convention changes, and a "contact sheet" listing the names and addresses of legislative leaders in unratified states. The boycott kit was not being distributed at time of trial because NOW officials found it to be prohibitively expensive.

Times, urging participation in boycott projects by local members. The attainment of extensive press coverage for NOW's boycott efforts was a critical part of the economic boycott campaign.

There is evidence that several of NOW's local chapters and individual NOW members carried out boycott projects of their own, in particular, active efforts to secure adoption of boycott resolutions by local governments. Although there is ample evidence to support a finding that NOW actively encouraged and aided such projects with **[**13]** materials and information, the parties have stipulated that NOW has no control or supervision over its local chapters, and that the local chapters are independent and autonomous and do not act as agents of NOW.

Although NOW's economic boycott campaign is a significant part of a larger convention boycott movement, it does not occupy the field. ERAmerica, a coalition of many pro-ERA groups, was formed as a neutral umbrella-type organization to provide leadership and coordination to the ERA ratification effort. Represented on the board of directors of ERAmerica are groups such as the National Education Association, the National Federation of Business and Professional Women, the National Womens' Political Caucus, the League of Women Voters, and the Coalition of Labor Union Women. ERAmerica has engaged in many of the same activities in support of the convention boycott as has NOW, including writing letters to organizations urging convention site changes away from unratified states, offering sample boycott resolutions, and keeping lists of organizations which have adopted such resolutions. [5.] There is evidence that NOW and ERAmerica exchanged information on a staff level relating to **[**14]** corrections in their respective lists of boycotting organizations; however, there is nothing to indicate that the two groups made any effort to coordinate their activities in support of the convention boycott. ERAmerica recognized NOW's organizational role in the boycott movement, but has pursued an essentially independent, though somewhat parallel, course of action.

There is evidence of at least one completely independent effort in support of the boycott movement. Several professional historians conducted their own campaign to influence historical associations to which **[*295]** they belonged. This campaign involved letter writing and the organization of a petition drive among association members, all at the personal expense of the **[**15]** individuals. There is no evidence that this individual campaign was a result of solicitation by or a combination or agreement with NOW or anyone else. [6.]

It is evident that even though NOW came to occupy what is perhaps the leadership role in the convention boycott movement, it was and still is one actor among many. The circumstances surrounding each convention cancellation in Missouri and the adoption of each convention boycott resolution are as varied as the number of organizations involved. Missouri alleges that these decisions were made "at the express urging" and "in combination with" NOW. In fact, NOW's influence in the decisions varied greatly. As discussed above, there were several large groups which made boycott decisions far in advance of the inception of NOW's economic boycott campaign, and which could not have been influenced in any way by NOW. On the other hand, there are groups **[**16]** which were the objects of direct and active solicitation by NOW, including letters, personal contacts, speeches, and telephone calls. In these situations, active solicitation by NOW was followed by a boycott decision. [7.]

There are other cases in which NOW's contacts with particular groups were of varying degree. Some groups adopting boycott resolutions were the recipients of a single letter as a part of a NOW mass mailing. Some groups were actively solicited by local NOW chapters, but had no contact whatever with NOW. Some groups were not contacted at all, but were influenced indirectly by NOW through **[**17]** the publicity surrounding the boycott movement and NOW's campaign. [8.] Resolutions adopted by some groups expressly refer to NOW or the "NOW

[5.] On February 8, 1977, ERAmerica released a list of 15 national organizations which had adopted boycott resolutions, erroneously including the National Organization for Women. This list reflects activity in the convention boycott movement long before NOW took any part.

[6.] On the contrary, the evidence shows that NOW did not even respond to correspondence from these individuals.

[7.] Groups in this category include the American Nurses Association (in relation to the convention of the International Congress of Nursing), the National Council of Senior Citizens, and the American Home Economics Association. However, there was evidence that many groups in this category were considering some sort of participation in the convention boycott movement before the initial contact from NOW.

boycott." It is clear that some were influenced by the number and type of organizations which had previously adopted resolutions. This lends importance to the influence of NOW's list of boycotting organizations and its broad publication.

The parties have stipulated that the goal of NOW's convention boycott campaign is the ratification of the ERA. A careful review of the entire record in this case confirms that no contrary finding is possible. The motivation of NOW and of the organizations involved in the boycott movement can be viewed from two points, both aimed directly at the legislative process. One reflects a desire of these groups to make a symbolic gesture. The evidence shows that the various decisions to encourage and to participate in the **[**18]** boycott were intended as demonstrations of support for ERA ratification. The affirmative step of a boycott resolution or convention cancellation, urged by NOW and taken by many organizations including NOW, was conceived to show strong support for a political issue, support of a nature beyond a simple expression of policy or preference. The other view of the intent behind the boycott movement concerns publicity. The public acts of these organizations were meant to attract attention and bring public visibility to the issue of ratification. This publicity was intended to engender discussion and lend an air of importance to the issue and to bring the question to a higher position among legislators' priorities. NOW and the other groups also intended that the adverse economic impact of the boycott on those who would otherwise profit from conventions in Missouri would cause those persons to influence their legislators to support ERA ratification. The record is convincing **[*296]** that the above-described actions were not intended as punitive, in the sense that the boycott was not intended to punish Missouri for its past failure to ratify but to promote ratification in the future, **[**19]** and were not motivated by any type of anticompetitive purpose.

NOW argues that the evidence is not sufficient to sustain a finding of combination or conspiracy within the meaning of *§ 1* of the Sherman Act. Assuming, Arguendo, that the above-described actions taken by NOW fall within the purview of the Sherman Act, there is sufficient evidence to justify a finding that NOW entered into a combination to implement a convention boycott of unratified states. It is clear that at least some of the decisions to boycott convention facilities of unratified states were taken in direct response to NOW's advocacy. In addition, the invitation to act, the presence of a strong motive for concerted action, and the knowledge that others were taking similar action are sufficient to find conspiracy under the *Sherman Act. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*. [9.]

[20]** II. Standing [10.]

The State of Missouri asserts that it has standing to bring this action for injunctive relief as "Parens patriae, trustee, guardian and representative of its citizens and the economy of the State." [11.]

HN1[] The Supreme Court has settled that a state does have standing to sue under the antitrust laws to protect its quasi-sovereign interest in the well-being of its general economy and the welfare of its citizens. *Georgia v. Pennsylvania R. R., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*. This question of standing was reviewed in *Hawaii **[**21]** v. Standard Oil, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, in which the Court held that Hawaii, as Parens patriae, could not recover damages for an injury to its economy under § 4 of the Clayton Act, *15 U.S.C. § 15*. However, state standing to obtain injunctive relief to remedy an injury to its economy was effectually reaffirmed when the Court distinguished as "notably different" § 4, which requires injury to "business or property" in

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8. The convention boycott movement was the subject of a front page article in the New York Times on November 13, 1977.

9. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.

Interstate Circuit, Inc. v. United States, supra, at 226, 59 S. Ct. at 474.

10. Because this substantial legal issue, raised in NOW's motion for summary judgment, was interposed so close to time of trial, this Court deferred its ruling until after the trial on the merits.

11. It is unnecessary to reach other grounds for standing asserted by Missouri.

order to recover damages, and § 16 of the Clayton Act, *15 U.S.C. § 26*, which authorizes injunctive relief upon a showing of "threatened loss or damage." [12.] Missouri brings this action under § 16.

At the pleading stage of this case, Missouri alleged substantial injury to **[**22]** the "economy and prosperity" of the state, which included financial loss suffered by convention and tourist-related businesses and diminished tax revenues for the state and local governments as a result of the lower level of economic activity within the state. The evidence revealed that more than ten major conventions definitely booked [13.] into Missouri cities have been cancelled as a result of the boycott movement. [14.] These cancellations represent a **[*297]** very approximate revenue loss of at least $ 8.6 million to Missouri hotels, restaurants and numerous other businesses catering to the convention trade. Although no revenue loss estimate was available, at least six smaller conventions, also definitely booked into Missouri hotels, have been moved to facilities in other states. A substantial amount of tentative convention business, perhaps exceeding the dollar volume of cancelled definite bookings, has also been moved to locations outside of Missouri. [15.] It is difficult to produce accurate estimates of revenue loss due to these cancellations because some of the conventions were scheduled to occur two or more years in the future. Obviously, the sales personnel in the convention **[**23]** and visitors bureaus and the affected hotels are and will be making efforts to rebook the previously reserved space with other conventions. There is evidence that some amount of such rebooking has taken place, which would reduce any estimate of revenue loss by the volume of the substituted business. The revenue loss equation, however, must include the consideration that most national conventions are booked from three to five years in advance, some as far as ten years in advance. It is difficult, therefore, to rebook a large block of space with another large convention, if given only one or two year's notice from the time of cancellation.

[24]** The lead time requirement for most national conventions adds an additional factor to the estimation of injury. Although Missouri businesses catering to conventions have already been harmed in some degree due to cancellations of definite convention bookings, the evidence shows that the impact of the convention boycott may be felt to a greater extent some years in the future. Decisions being made currently concern site selection for conventions to be held five or ten years in the future. At least the larger organizations have a limited time frame in which advance bookings can be made and once that time is past, the potential business is lost because an alternative site will have been selected. There may be no additional cancellations of definite bookings, but the refusal of the large number of boycotting groups to even Consider a Missouri convention site poses an undeniable threat of injury in the future.

The estimate of revenue loss due to the convention boycott published by NOW in January, 1978, listed revenue loss to St. Louis of $ 11 million and revenue loss to Kansas City of $ 8 million. [16.] The NOW list of boycotting organizations dated October 17, 1978, contains 273 organizations **[**25]** and independent decision-making components thereof and 34 city and county governments.

[12.] In holding that damage to a state's general economy is not an injury to its "business and property" necessary for recovery of damages under § 4, the Court contrasted the potential of multiple recoveries inherent to a Parens patriae damage claim with the unitary effect of an injunction.

[13.] In the parlance of the convention industry, a definite booking is the confirmation, probably in writing, of the official decision of the organization to designate a certain city or particular facilities for its meeting.

[14.] At least one of these cancellations, occurring in 1976, predated NOW's active role in the boycott campaign.

[15.] A tentative booking is notification from the organization that it is interested in particular facilities and constitutes a request that the space be reserved on a tentative basis pending an official decision. At this stage, the organization may tentatively book several locations, with the result that every tentative booking does not become a definite booking.

[16.] NOW's estimate represents revenue loss over the period 1978-1981 and does not include revenue loss resulting from the cancellation of the 1981 International Congress of Nursing convention in Kansas City, Missouri. That convention is estimated to represent.$ 3.2 million revenue to the convention site.

NOW argues that Missouri lacks standing as Parens patriae because the state seeks to represent the interests of a single industry, which is quite small in relation to Missouri's total economy, [17.] and which is capable of action in its own behalf to protect individual interests. [18.] NOW categorizes this case as one in which the interests of particular individuals are paramount, rather than one in which the interests of all the citizens of the State of Missouri are adversely affected, **[*298]** citing *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health, 160 F. Supp. 387 (E.D.La.1958)*. In that case, several **[**26]** Minnesota manufacturers of dried milk sued to overturn Louisiana milk labeling provisions. The Attorney General of Minnesota described the dairy industry as one which involves "a major economic activity of importance to the people of Minnesota" and sought leave to intervene as Parens patriae on behalf of all Minnesota dried milk producers not already party to the suit. The court denied the state's motion to intervene, taking judicial notice that the dairy industry was neither the only nor the largest industry in Minnesota.

[27]**

> The dairy industry statistics offered by Minnesota fail to demonstrate that the sale of dried milk is of such pervasive importance to that industry and to Minnesota citizens generally that restrictions on the interstate distribution of dried milk would directly and materially affect the "welfare of the people of Minnesota." Thus the interests of the single industry here involved must be held to be private interests, not interests affecting the whole economy or all of the people of the state. This type of interest is insufficient to give Minnesota the right to sue as Parens patriae in behalf of all, or a substantial number of her citizens. *Id. at 389*.

It is NOW's argument that the facts before this Court are analogous to those in Land O'Lakes Creameries; that Missouri's suit is for the benefit of individual interests rather than for the benefit of all the people of the state and that therefore the state lacks standing as Parens patriae. [19.]

[28]** Over NOW's strong relevancy objection, Missouri offered the testimony of an expert economist to illustrate (1) that the injury resulting from the boycott is not confined to a narrowly defined convention industry, but cuts across the entire economy of the state, and (2) that the magnitude of the injury to the general economy is much greater than the figures contained in the estimates of revenue loss to convention businesses. The economy of a political region, such as the State of Missouri, has been divided by economists into various sectors for the purpose of analysis. [20.] The economic units (businesses and individuals) that make up each sector produce output which is exchanged with other sectors to obtain necessary inputs. These economic linkages between and among the various sectors are a primary cause of the interdependence which characterizes the complex state of a modern economy. There is evidence that the dollars spent by the average convention delegate flow fairly directly into thirteen sectors of the economy of the convention site. [21.] However, the linkages between the sectors receiving convention dollars and other sectors operate to move that money through all the sectors, **[**29]** with the result that dollars spent by convention delegates affect Every sector in the economy of the convention site. As convention dollars move through the economy, each turnover between sectors generates new dollars of business income in a

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[17.] It is NOW's position that whatever injury has been proved is insignificant if compared with the dollar volume of all economic activity within the state of Missouri. In 1977, the convention industry brought $ 183 million in revenue to the state. Total personal income in Missouri in 1977 was in the neighborhood of $ 25 billion.

[18.] See Action Committee for Tourism, Inc. v. National Organization for Women, Inc., Civil Action No. 78-1510 (E.D.La., filed May 6, 1978) (suit with issues common to this case brought by private interests).

[19.] See *Oklahoma v. Atchison, T. & S. F. Ry., 220 U.S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911)*; *Kansas v. United States, 204 U.S. 331, 27 S. Ct. 388, 51 L. Ed. 510 (1907)*.

[20.] E.g., livestock, textiles and apparel, primary metals, household appliances, heavy construction contractors, etc. There are over 50 such sectors.

[21.] Sectors receiving convention dollars are hotels, eating and drinking places, meat processing, dairy products, grain mill products, other food products, gasoline service stations, other retail businesses, miscellaneous manufacturing, transportation services, other services, wholesale businesses, and imports. International Association of Convention and Visitors Bureaus, Convention Delegate Expenditure Survey 1973 (sector classifications were modified to comport with the analytical model of Missouri's expert witness).

phenomenon known as the "multiplier effect." Economists have calculated multiplier figures that measure the flow of dollars into the economy and the successive turnover of those dollars into new business income until the identifiable dollars finally disappear. Using multiplier figures for the Missouri economy, it has been calculated that every dollar spent by people attending **[*299]** conventions in Missouri generates $ 2.78 in spending throughout the economy of the State of Missouri.

[30]** Missouri thus argues that, as convention spending affects all sectors of the economy, the withdrawal of convention dollars from Missouri has an adverse effect on All sectors of Missouri's economy. Missouri also urges consideration of the economic Effect of the withdrawal of convention dollars, after application of the multiplier figure. Missouri maintains that the thus broadened base of incidence of injury (every economic sector affected) coupled with a consideration of the magnitude of its economic Effect (post-multiplier) is sufficient to constitute an injury to the "general economy" of the state. The state, says Missouri, should have standing as Parens patriae to remedy such injury.

The question thus presented to this Court is whether an economic injury of the type and extent as has been proved by the State of Missouri is sufficient to confer upon it standing as Parens patriae. It is a question not likely to produce an easy answer. The District of Columbia Circuit considered the problem in *Pennsylvania v. Kleppe, 174 U.S.App.D.C. 441, 447-48, 533 F.2d 668, 674-75*, Cert. denied sub nom. *Pennsylvania v. Kobelinski, 429 U.S. 977, 97 S. Ct. 485, 50 L. Ed. 2d 584 (1976).*

> **[**31]**
> The nature of the economic or welfare interest necessary to justify state standing is one of the more obscure issues with which we must deal. The valid though largely unhelpful generality which guides us is that the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens. However, in view of the substantial interrelationship of all economic activity, no clear demarcation is possible between individualized harms and injury to the economy as a whole. This appears to be one area where the sufficiency of the injury actually alleged is highly contingent upon other relevant factors bearing on the appropriateness of letting the plaintiff state pursue the case on the merits.
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> At one extreme, it is entirely clear that a state never has standing on the basis of personal claims assigned to it by individuals. It also seems well established that there can be no standing in the state where the primary thrust of an alleged wrong is injury to a narrowly limited class of individuals, and the harm to the economy as a whole is insignificant by comparison. However, in some cases, it has been **[**32]** held sufficient that the direct impact of the alleged wrong be felt by a substantial majority, though less than all, of the state's citizens, so that the suit can be said to be for the benefit of the public. And even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects.
> It thus appears that injury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, can give rise to a quasi-sovereign interest in relief as will justify a representative action by the state. The cases indicate not only that the nature and degree of essential harm cannot be characterized with any precision, but that factors other than the degree of injury are influential in determining state standing. . . . It Also appears that the sufficiency of the state interest asserted may sometimes be influenced by policy concerns arising from the context of the suit quite apart from the injury itself. (emphasis added)

This Court is convinced that Parens standing is not foreclosed simply because the most direct injury is suffered by a rather narrow **[**33]** class of individuals. NOW argues that the businesses that have been injured are capable of bringing suit to protect their individual interests and thus there is no justification for intervention by the state as Parens patriae, citing *Oklahoma v. Atchison, Topeka & Santa Fe Ry., 220 U.S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911)*. In *Burch v. Goodyear Tire Co., 420 F. Supp. 82 (D.Md.1976)*, *Aff'd, 544 F.2d 633 (4th Cir. 1977)*, the Attorney General of Maryland **[*300]** brought suit for injunctive relief under § 16 of the Clayton Act. It was alleged that Goodyear and Cities Service Oil Company had combined to restrain competition among tire manufacturers and foreclose competition in the tire replacement market, which consisted of individual Cities Service service station dealers. Goodyear argued that the suit was for the benefit of the individual service station dealers and that therefore the state lacked standing as Parens. The district court, later affirmed by the Fourth Circuit, rejected that argument and distinguished *Oklahoma v. Atchison, Topeka & Santa Fe Ry., supra*, as it involved a direct monetary benefit to the "individual" being represented by the state. The district court **[**34]** in Burch noted that there was no claim by Goodyear that the individual service station dealers would receive any monetary gain as a result of the suit and held that the state did have standing to sue.

> Any suit by a state on behalf of its citizens as a whole will benefit some of its citizens more than others. . . . The premise of the antitrust laws is that an anticompetitive injury felt acutely by a few is also an injury to the commonweal. The fact that some will benefit more than others is not a barrier to maintenance of this lawsuit. *Burch v. Goodyear Tire & Rubber Co., supra, at 89*.

The facts in Burch are analogous to this case inasmuch as there is no claim by NOW that any of the businesses that make up the convention industry in Missouri will receive any monetary benefit as a result of this lawsuit.

As a part of the reasoning process to determine whether a state will be recognized to have standing as Parens patriae, courts have had the occasion to consider factors other than the type and extent of injury involved. In Pennsylvania v. Kleppe, quoted Supra, the court referred to and considered "policy concerns arising from the context of the suit quite apart from the **[**35]** injury itself." NOW cites Land O'Lakes Creameries, in which the court found the interests involved to be private and denied state standing as Parens patriae. However, removed from its analysis of the Type of injury alleged, the district court in that case noted that it considered "the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states." *Id. at 390*. Indeed, the issue of Parens patriae standing has been most often litigated in the context of an assertion of the original and nonexclusive jurisdiction of the Supreme Court. It is undeniable that such cases "do not present an isolated question" and may "involve the concern to shepard the scarce time and resources of that tribunal." *Pennsylvania v. Kleppe, supra, 174 U.S.App.D.C. at 447 n.36, 533 F.2d, at 674 n.36*. See, e.g., *Pennsylvania v. New Jersey, 426 U.S. 660, 665, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976)*. This court has found that the businesses of Missouri's convention industry have suffered economic injury as a result of the boycott and are threatened with additional **[**36]** injury in the future. Although the dollar volume of that injury is a small relative proportion of the entire Missouri economy, the injury is not insubstantial in the absolute. The adverse effect of the injury extends to all parts of the economy of the state. After having considered the nature and the extent of the injury to the economy of Missouri, this Court is compelled to turn to the additional factors and policy concerns mentioned in *Pennsylvania v. Kleppe and Land O'Lakes Creameries, supra.*

It has been remarked that this case has no precedent; that it presents a unique set of circumstances not before determined in any other court. That fact weighs as heavily in that balance on the issue of standing as it does on the merits. The parties stipulate that the aim of the boycott is to secure ratification of the Equal Rights Amendment. All of the boycott activity undertaken by NOW insofar as it has affected the State of Missouri, has been directed toward securing an act of the Missouri General Assembly. NOW's target, if such a word can be used, is the state legislature, **[*301]** the supreme policy-making body of the state. The State of Missouri as a political entity is as **[**37]** much a part of the underlying controversy as is Missouri a formal party to the lawsuit. In this unique set of circumstances, after giving full consideration to the type and extent of general economic injury suffered, this Court is drawn to the conclusion that it is appropriate that the State of Missouri have standing as Parens patriae to pursue this matter on the merits and seek injunctive relief under the antitrust laws. The Court is of the opinion that this is not a case "in which the state is gratuitously attempting to prosecute purely personal claims of its citizens, . . . but rather is one in which the state is seeking to protect the public interest." *Kelley v. Carr, 442 F. Supp. 346, 357 (W.D.Mich.1977)*.

It must be noted that this conclusion is the result of a consideration of the economic and policy factors in this case. This opinion is not to be read as a general approval of Parens patriae standing as a matter of law in any case in which the state adduces expert testimony to show generalized economic injury due to linkage or interdependence among the various sectors of the state's economy. [22.]

[38]** III. Antitrust Claims

HN2[] "Boycott" has been defined as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 541, 98 S. Ct. 2923, 2930, 57 L. Ed. 2d 932 (1978)*. From the very beginning of antitrust enforcement, the boycott or concerted refusal to deal has been held to be a combination in restraint of trade, in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. E.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *Fashion Originators' Guild v. F.T.C., 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941)*; *Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914)*. Missouri contends that the convention boycott fostered by NOW is a combination in restraint of trade and as such violates the Sherman Act. [23.]

[39]** It is NOW's position that the antitrust laws simply do not apply to the convention boycott because of its "noncommercial" nature. [24.] **[**40]** "(T)he Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 213 n.7, 79 S. Ct. at 710 n.7*. NOW argues that the convention boycott takes place in a political, rather than business, context and thus is outside the scope of the Sherman Act, [25.] which was intended **[*302]** to concern "commercial enterprises, competing in particular markets, arguing over issues which will determine the commercial success and profitability of one or the other of the parties to the dispute." *Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9, 12 (1st Cir. 1978)*, cert. denied, *440 U.S. 945, 99 S. Ct. 1421, 59 L.Ed.2d 633 (1979)*.

[22.] NOW argues that "acceptance of the state's theory (of economic linkage causing damage to the general economy) would give the state standing to sue in every case where any Missouri business claims injury by reason of any tort, including violations of antitrust laws, or presumably even in ordinary breach of contract cases." Defendant's post-trial brief, at 10. The Court shares this concern and notes that the economic interdependence rationale for Parens patriae standing cannot be viewed in isolation or accepted as the sole justification for state standing. To do so would carry the doctrine of Parens patriae far beyond its proper bounds.

[23.] Missouri further argues that withholding patronage from Missouri convention businesses in order to influence the Missouri legislature constitutes a secondary boycott, I. e., economic pressure on innocent third parties to achieve some result with respect to the boycott target, and therefore is Per se unlawful under the Sherman Act. See *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*; *Fashion Originators' Guild v. F.T.C., supra.*

[24.] See *Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.5, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)* (Sherman Act intended to control problems of "business competition").

[25.] Missouri cites cases for the proposition that the Sherman Act does apply to "non-traditional" boycotts, the ultimate focus of which is an objective other than the business or commercial advancement of the participants. *American Medical Assoc. v. United States, 317 U.S. 519, 63 S. Ct. 326, 87 L. Ed. 434 (1943)* (exclusion from hospital facilities of doctors on salary with prepaid group health plan); *Hennessey v. National Collegiate Athletic Assoc., 564 F.2d 1136 (5th Cir. 1977)* (application of Sherman Act to regulation of non-profit educational association limiting the number of assistant football coaches of member institutions); *Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920)* (boycott of Hearst publications organized by officially-supported state organization); *Tondas v. Amateur Hockey Assoc., 438 F. Supp. 310 (W.D.N.Y.1977)* (non-profit athletic association); *Tropic Film Corp. v. Paramount Pictures Corp., 319 F. Supp. 1247 (S.D.N.Y.1970)* (film rating program); *American Brands, Inc. v. National Assoc. of Broadcasters, 308 F. Supp. 1166 (D.D.C.1969)* (guidelines prohibiting advertising of "low tar" cigarettes). But cf. *Marjorie Webster Junior Colleges, Inc. v. Middle States Assoc. of Colleges and Secondary Schools, Inc., 139 U.S.App.D.C. 217, 432 F.2d 650*, Cert. denied, ***400 U.S. 965, 91 S. Ct. 367, 27 L. Ed. 2d 384 (1970)***.

[41]** In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, the Supreme Court considered the scope of the Sherman Act in a political context. In that case, the railroads conducted a publicity campaign designed to promote stricter government regulation of the trucking industry. The campaign, utilizing methods characterized as unethical, was motivated by a purely anticompetitive purpose. Citing *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Court reiterated that a restraint of trade resulting from a valid government action could not be the basis of a Sherman Act violation and stated:

> We think it equally clear that 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. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination(s) . . . in restraint of trade," they bear little if any resemblance to the combinations normally held **[**42]** violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by *§ 1* of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.
>
> In the first place, such a holding would substantially impair the power of government to take actions through its legislature **[**43]** and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, 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. Secondly, and of at least **[*303]** equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the *Bill of Rights*, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not **[**44]** apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. *Id., 365 U.S. at 136-38, 81 S. Ct. at 529-530*. (emphasis added)

The Court found that the anticompetitive purpose underlying the railroads' campaign was irrelevant, in that the right of the people to inform their representatives could not depend upon their intent in so acting. The unethical and misleading methods employed by the railroads also were found not to be a basis for Sherman Act liability.

> Insofar as the Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of **[**45]** this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical. *Id. at 140-41, 81 S. Ct. at 531*.

Missouri's analysis would limit the Court's holding in Noerr to its facts and distinguish that case from this. The convention boycott fostered by NOW, it is argued, is the very antithesis of the activity protected in Noerr. The Court in Noerr found that concerted activity to influence the legislature to adopt a law which would result in a restraint of trade was not a Sherman Act violation. The restraint of trade in Noerr was the result of a valid legislative act, already held nonviolative of the Sherman Act in *Parker v. Brown, supra.* On the contrary, says Missouri, the restraint of trade in this case is a direct result of the concerted action undertaken by NOW and the boycott participants; the harm results from the combination, and not from the legislative act which is the boycott's ultimate goal. Missouri states that NOW's actions have gone far beyond the "mere solicitation **[**46]** of government action" in *Noerr, supra*, and are therefore not within the Noerr "exclusion" from antitrust coverage.

Missouri's conclusion of antitrust liability is based on the presumption against implied exclusions from the Sherman Act. In *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*, the Court referred to the "overarching and fundamental" policies represented in the antitrust laws which argue against implied exclusions. The Court noted that two policies have been held sufficiently weighty to overcome this presumption: the Parker v. Brown "state action" exclusion, and the Noerr "political" exclusion, concerted action to influence lawmakers. The Court found common to both of these exclusions a potential conflict between the Sherman Act and " "policies of signal importance in our national traditions and governmental structure of federalism.' " However, the Court did remark that even these exclusions would not prevent antitrust enforcement unless it was thought to "severely impinge" upon the fundamental policies underlying the exclusions.

Missouri argues specifically against a general "*first amendment* exclusion" from Sherman **[**47]** Act coverage. In *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949)*, the Supreme Court held that the *first amendment* does not protect speech or writing used as an integral part of conduct in violation of a **[*304]** valid criminal statute. Missouri cites cases applying this principle to Sherman Act enforcement. *National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*; *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*. These cases hold that conduct found to be in violation of the Sherman Act is not immunized from antitrust liability simply because it involves some element of speech. "*First Amendment* rights may not be used as the means or the pretext for achieving "substantive evils' . . .." *California Motor Transport Co. v. Trucking Unlimited, supra, 404 U.S. at 515, 92 S. Ct. at 614*. However, they do not touch the issue in this case, which is whether NOW's actions, which are themselves an exercise of *first amendment* rights, constitute a violation **[**48]** of the Sherman Act. [26.]

[49]** The activities of the railroads complained of in *Noerr, supra*, were undertaken in what was essentially a commercial context. The parties and the industries they represented were in a competitive relationship. It was clear that the sole motivation behind the railroads' actions was to destroy that competition. Although such a commercial setting is the context in which the antitrust laws were intended to operate, the Supreme Court found that the railroads' publicity campaign was not subject to the Sherman Act, as a contrary construction would hinder the communication vital to a representative government and raise important constitutional questions implicating the *first amendment*.

In contrast, the convention boycott complained of in this case takes place in what is essentially a political context. The parties have stipulated that the sole purpose of the boycott is ratification of an amendment of the Constitution. The participants are not moved by any anticompetitive purpose; [27.] they are not in a competitive relationship. The

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26. *Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920)*, cited by Missouri, is not to the contrary. The Eighth Circuit found that a boycott of Hearst magazines organized by a state-supported organization was a violation of the Sherman Act. The court stated: "Any contention that appellants were within their constitutional rights of free speech in saying, writing, and publishing the objectionable matter, is answered by *Gompers v. Buck Stove Co., supra.*" In *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911)*, the *first amendment* question raised was identical to that in *Giboney v. Empire Storage & Ice Co., supra*, in which the Court held that an otherwise illegal action is not protected simply because speech is used to advance the illegal activity. The *first amendment* protections for freedom of petition and of political association, which are implicit in this case, were neither presented to nor treated by the court in Council of Defense.

boycott can be characterized as "non-commercial," in that its participants are not business interests and its purpose is not increased profits. [28.] The boycott **[**50]** also can be termed "noneconomic"; it was not undertaken to advance the economic self-interest of the participants. The "essential dissimilarity" between the convention boycott directed at the legislatures of unratified states and agreements traditionally held violative of *§ 1* of the Sherman Act is of a greater magnitude in this case than that in Noerr.

Application of the Sherman Act to NOW's boycott campaign also would involve serious questions concerning the right of petition and the freedom of association protected by the *first amendment*. [29.] **[**52]** In Noerr the Supreme Court "recognized a necessary limitation in order to resolve the conflict between the legislative intent to foster competition and the fundamental **[**51]** precepts embodied in the *First Amendment* which protect legitimate attempts to influence the operation of the executive and **[*305]** legislative process." *Bethlehem Plaza v. Campbell, 403 F. Supp. 966, 969 (E.D.Pa.1975)*. [30.] The Supreme Court's reasons for nonapplication of the antitrust laws in Noerr apply with greater weight to this case, which "involves political opponents, not commercial competitors; and political objectives, not market place goals. [31.] For these reasons, this Court concludes that the Sherman Act does not apply to the actions of NOW in furtherance of its convention boycott campaign. [32.] "There are areas of our economic and political life in which the precepts of antitrust must yield to other social values." [33.] **[**53]** It is clear that this is such a case. [34.] Likewise, the Missouri ***antitrust law***, *§ 416.031.1, RSMo*, does not apply to NOW's activities in furtherance of the boycott campaign. [35.]

IV. State Law Tort Claim

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27. See *Miller & Son Paving, Inc. v. Wrightstown Township Civic Assoc., 443 F. Supp. 1268, 1272 (E.D.Pa.1978)*.

28. See Coons, Non-commercial Purpose as a Sherman Act Defense, 56 Nw.L.Rev. 705 (1962); Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L.J. 247.

29. See *J. P. Stevens & Co., Inc. v. Jackson, 99 L.R.R.M. 2827* (N.D.Ga.1978). See also *Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)*; *NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)*. Cf. *NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)* (Of the NAACP, the Supreme Court said: "For such a group, association for litigation may be the most effective form of political association." *Id. at 431, 83 S. Ct. at 337*.).

30. See also *Mountain Grove Cemetery Assoc. v. Norwalk Vault Co., 428 F. Supp. 951 (D.Conn.1977)*.

31. *Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9, 12* (1st Cir.), Petition for cert. filed, 47 U.S.L.W. 3228 (U.S. Sept. 21, 1978) (No. 78-486).

32. This Court has considered and dismissed the theory advanced in Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L.J. 247, in which the author urges that noncommercial boycotts be treated as Per se unlawful under the antitrust laws. The noncommercial boycott is seen as an "undesirable aggregation of private (economic) power" with no more than self-imposed restraints on harm caused to others. The author hypothesizes that such power could be wielded by zealous believers willing to impose economic harm upon their victims without limit until their noneconomic goal is achieved. This theory does not confront the *first amendment* guarantees of freedom of association and the right to petition which must be dealt with by the courts. This lack, coupled with the political realities of American government, makes it impossible for this Court to subscribe to it.

33. Handler, Annual Review of Antitrust Developments, 71 Yale L.J. 75, 88 (1961).

34. See *Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288 (8th Cir. 1978)*; *Metro Cable Co. v. CATV of Rockford, Inc., 375 F. Supp. 350 (N.D.Ill.1974)*, *Aff'd, 516 F.2d 220 (7th Cir. 1975)*; Kestenbaum, The Antitrust Challenge to the Arab Boycott, 54 Tex.L.Rev. 1411, 1423-24 (1976).

35. *Section 416.141, RSMo*, provides: "Sections 416.011 to 416.161 shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes."

Missouri alleges that NOW has intentionally inflicted economic harm upon the state without legal justification or excuse, and offers as authority § 766 of the Restatement of Torts (1939). [36.] **[**55]** That section provides that the unprivileged inducement of third parties not to engage in business relations with another is tortious. Missouri courts have stated that the unjustified interference with reasonable expectancies of commercial relations is an actionable tort, citing § 766 of the Restatement. *Downey v. United Weatherproofing, Inc., 363 Mo. 852, 253 S.W.2d 976 (Mo.1953)*. The absence of justification, **[**54]** or existence of privilege, is an essential and required element of any such claim. *Cady v. Hartford Accident & Indemnity Co., 439 S.W.2d 483 (Mo.1969)*. [37.] In this case economic pressure is being utilized in a good faith effort to influence the ratification of an amendment to the Constitution. In these circumstances, the interest sought to be advanced by NOW and especially the constitutional interests involved in protecting NOW's ability to exercise its **[*306]** right to petition and right to political association outweigh the interest in protecting the business expectancy involved. [38.] If NOW's actions were not a legitimate effort to influence the legislature, this Court would be presented with a different case. [39.] Under the particular facts of this case, the Court finds that NOW's convention boycott activities are privileged and therefore not actionable in tort under Missouri law.

[56]** Accordingly, the relief prayed for by the State of Missouri should be, and it is hereby, denied. In accordance with this opinion, judgment is to be entered for defendant.

IT IS SO ORDERED.

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[36.] ***Restatement of Torts § 766*** provides:

Except as stated in Section 698, (dealing with interference with a marriage contract) one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

Missouri cites no cases from its own courts on this issue.

[37.] Factors applicable to the determination of justification or privilege are set out in ***Restatement of Torts § 767*** (1939):

In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:

(a) the nature of the actor's conduct,

(b) the nature of the expectancy with which his conduct interferes,

(c) the relations between the parties,

(d) the interest sought to be advanced by the actor, and

(e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

The discussion of privilege in the Restatement, including §§ 767 and 768, is referred to in *Downey v. United Weatherproofing, supra.*

[38.] See *Sierra Club v. Butz, 349 F. Supp. 934 (N.D.Cal.1972)* (recognition of privilege based on *first amendment* right of petition).

[39.] See *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* ("sham" exception); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*.

North American Soccer League v. National Football League

United States District Court for the Southern District of New York

February 21, 1979

No. 78 Civ. 4560-CSH

Reporter

465 F. Supp. 665 *; 1979 U.S. Dist. LEXIS 14323 **; 1979-1 Trade Cas. (CCH) P62,489

NORTH AMERICAN SOCCER LEAGUE et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE et al., Defendants

Core Terms

cross-ownership, ban, franchise, league, sports, preliminary injunction, merits, irreparable harm, competitors, team, antitrust, soccer, divestiture, irreparable, by-law, anticompetitive, cross-owners, investors, propose an amendment, group boycott, Sherman Act, hardships, ownership, stability, boycott, antitrust case, injunction, television, concerted, questions

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Civil Procedure > Remedies > Injunctions > General Overview

HN1[] Injunctions, Preliminary & Temporary Injunctions

Fed. R. Civ. P. 65 provides that an injunction is binding upon the parties to an action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

HN2[] Methods of Discovery, Stipulations

When the parties to an action agree that an evidentiary hearing need not precede resolution of a motion filed in the action, no evidentiary hearing is required.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Civil Procedure > Preliminary Considerations > Equity > Irreparable Injury

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Burdens of Proof > General Overview

HN3[] **Equity, Adequate Remedy at Law**

Under Sonesta International Hotels Corp. v. Wellington Associates, a preliminary injunction should issue only upon a clear showing of either: (1) probable success on the merits and possible irreparable injury; 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. It has been held, however, that irreparable injury is required under both prongs of the test, such being a fundamental and traditional requirement of all preliminary injunctive relief, since equity cannot intervene where there is an adequate remedy at law. That said, the balancing of hardships test necessarily includes the showing of irreparable harm.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

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

HN4[] **Remedies, Injunctions**

In anti-trust cases, § 16 of the Clayton Act, *15 U.S.C.S. § 26*, authorizes a preliminary injunction under general principles of equity and a showing that the danger of irreparable loss or damage is immediate.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Injunctions, Preliminary & Temporary Injunctions**

As to the merits of a motion seeking a preliminary, within the antitrust context, the second branch of the Sonesta International Hotels Corporation. v. Wellington Associates test therefor requires no more than a showing of sufficiently serious questions going to the merits of the action to make them a fair ground for litigation.

Antitrust & Trade Law > Regulated Industries > Sports > Football

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

HN6[] **Sports, Football**

The business of professional football is subject to antitrust scrutiny.

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

HN7[] **Practices Governed by Per Se Rule, Boycotts**

In antitrust actions, the per se rule respecting boycotts applies only where competitors engage together to inhibit others with whom they compete by depriving those others of elements needed in the competitive context.

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 United States Supreme Court has held that under the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se. and that whatever other characterizations are possible, a petitioner's conduct may be viewed as "an organized boycott" if it induces its competitors to refuse to deal on any terms with its customers.

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**

When viewing an agreement in an antitrust action in the light of the rule of reason, the decisive issue is whether the challenged agreement is one that promotes competition or one that suppresses competition. Crucial to such evaluation is inquiry into the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed, to the end that the court may form a judgment about the competitive significance of the restraint. Thus, the court must ultimately analyze the purpose and effect of the agreement and determine whether on balance its anticompetitive effects outweigh its pro-competitive benefits.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Monopolies & Monopolization, Attempts to Monopolize**

Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct that will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be wholly nascent or abortive on the one hand, or successful on the other.

Counsel: **[**1]** Weil, Gotshal & Manges, by Ira M. Millstein, James W. Quinn, Kenneth Lemberger, Jeffrey L. Kessler, New York City, for plaintiffs.

Sullivan & Cromwell, by William E. Willis, James H. Carter, Howard D. Burnett, New York City, for defendants.

Opinion by: HAIGHT

Opinion

[*666] MEMORANDUM OPINION

This is an antitrust case brought by the North American Soccer League ("NASL") and 21 of its member clubs against the National Football League ("NFL") and 25 of its member clubs to test the legality under the Sherman Act, *15 U.S.C. § 1 Et seq.*, of a proposed amendment to the NFL's constitution and by-laws implementing a "cross-ownership ban." The amendment, if enacted, would prevent the owner of a majority interest in an NFL club, or a member of his family, from acquiring any interest in another major team sport. To the extent that such cross-ownership presently exists, the amendment mandates divestiture, and imposes fines and other sanctions for non-compliance within the time specified. Plaintiffs assert their complaint under *Sections 4* and 16 of the Clayton Act, *15 U.S.C. §§ 15* and *26*, and *28 U.S.C. § 2201*. They claim injunctive and declaratory relief, and treble money damages. Jurisdiction **[**2]** is posited upon *28 U.S.C. §§ 1331* and *1337*, and venue asserted under *28 U.S.C. § 1391* and *Sections 4* and 12 of the Clayton Act, *15 U.S.C. §§ 15* and *22*. Plaintiffs now move pursuant to *Rule 65, F.R.Civ.P.* and Section **[*667]** 16 of the Clayton Act, *15 U.S.C. § 26*, for a preliminary injunction restraining enactment of the amendment. Because plaintiffs have made the requisite showing for such relief, the injunction will issue.

I.

Preliminarily, we note that a number of the defendant NFL clubs have by their answers contested the Court's jurisdiction over their persons. Whatever the merits of those assertions and the jurisdictional issue is not pressed on this motion it is clear that a preliminary injunction, if otherwise appropriate, would not be inhibited. The NFL does not contest In personam jurisdiction. *Rule 65* ***HN1***[] provides that an injunction is binding:

> " . . . upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

All member clubs of the NFL are by definition "in active concert or participation **[**3]** with" the League they formed to conduct their joint affairs. There is, in short, the requisite showing of privity. *Golden State Bottling Co. v. National Labor Relations Board, 414 U.S. 168, 179-180, 94 S. Ct. 414, 38 L. Ed. 2d 388 (1973)*; *Hart v. Community School Board of Brooklyn, N. Y. School District No. 21, 383 F. Supp. 699, 753 (E.D.N.Y.1974)*, Appeal dismissed, *497 F.2d 1027 (2d Cir. 1974)*; 7 Moore's Federal Practice P 65.13 (2d ed. 1978). No difficulty in notifying the NFL member clubs of the Court's order need be anticipated.

II.

Plaintiffs move for a preliminary injunction, prohibitory in nature, to prevent the NFL and its member clubs from enacting a particular amendment to the NFL constitution and by-laws. The record on the motion consists of the pleadings, affidavits and exhibits. Two oral arguments have been heard, the first shortly after service of the motion and the second after filing of extensive and able briefs. While discovery is proceeding on the merits, both plaintiffs and defendants stated that an evidentiary hearing need not precede resolution of the present motion. ***HN2***[] In these circumstances no evidentiary hearing is required. *Jacobson & Co., Inc. v. Armstrong* ***[**4]*** *Cork Co., 548 F.2d 438, 442 (2d Cir. 1977)*.

The showing a plaintiff must make to obtain a preliminary injunction has been the subject of a number of recent Second Circuit decisions, not all of them entirely reconcilable. For a time *Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973)* appeared to declare a two-pronged test as the rule of the Circuit:

> "The settled rule is that ***HN3***[] a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits And possible irreparable injury, 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." (emphasis in original).

The Sonesta formulation was repeated in numerous subsequent cases. However, in *Triebwasser & Katz v. A. T. & T. Co., 535 F.2d 1356, 1359 (2d Cir. 1976)*, the Court stressed that irreparable injury was required under both prongs of the Sonesta test:

> "(T)his language of the second prong of the Sonesta test does not eliminate the basic obligation of the plaintiff to make a clear showing of the threat of irreparable **[**5]** harm. That is a fundamental and traditional requirement of all preliminary injunctive relief, since equity cannot intervene where there is an adequate remedy at law. If the element of irreparable damage is prerequisite for relief where the plaintiff must show probable success on the merits, then A fortiori where the plaintiff establishes something less than probable success as to the merits, need for proof of the threat of irreparable damage is more pronounced. In sum, the balancing of hardships test of Sonesta **[*668]** necessarily includes the showing of irreparable harm." (emphasis in original) (citations omitted).

Some commentators regarded Triebwasser as a major revision of the Sonesta test, in that Triebwasser required a showing of irreparable harm in the second prong where none had been required before. Other commentators argued that irreparable harm had in the past been part of the second prong's proof of "balance of hardships," a view endorsed shortly after Triebwasser by at least one member of the Second Circuit. Mulligan, Preliminary Injunction in the Second Circuit, 43 Bklyn.L.Rev. 831, 832 (1977); to the extent that Sonesta indicated "that irreparable harm is **[**6]** not necessary for every preliminary injunction," Judge Mulligan disagreed with it. Id. at 839. In *New York Association of Homes for Aging v. Toia, 559 F.2d 876, 880 (2d Cir. 1977)*, the Court said that under either Sonesta test "the movant must show a threat of irreparable harm"; a comparable holding in *New York v. Nuclear Regulatory Commission, 550 F.2d 745, 755 (2d Cir. 1977)* was embellished by the requirement that "the alleged threats of irreparable harm are not remote or speculative but are actual and imminent." A trace of confusion creeps back in, however, in the Court's recent citation of Sonesta for the proposition that the "moving party must make a showing of Possible irreparable harm," *Selchow & Righter Co. v. McGraw-Hill Book Co., 580 F.2d 25, 27 (2d Cir. 1978)*. Cf. *Caulfield v. Board of Education, 583 F.2d 605 (2d Cir. 1978)*, where the Court announced the standard as "Possible irreparable injury" but found that the District Court "could not conclude that the appellants were Likely to suffer irreparable injury." (emphasis added).

Since the case at bar falls within the antitrust statutes, we must also conjure with *15 U.S.C. § 26*, ***HN4***[] which authorizes a preliminary injunction **[**7]** under general principles of equity "and a showing that the danger of irreparable loss or damage is immediate . . . ." In *Triebwasser, supra*, the Second Circuit, after characterizing the showing of irreparable harm as necessary under either Sonesta test, went on to observe:

> "In antitrust cases, the proposition requires no further elucidation since *15 U.S.C. § 26* explicitly requires for a preliminary injunction a showing "that the danger of irreparable loss or damage is immediate,' and we have so held in a recent private antitrust case, *SCM Corp. v. Xerox Corp., 507 F.2d 358, 360 (2d Cir. 1974)*."

In SCM Corp. v. Xerox Corp., cited by the Second Circuit in Triebwasser, the Court characterized the Clayton Act's requirements as "merely declarative of ordinary equitable principles." *507 F.2d at 360*. Thus the degree to which the Second Circuit regards the statute's requirement of Immediacy as a separate element is somewhat obscure. *Jacobson, supra*, also an antitrust case, reiterates the Sonesta formulae, *548 F.2d at 441 n. 2*, but says nothing about the requirements of *§ 26*. Jacobson does make clear that, ***HN5***[] as to the merits, within the antitrust context:

> ". . . the second branch **[**8]** of the Sonesta test requires no more than a showing of "sufficiently serious questions going to the merits to make them a fair ground for litigation.' *483 F.2d at 250*."

The formula I distill from these authorities is that the plaintiffs in this antitrust action are entitled to a preliminary injunction if they bring themselves within either of the two branches of Sonesta ; and, in so doing, demonstrate a substantial threat of immediate irreparable harm.

I hold that plaintiffs have made the requisite showings.

III.

A. The Threat of Irreparable Harm to the NASL and Its Members.

I conclude that the NASL and its plaintiff clubs have made a sufficient showing of a threat of irreparable harm, should the NFL proceed to enact the proposed amendment or otherwise attempt to enforce the cross-ownership ban, to satisfy that requirement of the applicable standards. To **[*669]** appreciate the nature and immediacy of the harm, some background discussion is necessary. [1]

[9]** The NASL is a relative newcomer to the ranks of professional team sport leagues in America, having been established in 1968. On the basis of the undisputed factual recitations in NASL Commissioner Woosnam's affidavit, I find that the ten year history of the NASL has been one of struggle for financial security, franchise stability, and public recognition. Although the 1978 soccer season was the most successful in NASL history, only one of the 28 NASL franchises is expected to show a profit for that year; the remaining teams suffered operating losses, which in one instance ran as high as $ 1.5 million. However, for the first time in some ten years, the NASL has negotiated major television network coverage for its 1979 season. Commissioner Woosnam asserts that such television coverage is vital to the NASL in two respects: first, network television exposure generates fan interest which leads to increased attendance at games and increased gate receipts; second, a network contract provides direct revenues for the financially pressed NASL clubs. The Commissioner points out that for the NASL to retain and expand such television coverage, the major networks must be convinced "that the NASL **[**10]** is a stable and successful league" [2] with a bright economic future.

An important element of stability for the NASL has been furnished by individuals or families who own member soccer clubs, and also own NFL football clubs. Perhaps the foremost among these "cross-owners" is Lamar Hunt of Dallas, Texas, a sporting world legend in his own time. Hunt, as owner of the Kansas City Chiefs football team, was in the early 1960's one of the founders of the American Football League, subsequently merged with the NFL. Hunt is now chairman and sole owner of the NFL Kansas City franchise. Hunt also is a part owner of the Chicago Bulls of the National Basketball Association, and the founder of the World Championship Tennis circuit. In 1967 Hunt purchased a Dallas soccer franchise which, in 1968, became the NASL's Dallas club, called the Dallas Tornado. Woosnam's affidavit pays eloquent and, in my judgment convincing, tribute to the past **[**11]** and continuing importance to the struggling NASL of Hunt's presence and participation. [3]

In addition to Mr. Hunt, the present NASL and NFL cross-owners include two well-known sports families whose participation in the NASL has contributed in some measure to its stability. The Robbie family is a case in point. Elizabeth Robbie is the owner and managing general partner of the NASL's Fort Lauderdale Strikers franchise; her husband, Joe Robbie, is the managing general partner and principal owner of the NFL's Miami Dolphins franchise; their son, Tim, serves as the Strikers' public relations director. Mrs. Robbie's NASL involvement has increased from that of a limited partner in 1973 to managing general partner in 1976, a position she assumed "to preserve her investment when all of the remaining general partners resigned from the partnership." [4] The Robbies have thus provided an NASL club with crucial capital and sports entrepreneurial skill, and, according to Commissioner Woosnam, have **[**12]** "dramatically turned around the prospects for the NASL's Fort Lauderdale franchise." [5]

Another cross-owning family is the Nordstroms of Seattle. They present a unique situation in that family members had a prior NASL investment when, in 1975, an entity owned by the Nordstrom Family **[*670]** Partnership was

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[1] It is perhaps more common to discuss merits questions first and then consider the elements of irreparable harm. I reverse that order here because certain historical and economic factors, useful to an understanding of the case as a whole, fit more naturally within this topic.

[2] Affidavit of Philip A. Woosnam, NASL Commissioner, September 27, 1978, at p. 10, P 17.

[3] Id. at pp. 6-7, PP 9-11.

[4] Affidavit of Joe Robbie, October 27, 1978, at p. 1, P 1.

[5] Woosnam affidavit at p. 11, P 19.

awarded the new NFL Seattle franchise. Commissioner Woosnam asserts, and the NFL does not seriously dispute, that the Nordstroms' soccer success "paved the way for their entry into the NFL." [6]

A fourth instance of NASL/NFL cross-ownership is presented by William Bidwell, an owner of the NFL St. Louis Cardinals and the holder of a 3 percent interest in the NASL California Surf. [7]

[13]** We now consider the effect of the NFL's proposed amendment upon this presently existing cross-ownership. The amendment was prefaced by a series of four resolutions enacted by the NFL in 1967, 1972, 1973 and 1976, the texts of which are reproduced in the margin. [8] While these resolutions condemned in principle certain species of cross-ownership, no effort was made to enforce divestiture of such cross-ownership as existed. The 1967, 1972 and 1973 resolutions said nothing about divestiture. The 1976 resolution contented itself was calling upon those NFL owners holding an interest in another major team sport to "use best effort(s) to dispose of current holdings." No sanctions were imposed for failure to do so, and it does not appear that any divestitures in fact occurred. While the 1967 resolution "instructed" counsel for the league to draft "appropriate amendments to the Constitution and By-Laws," the record does not reveal any action in response to those instructions. "NFL Resolutions Concerning Cross-Ownership

[14]** Now an amendment to the by-laws is proposed. Its provisions form the subject matter of this action. The amendment is also reproduced in the margin. [9] Its terms **[*671]** would expand the scope of the June 16, 1976

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[6] Ibid.

[7] Affidavit of Pete Rozelle, NFL Commissioner, October 13, 1978, at p. 18, P 30.

[8] Resolution adopted January 16, 1967:

"RESOLVED that the National Football League does reaffirm its traditional position that no person having operating control of a franchise in the National Football League may acquire or possess control, directly or indirectly, of any other team sports enterprise or business, and that league counsel is instructed to draft appropriate amendments to the Constitution and By-Laws and necessary related resolutions defining the word "control' for the purpose of this resolution."

Resolution adopted May 25, 1972:

"RESOLVED, that no person owning a majority interest in or in direct or indirect operational control of a member club may acquire any interest in another major team sport. Additionally, any person holding such financial interest at the time this Resolution is adopted will in no case increase his percentage of such interest in another major team sport. The adoption of the foregoing Resolution shall not affect or modify the provisions of Article III, Section 3.5 of the Constitution and By-Laws."

Resolution adopted June 26, 1973:

"RESOLVED, that no person owning a majority interest in or in direct or indirect operational control of a member club may acquire any interest in another major team sport. Additionally, any person holding such financial interest at the time this Resolution is adopted will in no case increase his percentage of such interest in another major team sport. The adoption of the foregoing Resolution shall not affect nor modify the provisions of Article III, Section 3.5 of the Constitution and By-Laws."

Resolution adopted June 16, 1976:

"RESOLVED, That no person owning a majority interest in or in direct or indirect operational control of a member club may acquire any interest in another major team sport. Additionally, any person holding such financial interest at the time this resolution is adopted will in no case increase his percentage of such interest in another major team sport and will use best effort to dispose of current holdings. Major team sport, for purposes of this resolution, is defined as major league basketball, hockey, baseball and soccer. The adoption of the foregoing resolution shall not affect nor modify the provisions of Article III, Section 3.5 of the NFL Constitution and By-Laws." Affidavit of Donald Weiss, NFL Executive Director, September 29, 1978, at Exhibit A.

[9] The proposed amendment reads as follows:

"Amend Article IX, by adding a new Section 9.4 as follows:

"9.4(A) No person (1) owning a majority interest in a member club, or (2) directly or indirectly having substantial operational control, or substantial influence over the operations, of a member club, or (3) serving as an officer or director of a member club, resolution currently in effect in three important respects. Similar to the 1976 resolution, it would prohibit an NFL "control person" from Acquiring any interest in a competing major league team sport, defined to include baseball, basketball, hockey and soccer. The amendment, however, would significantly expand the class of persons subject to the prohibition. With respect to the Retention of a present cross-ownership interest, the amendment would replace the resolution's "best effort to dispose" requirement with a flat prohibition. Finally, the amendment would set a definite date February 1, 1980 for divestiture of cross-ownership holdings, and would authorize substantial financial penalties and ultimately, ouster from the NFL, for violation of the cross-ownership ban after that date.

[15]** If the amendment takes effect, all four of the present cross-ownership situations discussed Supra would be affected. That is because the amendment, going beyond the bounds of the resolution, embraces family members of NFL club owners; thus the soccer interests of Mrs. Robbie and the Nordstrom family would be condemned. In consequence, passage of the amendment would require Hunt, the Robbies, Bidwell, and arguably the Nordstroms, [10] to divest themselves of their interests in their NASL clubs. Bidwell's soccer interest is minor, but Hunt and Mrs. Robbie control the Dallas and Miami soccer clubs, and the Nordstroms' interests in the Seattle club are substantial.

[16]** To meet a divestiture deadline of February 1, 1980, it is reasonable to assume that the affected NASL owners would have to begin sales negotiations now. The sale and purchase of a major sports franchise is a considerable undertaking.

I also find, on the basis of NASL Commissioner Woosnam's affidavit, that as a consequence of the NASL's continuing battle for economic stability the league is "experiencing a significant degree of change in both the ownership and location of its franchises," so that "before the beginning of the NASL's 1979 playing season, controlling interests in as many as five NASL clubs are likely to be sold." [11] In those circumstances, the NASL has a vital interest in attracting potential new investors. The affidavits reveal, however, that the mere prospect of the NFL's proposed amendment has had a chilling effect upon presently football-oriented **[*672]** investors who might otherwise favorably consider ownership of an NASL franchise. [12]

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nor (4) any spouse or minor child of any such person, may directly or indirectly acquire, retain, or possess any interest in another major team sport (including major league baseball, basketball, hockey and soccer).

"(B) The prohibition set forth in subsection (A) hereof shall also apply to relatives of such persons (including siblings, parents, adult children, adult and minor grandchildren, nephews and nieces, and relatives by marriage) (1) if such person directly or indirectly provided or contributed all or any part of the funds used to purchase or operate the other sports league entity, or (2) if there exists between such person and any such relative a significant community of interest in the successful operation of the other sports league entity.

"(C) The Commissioner shall investigate, to the extent he deems necessary or appropriate, any reported or apparent violation of this Section and shall report his findings to the Executive Committee prior to imposition of disciplinary action by the Committee.

"(D) Beginning on February 1, 1980, any person who, after notice and hearing by the Executive Committee, is found to have violated subsection (A) or (B) above will be subject to fines of up to $ 25,000 per month for each of the first three months of violations; up to $ 50,000 per month for each of the next three months; and up to $ 75,000 per month thereafter. In addition, violations of more than six months' duration may be dealt with by the Executive Committee pursuant to Article VIII, Section 8.13(B).

"(E) If such person does not pay such fine to the League Treasurer within 20 days of its assessment, the unpaid amount thereof may be withheld, in whole or in part, by the Commissioner from available funds in possession of the League Office belonging to the member club with which the person in violation is affiliated." Weiss affidavit at Exhibit B.

[10] Apparently the Nordstroms take the position, Vis-a-vis the NFL, that the "overlapping minority interest holders" comprising the Nordstrom Family Partnership are not subject to the amendment, "since none of them controls either team" (i. e., the Seattle NFL and NASL franchises). Rozelle affidavit at p. 22, P 38. I need not resolve that issue. The present inquiry relates to the threat of harm to the NASL. The NFL does not appear to accept the Nordstroms' contention; Rozelle affidavit at p. 22, P 39. Its position may be considered in assessing the potential effect of the NFL amendment upon the NASL.

[11] Woosnam affidavit at p. 8, P 15.

[12] The record contains ample and essentially undisputed evidence that some seven NFL owners (in addition to the current cross-owners) have recently expressed interest in acquiring all or part of various NASL franchises. (Woosnam affidavit at pp. 15-

[17]** These factors combine to establish the NFL cross-ownership ban as a source of harm to the NASL sufficiently grave and immediate to satisfy Second Circuit and Clayton Act Standards. Loss of the stabilizing Hunt, Robbie and Nordstrom presences [13] would be injurious in itself. The forced addition of three franchises to an already burdened market would have an obviously depressing influence, particularly when viewed in combination with the chilling effect of the ban upon potential new investors. I am not persuaded by the defendants' argument that the present cross-owners could elect to retain their NASL interests and divest themselves of their NFL holdings. According to Woosnam [14] the current value of an NASL franchise is $ 2 million and that of an NFL franchise in excess of $ 30 million. A cross-owner is not likely to abandon the latter for the former.

I find that plaintiffs have made a sufficient showing of immediate and irreparable **[**18]** harm to satisfy that requirement of a preliminary injunction.

B. The Merits.

On the merits, the question that arises is whether the cross-ownership ban is open to serious challenge on antitrust grounds.

With respect to the general applicability of the Sherman Act to the facts of this case, it is well-settled that ***HN6***[] the business of professional football is subject to antitrust scrutiny, *Radovich v. NFL, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*; *Smith v. Pro Football, Inc., 193 U.S.App.D.C. 19, 593 F.2d 1173 (1978)* Reprinted in 1978 BNA ATTR No. 889 at E-1 (Nov. 16, 1978); *Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976)*, Cert. denied, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)*; *Kapp v. NFL, 390 F. Supp. 73 (N.D.Cal.1974)*, and there is no serious dispute but that enactment of the proposed by-law amendment would constitute an agreement among the NFL and its member teams sufficient to satisfy the "contract, combination . . . or conspiracy" language of *section 1* of the Sherman Act, *15 U.S.C. § 1*. *Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1062 (C.D.Cal.1971)*; *Kapp v. NFL, supra, 390 F. Supp. at 81*; *U. S. v. NFL, 116 F. Supp. 319, 321 (E.D.Pa.1953)*. Cf. *Associated **[**19]** Press v. U. S., 326 U.S. 1, 11-12, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)* (bylaws of association in and of themselves a contract in restraint of trade).

Plaintiffs contend that the proposed cross-ownership ban constitutes an unlawful conspiracy or agreement among the NFL and its member clubs to deprive a competitor, the NASL, of a necessary competitive resource sports entrepreneurial know-how and capital by eliminating a fertile source of that resource, to wit, NFL owners. Plaintiffs argue that the cross-ownership ban constitutes a classic group boycott, Per se unlawful under the Sherman Act, e.g., *Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *Associated Press v. U. S., 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1944)*; *Fashion Originators Guild v. F. T. C., 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 **[*673]** (1940)*; *Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978)*, or at best, a restraint of trade which must fall as unreasonable when tested under the rule of reason. See generally, *National Soc. of Prof. Engineers v. U. S., 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Standard Oil Co. v. U. S., 221 U.S. 1, 31 S. Ct. 502, **[**20]** 55 L. Ed. 619 (1911)*; *Smith v. Pro Football, Inc., supra* ; *Mackey v. NFL, supra.* For the reasons that follow, I conclude that the Per se rule of illegality usually applied to "horizontal" group boycotts is inapplicable to the concerted action at issue here, but that plaintiffs have raised sufficiently serious litigable questions going to the merits as to satisfy the second prong of the preliminary injunction test.

16, P 27; Rozelle affidavit at p. 25, P 44). In one instance in 1978, following discussions between Robert R. Hermann, Chairman of the Board of an NASL franchise and an NFL owner (concerning the latter's desire to purchase the soccer franchise), Mr. Hermann asserts he was told "point blank that there was no sense in proceeding any further with our conversations in light of the NFL's stated intention to adopt and/or enforce" the cross-ownership ban. (Affidavit of Robert R. Hermann, September 21, 1978). A similar "chilling" as a result of the impending by-law amendment of another NFL owner's interest in purchasing a soccer franchise also apparently occurred within the past year. (Reply Affidavit of Philip A. Woosnam, October 27, 1978, at p. 3, P 4).

[13] No disrespect is meant to Mr. Bidwell.

[14] Affidavit, pp. 8, 12, PP 13, 20.

In his comprehensive analysis of boycott caselaw, Professor L. A. Sullivan limits the concept of the "classic group boycott," horizontal in nature, which is condemned as Per se unlawful under the Sherman Act:

> "If the Per se rule respecting boycotts is to become coherent, we must recognize that ***HN7***[] it applies only where competitors engage together to inhibit others with whom they compete by depriving those others of elements needed in the competitive context." L. A. Sullivan, Antitrust p. 259. [15]

[21]**

The Second Circuit in Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978), signalled its approval of the limitations Sullivan suggests upon the Per se rule respecting boycotts (see note 17, Infra); as did the *District of Columbia Circuit in Smith v. Pro Football, Inc., supra*, a case which considered the validity of the NFL player draft. [16]

The Supreme Court has had occasion recently to observe that "the (boycott) decisions reflect a marked lack of uniformity in defining the term . . . express(ing) **[**22]** no opinion, however, as to the merits of any of (the proffered) definitions." *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 542* and n. 14, *98 S. Ct. 2923, 2930* and n. 14, *57 L. Ed. 2d 932 (1978)*. The Court quoted its prior decision in *FMC v. Svenska Amerika Linien, 390 U.S. 238, 250, 88 S. Ct. 1005, 19 L. Ed. 2d 1071 (1968)*, to the effect that " ***HN8***[] "(under) the Sherman Act, any agreement by a Group of competitors to boycott a particular buyer or group of buyers is illegal Per se,' " Id. (former emphasis added), and concluded that "(whatever) other characterizations are possible, ( ) petitioners' conduct may be viewed as "an organized boycott,' *Fashion Guild v. Trade Comm., 312 U.S. 457, 465, 61 S. Ct. 703, 85 L. Ed. 949 (1941)* . . . (in that petitioner) induced Its competitors to refuse to deal on any terms with its customers." *Id. at 2931* (emphasis added). The Supreme Court's focus in the St. Paul case appears to have been on whether the members of the boycotting group were competitors Inter se, rather than on whether their action was aimed at harming competitors. In this sense, the Supreme Court's view of the classic group boycott may be somewhat broader than Professor Sullivan's, **[**23]** but under either approach a crucial element is agreement among competitors.

The problem with applying the "classic group boycott" label to the facts of this case lies in the peculiar relationship among the NFL and its member clubs. It is by now a well-recognized principle of the relevant **[*674]** caselaw (and the instant record does not demonstrate otherwise) that the members of a professional team sports league are more like "economic joint venturers" than competitors Inter se. E.g., *Smith v. Pro Football, Inc., supra*; *Mackey v. NFL, supra*; *Levin v. N. B. A., 385 F. Supp. 149 (S.D.N.Y.1974)*; *San Francisco Seals, Ltd. v. N. H. L., 379 F. Supp. 966 (C.D.Cal.1974)*. This is not a case where sports league members in competition with each other, e.g., for the services of players concertedly impose restraints on those players, E.g., *Smith v. Pro Football, Inc., supra.* In short, because under these facts, the NFL teams are not economic competitors among themselves, their action does not fit the classic group boycott definition, at least as that has been articulated by Professor Sullivan. [17]

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[15] In Professor Sullivan's analysis, a boycott is "horizontal" when it operates, i. e., when its effect is felt, on the same market level at which the boycotting group operates. In short, it is a boycott of competitors by competitors. To be distinguished are "vertical" boycotts, as for example where a group of sellers agrees to withhold their product from a particular buyer with whom, of course, they do not compete. Sullivan focuses upon whether the boycotting group's target is or is not a competitor; he views the former situation as more pernicious and thus more appropriate for Per se condemnation. L. A. Sullivan, Antitrust, pp. 229-232.

[16] The Smith court adopted Professor Sullivan's definition of the classic group boycott but refused to apply a Per se rule to the NFL player draft for two reasons. First, the court opined that notwithstanding competition among league members for players, the joint venture nature of the league made Per se rules inappropriate. Second, the court found the NFL's player boycott to be vertical rather than horizontal. See note 15 Supra. The restraint was found to be illegal, however, under the rule of reason.

[17] In *Oreck Corp., supra, 579 F.2d at 131*, the Second Circuit said:

" "While the boycott concept is infinitely expandable, the Per se doctrine ought not to be.' Sullivan, Antitrust 256 (1977), quoted in *Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978)*. It is important to distinguish between "horizontal' restraints, I. e. agreements

[24]**

There is a substantial degree of judicial recognition, in antitrust cases, that the business structure of league team sports is unique. *Smith v. Pro Football, Inc., supra*; *Kapp v. NFL, 390 F. Supp. 73, 79-81, 88-89 (N.D.Cal.1974)*; *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503-4 (E.D.Pa.1972)*; *Flood v. Kuhn, 316 F. Supp. 271, 273-6 (S.D.N.Y.1970)*, *Aff'd., 443 F.2d 264 (2d Cir. 1971)*, *Aff'd., 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*; *Molinas v. National Basketball Association, 190 F. Supp. 241, 243-4 (S.D.N.Y.1961)*; *United States v. National Football League, 116 F. Supp. 319, 323-6 (E.D.Pa.1953)*; *State of Milwaukee v. Milwaukee Braves, 31 Wis.2d 699, 144 N.W.2d 1, 10 (1966)*. These authorities indicate that the NFL should not be regarded as an association of economic competitors attempting to shield concerted anticompetitive behavior behind a joint venture facade. [18] **[**26]** Cf. *United States v. Topco Associates, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. While neither the able presentations of counsel nor the Court's own research has uncovered a case dealing with **[*675]** the type of restraint at issue here, so that **[**25]** the lawfulness of the NFL's cross-ownership ban poses a question of first impression, I am presently persuaded that the NFL's structure, its particular business needs, and the lack of judicial familiarity with this type of restraint, combine to call for application of "rule of reason" principles to test the legality of the cross-ownership ban. [19]

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between competitors at the same level of market structure, and "vertical' restraints, I. e. combinations of persons at different levels of the market structure, such as manufacturers and distributors."

[18] The rationale for a relaxed antitrust approach to league sports was stated in *United States v. National Football League, supra, 116 F. Supp. at 323*:

"Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary business man is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

"Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably."

In *Philadelphia World Hockey Club, supra, 351 F. Supp. at 503-04* Judge Higginbotham stated generally:

"The sports field is in some ways a hybrid, in that it is both similarly and dissimilarly affected by the normal economic variables governing business success. For a corporation producing aluminum, any entrant in the field is a competitor. From a traditional oligopolist's or monopolist's view, one might consider any new entrant as an adversary and thus undesirable. But by the nature of a sports contest, there must always be an adversary. By analogy, who would enjoy Vida Blue blazing strikes across home plate when the batter's box was empty, or Mark Spitz' triumphs, if he were the only one in the pool. Sports teams need competition, and if there are more than two teams, some type of league is probably desirable.

"For maximum customer receptivity and profit it is in the best interest of any club that its opponents not generally be viewed by the public as totally incompetent and utterly unable to compete effectively."

[19] The NASL makes the argument that Per se rules have been deemed inappropriate because of the joint venture nature of the league only when the restraint at issue applies to Intra -league competition. Plaintiffs would distinguish the instant case on the ground that the cross-ownership ban hinders Inter -league competition, i. e. that between the NFL and the NASL. Thus, the NASL contends that the "joint venture" defense is unavailing to save this "group boycott" from Per se condemnation.

I am not persuaded that the joint venture defense should be so narrowly construed. For example, *Philadelphia World Hockey Club, supra*, concerned a challenge by the World Hockey Association to the National Hockey League's player restrictions. The hindering of Inter -league competition was clearly at issue, yet Judge Higginbotham refused to apply a Per se rule to the alleged violation of *section 1* of the Sherman Act, largely because of the unique nature of the business of professional hockey. *351 F. Supp. at 503-04*.

[27]**

Of course, the joint venture nature of the NFL does not pose an insurmountable barrier to plaintiffs' case. *Robertson v. NBA, 67 F.R.D. 691, 694 n. 3 (S.D.N.Y.1975)*. See generally, *Timken Roller Bearing Co. v. U. S., 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*. It is not a prerequisite to antitrust liability that "coconspirators" be competitors of one another. E.g., *Tondas v. Amateur Hockey Ass'n, 438 F. Supp. 310 (W.D.N.Y.1977)*; *DuPont Glore Forgan Inc. v. A. T. & T. Co., 437 F. Supp. 1104 (S.D.N.Y.1977)*; *Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110 (S.D.N.Y.1976)*. Though united in a joint venture, the NFL members are discrete business entities individuals, partnerships and corporations whose concerted action can have antitrust implications, *Robertson, supra*; *Levin v. NBA, 385 F. Supp. 149, 152 (S.D.N.Y.1974)*; *San Francisco Seals v. NHL, 379 F. Supp. 966, 968, 970-71 (E.D.Cal.1974)*; *United States v. National Football League, supra.*

Viewing the cross-ownership ban in the light of the rule of reason, the decisive issue, recently articulated by the *Supreme Court in National Soc. of Professional Engineers v. U. S., supra*, is ***HN9***[] "whether the challenged **[**28]** agreement is one that promotes competition or one that suppresses competition." *435 U.S. at 691, 98 S. Ct. at 1365*. Crucial to this evaluation is inquiry into "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," to the end that the court may "form a judgment about the competitive significance of the restraint." In short, I must ultimately analyze the purpose and effect of the cross-ownership ban, *Oreck Corp. v. Whirlpool Corp., supra, 579 F.2d at 133*, and determine whether on balance its anticompetitive effects outweigh its pro-competitive benefits. See e.g., *Professional Engineers, supra*; *Continental T. V. v. GTE Sylvania, Inc., 433 U.S. 36, 49-51, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Plaintiffs are entitled to a preliminary injunction if, within the context of that controlling issue, they have "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Jacobson, supra, 548 F.2d at 442*.

The NASL plaintiffs perceive two principal anticompetitive effects of the cross-ownership ban. First, they view the limited **[*676]** **[**29]** number of individuals in the United States with sufficient wealth, interest, time and entrepreneurial skills to operate a major sports franchise effectively as a decidedly limited market, of which the present NFL members constitute a significant part. Plaintiffs claim that the cross-ownership ban obstructs the NASL from competing in that market, since under its terms present cross-owners are under pressure to divest themselves of NASL franchises, and new prospects cannot be approached if they are NFL owners, present or potential. Secondly, plaintiffs argue, this anticompetitive effect leads directly to another, since the coercions and restraints placed upon present and potential NASL owners serve to "undermine the stability, credibility and ability of the NASL to compete successfully with other sports, including the NFL" in the broader market for the public's entertainment dollar and leisure time. [20]

In one of its leading "boycott" cases, the Supreme Court opined that conduct which could be characterized as a "group boycott" might be saved from Per se condemnation by a "justification derived from the policy of another statute Or otherwise." *Silver v. N. Y. S. E., 373 U.S. 341, 348-49, 83 S. Ct. 1246, 1252, 10 L. Ed. 2d 389 (1963)* (emphasis added). Several commentators have "suggested that where collective action is inherent in the structure of the industry, as it is in sports leagues, the "or otherwise' justification is present." Note, Professional Team Sports and the Antitrust Laws, 81 Harv.L.R. 418, 423 (1967), citing Note, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 Colum.L.Rev. 1486, 1501 (1966).

[20] Plaintiffs' main brief at pp. 39-40.

Plaintiffs make a third argument, that the cross-ownership ban runs afoul of the so-called "essential facility" doctrine of ***antitrust law***. See generally, *Otter Tail Power Co. v. U. S., 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *U. S. v. Terminal R. R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*. The District of Columbia Circuit's recent discussion of the doctrine provides a helpful summary of the law:

" "(W)here facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.' . . . To be "essential' a facility need not be indispensible; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe

[30]**

Defendants dispute the accuracy of these perceptions. They point out that investors and potential investors in NASL franchises come from many walks and stations of life, so that the limited market of wealth and skill described by plaintiffs is illusory. The NFL scoffs at the dire anticompetitive effect visualized by the NASL, paraphrasing the plaintiffs to say that "their dynamically growing venture would collapse in a trice if two or three of its 24 franchises change ownership contrary to the league's wishes between now and 1980." [21] Defendants proclaim the cross-ownership ban to be procompetitive in overall effect, primarily because it inhibits the "creeping merger of the two leagues through joint ownership." [22]

The issues presented are interesting, complex and to a degree novel, such as the NASL's perception of wealthy, sportsminded individuals as components of a market for which rival leagues compete. One suspects that until now Mr. Hunt had thought **[**31]** of himself as a competitor, and not a commodity. At times the parties' arguments cut both ways. Thus defendants' characterizations of the cross-ownership ban as procompetitive, because it would prevent merger of the two leagues through "joint ownership," does not wholly square with their downgrading of the economic importance of the entrepreneurial sub-market: if **[*677]** NASL has so many and so wide a variety of investors to choose from, why is a cross-ownership ban necessary to prevent a "creeping merger" of the NASL and NFL?

Measured by the rule of reason and its quintessential issue as articulated in National Society of Professional Engineers the promotion or suppression of competition it is evident that the case at bar presents serious questions forming a fair ground for litigation, including the discovery procedures now in progress. If no prior case delineates sports entrepreneurs as a market with which ***antitrust law*** is properly concerned, no case holds that the concept is too fanciful to have validity. The precise boundaries of that market, in the case at bar, present substantial issues of fact. The cross-ownership ban would limit the options of (a) NFL owners and their **[**32]** family members who also own an NASL franchise or contemplate such an interest; and (b) NASL franchises seeking to interest such individuals as investors. The restraints attendant upon such limitations of choice fairly implicate the antitrust laws. *United States v. New Orleans Insurance Exchange, 148 F. Supp. 915, 920 (E.D.La.1957)*, *Aff'd, 355 U.S. 22, 78 S. Ct. 96, 2 L. Ed. 2d 66 (1957)*; *United States v. Insurance Board of Cleveland, 188 F. Supp. 949, 955 (N.D.Ohio 1960)*. I find no meaningful relationship between the proposed by-law amendment forming the subject matter of the instant case and the rejection by a professional basketball league of certain individuals for franchise ownership in *Levin v. National Basketball Association, 385 F. Supp. 149 (S.D.N.Y.1974)*, upon which defendants rely. That rejection in Levin was Ad hoc, ad hominem, and, as Judge Owen properly held, quite without antitrust implications. Such implications abound in the case at bar. [23] It is difficult for defendants to deny any anticompetitive intent for the

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handicap on potential market entrants. Necessarily, this principle must be carefully delineated: 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." *Hecht v. Pro-Football, Inc., 187 U.S.App.D.C. 73, 83, 570 F.2d 982, 992-93 (1977)* (citations and footnotes omitted).

Two problems with the applicability of this theory to the case at bar come immediately to mind. First, the cases cited by plaintiffs all deal with tangible physical objects as "essential facilities." *Otter Tail, supra* (electricity transmission lines); *Terminal R. R., supra* (railroad switching facilities); *Hecht, supra* (football stadium); *Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975)*, Cert. denied, *423 U.S. 1053, 96 S. Ct. 782, 46 L. Ed. 2d 642 (1976)* (flour mill); *U. S. v. Standard Oil Co., 362 F. Supp. 1331 (N.D.Cal.1972)*, *Aff'd, 412 U.S. 924, 93 S. Ct. 2750, 37 L. Ed. 2d 152 (1973)* (fuel storage facilities). The "essential facility" or "scarce resource" here is the sports capital and entrepreneurial skill of the NFL owners. Second, the cited cases all deal with situations where the defendant enjoyed a monopoly over the resource or facility. While it might be said that the NFL "monopolizes" NFL owners, I do not understand plaintiffs' position to be that the NFL monopolizes the entire field of "sports owners," nor is this a necessary showing to establish the right to relief under the other theories pressed. In sum, it seems that if the NASL succeeds on its primary theories of liability, then resort to "essential facility" law would be superfluous, if indeed it is applicable at all.

[21] Defendants' brief at p. 31.

[22] *Id. at p. 32*.

cross-ownership ban, in the face of Commissioner Rozelle's explanatory statement of June 28, 1978 to the NFL owners, which included the following discussion **[**33]** as a reason for the ban:

> "The NFL's success depends on fan interest and loyalty. The League competes with other major team sports for that interest and loyalty, as well as for gate receipts, television revenues, advertising dollars, and media coverage. Connections with NFL personnel may well enhance these competing team sports, both in fact **[**34]** and in the public's perception, at the expense of the NFL." [24]

In sum, there are present in this case merits issues of sufficient doubt and moment to satisfy the Sonesta and Jacobson tests.

C. The Balance of Hardships.

No extended discussion is necessary to demonstrate that the balance of hardships tips in favor of plaintiffs. The adverse effects to the NASL attendant upon immediate implementation of the cross-ownership ban have been considered Ante. Those effects may not be capable of precise calculation, but the potential is real. By way of contrast, the NFL points to no factor indicating that it will be harmed if a policy declared in 1967, but not sought to be enforced until 1978, is kept on the bench during the pendency of this litigation.

The parties have devoted some energy to debating whether the granting of a preliminary injunction to plaintiffs would preserve or disturb the Status quo. Clearly it is the former. The NFL made no meaningful efforts to enforce the cross-ownership ban, first declared **[**35]** in a resolution in 1967, until **[*678]** the 1978 proposed amendment, with its forced divestiture and Draconian penalties for non-compliance. Transforming a toothless tabby into a sabre-tooth tiger is no way to preserve the Status quo. The NFL's serene portrayal of cross-owners, cheerfully and without resentment, exercising their best efforts to divest themselves of other interests even prior to the proposed amendment, does not withstand analysis. Thus Hunt has expressed concern at the timing of an enforced divestiture. [25]

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[23] Assuming Arguendo that the cross-ownership ban violates the antitrust laws, that it has not yet been formally enacted or put into effect is irrelevant: ***HN10***[] "Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other.' " *Associated Press v. U. S., 326 U.S. 1, 12, 65 S. Ct. 1416, 1421, 89 L. Ed. 2013 (1945)* Quoting *U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 225, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

[24] Affidavit of Donald Weiss, NFL Executive Director, September 25, 1978, at Exhibit B.

[25] Defendants have submitted an exchange of letters between Lamar Hunt and Pete Rozelle, spanning the period of August 11, 1972 to March 8, 1977. The correspondence concerns Mr. Hunt's willingness and efforts to comply with the NFL policy resolutions on cross-ownership. Mr. Hunt's letters reveal his concern with being forced into divestiture at a time when there was little or no market for NASL franchises. His perceptions as to investor reaction to the sale of a "Hunt" business are instructive:

"The soccer investment of myself and my children (for which I am obviously responsible) is a Very substantial one unfortunately, at this point more than I expected. Though the picture looks infinitely brighter for the sport, it is still a long way from reaching fruition for the investors and, in fact, at present there is virtually no market for a going club especially one owned by a "Hunt.' (We have a historically bad record for selling any business for buyers seem to feel that anything we are selling must really be a "dog.' " Letter from Lamar Hunt to Pete Rozelle, at 1 (November 12, 1973).

More recently, Hunt has said:

"I am informed that NFL Commissioner Pete Rozelle has filed an affidavit in this action indicating that (i) I am in complete accord with this latest proposed rule by the NFL to bar NFL owners from having an interest in other team sports, and (ii) I am presently desirous of selling my other team sports interests. Neither of these assertions is true. In the past I have reluctantly indicated to the other owners in the NFL that, if they required me to do so, I would sell my interests in other team sports, specifically soccer and basketball, at an appropriate time when proper financial arrangements could be made in order to protect my investments in those franchises. However, as a businessman, I do not want to be in a position where I would be forced to sell either my soccer or basketball interest by a specified date and under threat of compulsion. Such a requirement would, in my view, jeopardize the

[36]**

For the purposes of this motion, the Court need not accept or reject plaintiffs' contention that the NFL's proposal to implement the cross-ownership ban at this time stems solely from anticompetitive animus toward the NASL, just as the latter begins to succeed. I recognize that the NFL asserts quite different motivations. [26] Resolution of this and other fact issues must await trial. It is sufficient for the present to say that the NFL's recently declared intent to implement a cross-ownership ban disturbs the Status quo in such a manner as to tip the balance of hardships in favor of plaintiffs; and that the other requisite elements are also established, thus entitling them to a preliminary injunction.

[37]**

CONCLUSION

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law pursuant to *Rule 52(a), F.R.Civ.P.*

A preliminary injunction will issue, restraining the NFL and its member clubs, pending the final resolution of this case, **[*679]** from implementing by by-law amendment or otherwise its cross-ownership ban.

The giving of security by plaintiffs is referred to both by *Rule 65(c)* and *15 U.S.C. § 26*. The present motion papers do not address this issue. Counsel should do so in connection with settling the order.

Counsel for plaintiffs are directed to settle an order and form of injunction on five (5) days' notice.

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substantial investment I have made in particular in my soccer franchise over the last twelve years. In fact, at the present time, it is not my desire to relinquish my ownership in the Dallas Tornado (or the Chicago Bulls for that matter) unless I am compelled to do so by the cross-ownership ban proposed by the NFL." Affidavit of Lamar Hunt, October 26, 1978, at p. 2, P 3.

[26] The business justifications urged by defendants in support of the cross-ownership ban are summarized in the NFL's brief at p. 6:

"(1) protection of commercial confidentiality;

"(2) preservation of good relations with the public, including

(a) avoiding dilution of the goodwill which a prominent local NFL "salesman' wins for the entire NFL;

(b) remaining untarnished by adverse fan reactions to publicly visible owners whose activities in other sports may arouse local hostility;

(c) taking the procompetitive side of the public debate concerning the proper role of sports ownership "magnates' or human "conglomerates'; and

"(3) encouragement of maximum cooperation, and minimizing animosity and suspicion, among the NFL member joint-venturers."

Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n

Supreme Court of the United States

December 4, 1978, Argued ; February 22, 1979, Decided

No. 77-654

Reporter

440 U.S. 69 *; 99 S. Ct. 925 **; 59 L. Ed. 2d 153 ***; 1979 U.S. LEXIS 59 ****; 1979-1 Trade Cas. (CCH) P62,475

GREAT ATLANTIC & PACIFIC TEA CO., INC. v. FEDERAL TRADE COMMISSION

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

Disposition: *557 F.2d 971*, reversed.

Core Terms

buyer, seller, bid, meeting-competition, price discrimination, competitor's, Robinson-Patman Act, dairy, defenses, induce, meeting competition, milk, lower price, good faith, derivative, disclosure, Automatic, affirmative defense, Administrative Law, Federal Trade Commission Act, discriminations, circumstances, differentials, knowingly, label, beat

LexisNexis® Headnotes

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

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

HN1[] **Price Discrimination, Buyer Liability**

See *15 U.S.C.S. § 13(f)*.

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

HN2[] **Regulated Practices, Trade Practices & Unfair Competition**

See *15 U.S.C.S. § 45(a)*.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Criminal Law & Procedure > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Sherman Act > Defenses

HN3[] **Defenses, Cost Justification Defense**

Under the Robinson-Patman Act, *15 U.S.C.S. §§ 2(a)*, *(b)*, a seller who can establish either that a price differential was cost justified or offered in good faith to meet competition has a complete defense to a charge of price discrimination under the statute.

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

HN4[] **Antitrust & Trade Law, Robinson-Patman Act**

See *15 U.S.C.S. § 2(f)*.

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

Criminal Law & Procedure > Defenses > General Overview

HN5[] **Price Discrimination, Buyer Liability**

A buyer cannot be liable for an illegal price discrimination if a prima facie case could not be established against a seller or if the seller has an affirmative defense.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN6[] **Price Discrimination, Defenses**

If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN7[] **Antitrust & Trade Law, Robinson-Patman Act**

See *15 U.S.C.S. § 13(e)*.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

The exchange of price information by competitors violates the Sherman Act.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

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

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Sherman Act > Defenses

HN9[] Robinson-Patman Act, Defenses

A buyer who has done no more than accept the lower of two prices competitively offered does not violate the Robinson-Patman Act *§ 2(f)*, *15 U.S.C.S. § 2(f)*, provided the seller has a meeting-competition defense.

Antitrust & Trade Law > Sherman 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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN10[] Sherman Act, Defenses

The test for determining when a seller has a valid meeting-competition defense is whether a seller can show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the defense under Robinson-Patman Act, *15 U.S.C.S. § 2(b)*. Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.

Lawyers' Edition Display

Decision

Buyer purchasing, from seller having meeting competition defense under *15 USCS 13(b)*, at lowest price competitively offered, held not to have induced or received illegal price discrimination under *15 USCS 13(f)*.

Summary

A grocery store chain, after deciding to switch from the sale of brand label milk to the sale of private label milk, solicited an offer from its longtime supplier to supply milk under the chain's private label. The chain was dissatisfied with the supplier's initial offer and solicited offers from other dairies, one of which submitted an offer lower than that of the supplier. The chain's buyer subsequently contacted the supplier and told it that it had another offer, that the supplier was "not even in the ballpark," and that a $ 50,000 improvement in the offer "would not be a drop in the bucket." The supplier then submitted a new bid, lower than the competing offer, emphasizing that it needed to keep the chain's business and that it made the new offer in order to meet the other dairy's bid. After the chain accepted the supplier's second offer, the Federal Trade Commission filed a complaint against the chain, charging, among other things, that it had violated 2(f) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(f)*) by knowingly inducing or receiving a price discrimination prohibited by 2 of the Act (*15 USCS 13*), namely the price discrimination of a seller, which is prohibited under 2(a) (*15 USCS 13(a)*). After proceedings before an administrative law judge, the Commission--rejecting the chain's contention that it could utilize, as a defense to its 2(f) liability, the meeting competition defense of 2(b) of the Act, which allows a seller to rebut a prima facie case of price discrimination by showing that the seller's lower price was made in good faith to meet a competitor's equally low price--held that the chain had violated 2(f), The United States Court of Appeals for the Second Circuit affirmed on review of the Commission's decision (*557 F2d 971*).

On certiorari, the United States Supreme Court reversed. In an opinion by Stewart, J., joined by Burger, Ch. J., and Brennan, Blackmun, Powell, and Rehnquist, JJ., it was held that a buyer who has done no more than accept the lower of two prices competitively offered does not induce or receive price discrimination in violation of 2(f) provided the seller has a valid meeting competition defense, the chain thus not being in violation of 2(f) since the supplier had a valid meeting competition defense under 2(b).

White, J., concurring in part and dissenting in part, expressed the view that the court should not have decided whether the supplier had a valid meeting competition defense, since neither the Commission nor the Court of Appeals had reached the issue.

Marshall, J., dissenting in part, agreed that the Commission and the Court of Appeals had applied an incorrect legal standard in assessing the chain's liability under 2(f), but disagreed with the court's ruling that 2(f) precluded buyer liability under the Act unless the seller could also be found liable for price discrimination, expressing the view that a buyer could claim the meeting competition defense if he acted in good faith to induce a seller to meet a competitor's price, regardless of whether the seller's price happened to beat the competitor's, but that a buyer who induced the lower bid by misrepresentation could not escape liability, and that the United States Supreme Court should not have resolved disputed factual issues in the case without a remand.

Stevens, J., did not participate.

Headnotes

MONOPOLIES §36 > buyer's inducement of price discrimination -- effect of seller's meeting competition defense --
> Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

A buyer who has done no more than accept the lower of two prices competitively offered does not knowingly induce or receive a seller's illegal price discrimination in violation of 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, (*15 USCS 13(f)*) where the seller from whom the buyer purchases has a meeting competition defense under 2(b) of the Act (*15 USCS 13(b)*) to the Act's prohibition against price discrimination by sellers (*15 USCS 13(a)*). (Marshall, J., dissented from this holding.)

MONOPOLIES §36 > price discrimination -- seller's defenses -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

Under 2(a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act, (*15 USCS 13(a)* and *(b)*), a seller who can establish that a price differential was cost justified or offered in good faith to meet competition has a complete defense to a charge of price discrimination under the Act.

MONOPOLIES §36 > price discrimination -- buyer's liability -- > Headnote:
LEdHN[3][] [3]

Under 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, (*15 USCS 13(f)*), a buyer cannot be liable for inducing or receiving a discrimination in price if a prima facie case of price discrimination under 2(a) and (b) of the Act (*15 USCS 13(a)* and *(b)*) could not be established against a seller or if the seller has an affirmative defense. (Marshall, J., dissented from this holding.)

MONOPOLIES §36 > price discrimination -- meeting competition defense -- > Headnote:
LEdHN[4][] [4]

The test for determining whether a seller has a valid defense against illegal price discrimination under 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, (*15 USCS 13(b)*) is whether a seller can show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor; a good faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the 2(b) defense, and a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.

MONOPOLIES §36 > price discrimination -- seller's meeting competition defense -- buyer's inducing or receiving price discrimination -- > Headnote:
LEdHN[5][] [5]

A seller is entitled to a meeting competition defense under 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, (*15 USCS 13(b)*) to any illegal price discrimination under 2(a) of the Act (*15 USCS 13(a)*) arising from its sale to a buyer who had purchased under the seller's second bid at a price lower than the low bid made by prospective seller in a bid submitted after the buyer had rejected the eventual seller's initial bid, where (1) the seller submitted its second bid after the buyer had informed the seller that, as to the prospective seller's bid, its initial bid was "not even in the ballpark" and that a $ 50,000 improvement "would not be a drop in the bucket," (2) the seller could justifiably conclude, in light of its established business relationship with the buyer, that it was necessary to make the second bid offering substantial concessions in order to avoid loss of the buyer's account, (3) the seller had made the second bid without knowing of the details of the competing bid, and, thus, the buyer, who does no more than accept such seller's second offer, is not liable under 2(f) of the Act (*15 USCS 13(f)*) for inducing or receiving an illegal discrimination in price. (Marshall, J., dissented in part from this holding.)

Syllabus

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination by sellers, but under *§ 2 (b)* the seller may rebut a prima facie case of price discrimination by showing that his lower price was made in good faith to meet a competitor's equally low price. *Section 2 (f)* makes it unlawful "for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." Petitioner, in an effort to achieve cost savings, entered into an agreement with its longtime supplier, Borden Co., under which Borden would supply "private **[****2]** label" (as opposed to "brand label") milk to petitioner's stores in the Chicago area. Petitioner refused Borden's initial offer in implementation of the agreement and solicited offers from other companies, resulting in a lower offer from one of Borden's competitors. At this point petitioner's buyer informed Borden that its offer was "not even in the ball park" and that a $ 50,000 improvement in the offer "would not be a drop in the bucket." Borden then submitted a new offer that was substantially better than its competitor's and petitioner accepted it. Based on these facts, the Federal Trade Commission charged petitioner with violating § 5 of the Federal Trade Commission Act for allegedly misleading Borden during contract negotiations by failing to inform it that its second offer was better than its competitor's, and with violating *§ 2 (f)* by knowingly inducing or receiving price discrimination from Borden. The FTC dismissed the § 5 charge on the ground that the issue was what amount of disclosure is required of the buyer during contract negotiations and that to impose a duty of affirmative disclosure would be "contrary to normal business practice" and "contrary to the public **[****3]** interest," but held that petitioner had violated *§ 2 (f)*, the FTC rejecting, *inter alia*, petitioner's defense that the Borden offer had been made to meet competition. The Court of Appeals affirmed. *Held*: A buyer who has done no more than accept the lower of two prices competitively offered does not violate *§ 2 (f)* provided the seller has a meeting-competition defense, and here where Borden had such a defense and thus could not be liable under *§ 2 (b)* petitioner, who did no more than accept Borden's offer, cannot be liable under *§ 2 (f)*. Pp. 75-85.

(a) Since liability under *§ 2 (f)* is limited to price discrimination "prohibited by this section," and since only *§§ 2 (a)* and *(b)* deal with seller liability for price discrimination, a buyer, under *§ 2 (f)*'s plain meaning, cannot be liable if a prima facie case cannot be established against a seller or if the seller has an affirmative defense. *Automatic Canteen Co. of America v. FTC, 346 U.S. 61*. In either situation, there is no price discrimination "prohibited by this section." And the legislative history of *§ 2 (f)* confirms the conclusion that buyer liability under *§ 2 (f)* is dependent on seller **[****4]** liability under *§ 2 (a)*. Pp. 75-78.

(b) To rewrite *§ 2 (f)* to hold a buyer liable even though there is no price discrimination "prohibited by this section" would contravene the rule that this Court "cannot supply what Congress has studiously omitted," *FTC v. Simplicity Pattern Co., 360 U.S. 55, 67*. Pp. 78-79.

(c) Imposition of *§ 2 (f)* liability on petitioner would lead to price uniformity and rigidity contrary to the purposes of other antitrust legislation. P. 80.

(d) A duty of affirmative disclosure requiring a buyer to inform a seller that his bid has beaten competition would frustrate competitive bidding and, by reducing uncertainty, would lead to price matching and anticompetitive cooperation among sellers. P. 80.

(e) The effect of the finding that petitioner's same conduct violated *§ 2 (f)* as violated § 5 of the Federal Trade Commission Act is to impose the same duty of affirmative disclosure that the FTC condemned as anticompetitive, "contrary to the public interest," and "contrary to normal business practice," in dismissing the § 5 charge. Pp. 80-81.

(f) The test for determining when a seller has a valid meeting-competition defense is whether **[****5]** he can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A. E. Staley Mfg. Co., 324 U.S. 746*. Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid, since, in light of its established business relationship with petitioner, it could justifiably conclude that petitioner's statements about the first offer were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with petitioner. Pp. 82-84.

Counsel: Denis McInerney argued the cause for petitioner. With him on the briefs were Raymond L. Falls, Jr., and William T. Lifland.

Deputy Solicitor General Easterbrook argued the cause for respondent. With him on the brief were Solicitor General McCree, Michael N. Sohn, Gerald P. Norton, W. Dennis Cross, and Jerold D. Cummins. [*]

Judges: STEWART, J., delivered the opinion of the Court, in which BURGER, **[****6]** C. J., and BRENNAN, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Parts I, II, and III of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, post, p. 85. MARSHALL, J., filed an opinion dissenting in part, post, p. 85. STEVENS, J., took no part in the consideration or decision of the case.

Opinion by: STEWART

Opinion

[*71] **[***157]** **[**928]** MR. JUSTICE STEWART delivered the opinion of the Court.

LEdHN[1A][] [1A]The question presented in this case is whether the petitioner, the **[***158]** Great Atlantic & Pacific Tea Co. (A&P), violated *§ 2 (f)* of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, *15 U. S. C. § 13 (f)*, [1] by knowingly inducing or **[**929]** receiving illegal price discriminations from the Borden Co. (Borden).

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[*] Thomas A. Rothwell and Arthur H. Brendtson filed a brief for the Small Business Legislative Council as amicus curiae.

[1] Title *15 U. S. C. § 13 (f)* provides:

HN1[] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Title *15 U. S. C. §§ 13 (a)* and *(b)* provide in pertinent part:

"(a) . . . It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

[**7]** **[*72]** The alleged violation was reflected in a 1965 agreement between A&P and Borden under which Borden undertook to supply "private label" milk to more than 200 A&P stores in a Chicago area that included portions of Illinois and Indiana. This agreement resulted from an effort by A&P to achieve cost savings by switching from the sale of "brand label" milk (milk sold under the brand name of the supplying dairy) to the sale of "private label" milk (milk sold under the A&P label).

To implement this plan, A&P asked Borden, its longtime supplier, to submit an offer to supply under private label certain of A&P's milk and other dairy product requirements. After prolonged negotiations, Borden offered to grant A&P a discount for switching to private-label milk provided A&P would accept limited delivery service. Borden claimed that this offer would save A&P $ 410,000 a year compared to what it had been paying for its dairy products. A&P, however, was not satisfied with this offer and solicited offers from other **[*73]** dairies. A competitor of Borden, Bowman Dairy, then submitted an offer which was lower than Borden's. [2]

[**8]** At this point, A&P's Chicago buyer contacted Borden's chain store sales manager and stated: "I have a bid in my pocket. You [Borden] people are so far out of line it is not **[***159]** even funny. You are not even in the ball park." When the Borden representative asked for more details, he was told nothing except that a $ 50,000 improvement in Borden's bid "would not be a drop in the bucket."

Borden was thus faced with the problem of deciding whether to rebid. A&P at the time was one of Borden's largest customers in the Chicago area. Moreover, Borden had just invested more than $ 5 million in a new dairy facility in Illinois. The loss of the A&P account would result in underutilization of this new plant. Under these circumstances, Borden decided to submit a new bid which doubled the estimated annual savings to A&P, from $ 410,000 to $ 820,000. In presenting its offer, Borden emphasized to A&P that it needed to keep A&P's business and was making the new offer in order to meet Bowman's bid. A&P then accepted Borden's bid after concluding that it was substantially better than Bowman's.

I

Based on these facts, the Federal Trade Commission filed a three-count complaint against **[****9]** A&P. Count I charged that A&P had violated § 5 of the Federal Trade Commission Act by misleading Borden in the course of negotiations for the private-label contract, in that A&P had failed to inform Borden that its second offer was better than the Bowman bid. [3] **[*74]** Count II, involving the same conduct, charged that A&P had violated *§ 2 (f)* of the Clayton Act, as **[**930]** amended by the Robinson-Patman Act, by knowingly inducing or receiving price discriminations from Borden. Count III charged that Borden and A&P had violated § 5 of the Federal Trade Commission Act by combining to stabilize and maintain the retail and wholesale prices of milk and other dairy products.

[**10]** An Administrative Law Judge found, after extended discovery and a hearing that lasted over 110 days, that A&P had acted unfairly and deceptively in accepting the second offer from Borden and had therefore violated §

"(b) . . . Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[2] The Bowman bid would have produced estimated annual savings of approximately $ 737,000 for A&P as compared with the first Borden bid, which would have produced estimated annual savings of $ 410,000.

[3] Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, *15 U. S. C. § 45 (a)*, provides in relevant part:

HN2[] "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

5 of the Federal Trade Commission Act as charged in Count I. The Administrative Law Judge similarly found that this same conduct had violated § 2 (f). Finally, he dismissed Count III on the ground that the Commission had not satisfied its burden of proof.

LEdHN[2A][] [2A]On review, the Commission reversed the Administrative Law Judge's finding as to Count I. Pointing out that the question at issue was what amount of disclosure is required of the buyer during contract negotiations, the Commission held that the imposition of a duty of affirmative disclosure would be "contrary to normal business practice and, we think, contrary to the public interest." Despite this ruling, however, the Commission held as to Count II that the identical conduct on the part of A&P had violated § 2 (f), finding that Borden had discriminated in price between A&P and its competitors, that the discrimination had been injurious **[****11]** to competition, and that A&P had known or **[***160]** should have known that it was the beneficiary of unlawful price discrimination. [4] The Commission rejected A&P's defenses that the Borden bid had been made to meet competition and was cost justified. [5]

[**12]** **[*75]** A&P filed a petition for review of the Commission's order in the Court of Appeals for the Second Circuit. The court held that substantial evidence supported the findings of the Commission and that as a matter of law A&P could not successfully assert a meeting-competition defense because it, unlike Borden, had known that Borden's offer was better than Bowman's. [6] Finally, the court held that the Commission had correctly determined that A&P had no cost-justification defense. 557 F.2d 971. Because the judgment of the Court of Appeals raises important issues of federal law, we granted certiorari. *435 U.S. 922*.

[**13]** II

The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers **[**931]** that threatened **[*76]** the existence of small independent retailers. Notwithstanding this concern with buyers, however, the emphasis of the Act is in § 2 (a), which prohibits price discriminations by sellers. Indeed, the original Patman bill as reported by Committees of both Houses prohibited only seller activity, with no mention of buyer liability. [7] Section 2 (f), making buyers liable for

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[4] The Commission also found that the interstate commerce requirement of § 2 (f) was satisfied.

[5]

LEdHN[2B][] [2B]**HN3**[] Under §§ 2 (a) and (b) of the Act, a seller who can establish either that a price differential was cost justified or offered in good faith to meet competition has a complete defense to a charge of price discrimination under the Act. *Standard Oil Co*. v. FTC, 340 U.S. 231. See n. 1, *supra*.

With respect to the meeting-competition defense, the Commission stated that even though Borden as the seller might have had a meeting-competition defense, A&P as the buyer did not have such a defense because it knew that the bid offered was, in fact, better than the Bowman bid. With respect to the cost-justification defense, the Commission found that Commission counsel had met the initial burden of going forward as required by this Court's decision in Automatic Canteen Co. of America v. FTC, 346 U.S. 61, and that A&P had not then satisfied its burden of showing that the prices were cost justified, or that it did not know that they were not.

The Commission upheld the Administrative Law Judge's dismissal of Count III of the complaint.

[6] The Court of Appeals, like the Commission, relied on *Kroger Co*. v. FTC, 438 F.2d 1372 (CA6), for the proposition that a buyer can be liable under § 2 (f) of the Act even if the seller has a meeting-competition defense. The *Kroger* case involved a buyer who had made deliberate misrepresentations to a seller in order to induce price concessions. While the Court of Appeals in this case did not find that A&P had made any affirmative misrepresentations, it viewed the distinction between a "lying buyer" and a buyer who knowingly accepts the lower of two bids as without legal significance. See n. 15, *infra*.

[7] H. R. 8442, 74th Cong., 1st Sess. (1935); S. 3154, 74th Cong., 1st Sess. (1935).

inducing or receiving price discriminations by sellers, was the product of a belated floor amendment near the conclusion of the Senate debates. [8]

[**14]** ***LEdHN[3]***[] [3]As finally enacted, *§ 2 (f)* provides:

HN4[] " **[***161]** That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price *which is prohibited by this section*." (Emphasis added.)

Liability under *§ 2 (f)* thus is limited to situations where the price discrimination is one "which is prohibited by this section." While the phrase "this section" refers to the entire *§ 2* of the Act, only subsections (a) and (b) dealing with seller liability involve discriminations in price. Under the plain meaning of *§ 2 (f)*, therefore, ***HN5***[] a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination "prohibited by this section." [9] **[*77]** The legislative history of *§ 2 (f)* fully confirms the conclusion that buyer liability **[****15]** under *§ 2 (f)* is dependent on seller liability under *§ 2 (a)*. [10]

[**16]** The derivative nature of liability under *§ 2 (f)* was recognized by this Court in *Automatic Canteen Co. of America v. FTC, 346 U.S. 61*. In that case, the Court stated that even if the Commission has established a prima facie case of price discrimination, a buyer does not violate *§ 2 (f)* if the lower prices received are either within one of the seller's defenses or not known by the buyer not to be within one of those defenses. The Court stated:

"Thus, at the least, we can be confident in reading the words in *§ 2 (f)*, 'a discrimination in price which is prohibited by this section,' as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act. It is therefore apparent that the discriminatory price that buyers are forbidden by *§ 2 (f)* to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act . . . . For we are not dealing simply with a 'discrimination in price'; the 'discrimination in price' in *§ 2 (f)* must be one 'which is prohibited by this section.' Even if any price differential were to be comprehended within the term 'discrimination in price,' *§ **[****17]** 2 (f)*, which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as that the price differentials **[*78]** reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses **[**932]** are set out in the **[***162]** provisos of *§§ 2 (a)* and *2 (b)*." *346 U.S., at 70-71* (footnotes omitted).

The Court thus explicitly recognized that a buyer cannot be held liable under *§ 2 (f)* if the lower prices received are justified by reason of one of the seller's affirmative defenses.

III

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[8] F. Rowe, Price Discrimination Under the Robinson-Patman Act 423 (1962). *Section 2 (f)* has been described by commentators as an "afterthought." *Id*., at 421; J. McCord, Commentaries on the Robinson-Patman Act 96 (1969).

[9] Commentators have recognized that a finding of buyer liability under *§ 2 (f)* is dependent on a finding of seller liability under *§ 2 (a)*. McCord, *supra*, at 96 ("*[Section] 2 (f)* cannot be enforced if a prima facie case could not be established against the seller on the basis of the transaction in question under *Section 2 (a)* or if he could sustain an affirmative defense thereto"); Rowe, *supra*, at 421 ("the legal status of the buyer is derivative from the seller's pricing legality under the Act"); H. Shniderman, Price Discrimination in Perspective 136 (1977) (a buyer can be liable under *§ 2 (f)* only if the price received "cannot be excused by any defenses provided to the seller").

[10] In presenting the Conference Report to the House, Representative Utterback summarized the meaning of *§ 2 (f)* by stating: "This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph *[§ 2 (a)]*] of the amendment." 80 Cong. Rec. 9419 (1936).

LEdHN[1B][] [1B]The petitioner, relying on this plain meaning of *§ 2 (f)* and the teaching of the *Automatic Canteen* case, argues that it cannot be liable under *§ 2 (f)* if Borden had a valid meeting-competition defense. The respondent, on the other hand, argues that the petitioner may be liable even assuming that Borden had such a defense. The meeting-competition defense, the respondent contends, must in these circumstances be judged from the point of view of **[****18]** the buyer. Since A&P knew for a fact that the final Borden bid beat the Bowman bid, it was not entitled to assert the meeting-competition defense even though Borden may have honestly believed that it was simply meeting competition. Recognition of a meeting-competition defense for the buyer in this situation, the respondent argues, would be contrary to the basic purpose of the Robinson-Patman Act to curtail abuses by large buyers.

A

The short answer to these contentions of the respondent is that Congress did not provide in *§ 2 (f)* that a buyer can be liable even if the seller has a valid defense. The clear language of *§ 2 (f)* states that a buyer can be liable only if he receives a price discrimination "prohibited by this section." ***HN6***[] If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

A similar attempt to amend the Robinson-Patman Act judicially was rejected by this Court in *FTC v. Simplicity Pattern Co.,* ***[*79]*** *360 U.S. 55*. There the Federal Trade Commission had found that a manufacturer of dress patterns had **[****19]** violated *§ 2 (e)* of the Clayton Act, as amended by the Robinson-Patman Act, by providing its larger customers services and facilities not offered its smaller customers. [11] The manufacturer attempted to defend against this charge by asserting that there had been no injury to competition and that its discriminations in services were cost justified. Since liability under *§ 2 (e)*, unlike *§ 2 (a)*, does not depend upon competitive injury or the absence of a cost-justification defense, the manufacturer's primary argument was that "it would be 'bad law and bad economics' to make discriminations unlawful even where they may be accounted for by cost differentials or where there is no competitive injury." *360 U.S., at 67* (footnote omitted). The Court rejected this argument. Recognizing that "this Court is not in a position to review the economic wisdom of Congress, **[***163]** "the Court stated that "[we] cannot supply what Congress has studiously omitted." *Ibid*. (footnote omitted). The respondent's attempt in the present case to rewrite *§ 2 (f)* to hold a buyer liable even though there is no discrimination in price "prohibited by this section" must be rejected for **[****20]** the same reason. [12]

[**21]** **[*80]** **[**933]** B

In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *346 U.S., at 63*. Imposition of *§ 2 (f)* liability on the petitioner in this case would lead to just such price uniformity and rigidity. [13]

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[11] *Section 2 (e)* provides:

HN7[] "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." *15 U. S. C. § 13 (e)*.

[12] Contrary to the respondent's suggestion, this interpretation of *§ 2 (f)* is in no way inconsistent with congressional intent. "[The] buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." *Automatic Canteen Co. of America v. FTC, 346 U.S., at 79*. Here, by contrast, we conclude that a buyer is not liable if the seller *does* have a defense under *§ 2 (b)*.

[13] More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. *United States v. United States Gypsum Co., 438 U.S. 422*; *Automatic Canteen Co. of America v. FTC, supra, at 74*.

In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that **[****22]** ***HN8***[] the exchange of price information by competitors violates the Sherman Act. *United States v. Container Corp., 393 U.S. 333*. Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers. [14]

Ironically, the Commission itself, in dismissing the charge under § 5 of the Federal Trade Commission Act in this case, recognized the dangers inherent in a duty of affirmative disclosure:

"The imposition of a duty **[****23]** of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is **[*81]** intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest.

. . . .

"We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." *87 F. T. C. 1047, 1050-1051*.

The effect of the finding that the **[***164]** same conduct of the petitioner violated *§ 2 (f)*, however, is to impose the same duty of affirmative disclosure which the Commission condemned as anticompetitive, "contrary to the public interest," and "contrary to normal business practice," in dismissing the charge under § 5 of the Federal Trade Commission Act. Neither the Commission nor the Court of Appeals offered any explanation for this apparent anomaly.

As in the *Automatic Canteen* case, we decline to adopt a construction of *§ 2 (f)* that is contrary to its plain meaning and would lead **[****24]** to anticompetitive results. Accordingly, we hold that ***HN9***[] a buyer who has done no more than accept the lower of two prices competitively offered does not violate *§ 2 (f)* provided the seller has a meeting-competition defense. [15]

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[14] A duty of affirmative disclosure might also be difficult to enforce. In cases where a seller offers differing quantities or a different quality product, or offers to serve the buyer in a different manner, it might be difficult for the buyer to determine when disclosure is required.

[15] In *Kroger Co*. v. *FTC, 438 F.2d 1372*, the Court of Appeals for the Sixth Circuit held that a buyer who induced price concessions by a seller by making deliberate misrepresentations could be liable under *§ 2 (f)* even if the seller has a meeting-competition defense.

This case does not involve a "lying buyer" situation. The complaint issued by the FTC alleged that "A&P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact." The complaint did not allege that Borden's second bid was induced by any misrepresentation. The Court of Appeals recognized that the *Kroger* case involved a "lying buyer," but stated that there was no meaningful distinction between the situation where "the buyer lies or merely keeps quiet about the nature of the competing bid." *557 F.2d 971, 983*.

Despite this background, the respondent argues that A&P did engage in misrepresentations and therefore can be found liable as a "lying buyer" under the rationale of the *Kroger* case. The misrepresentation relied upon by the respondent is a statement allegedly made by a representative of A&P to Borden after Borden made its second bid which would have resulted in annual savings to A&P of $ 820,000. The A&P representative allegedly told Borden to "sharpen your pencil a little bit because you are not quite there." But the Commission itself referred to this comment only to note its irrelevance, and neither the Commission nor

[**25] [*82] [**934]** IV

Because both the Commission and the Court of Appeals proceeded on the assumption that a buyer who accepts the lower of two competitive bids can be liable under *§ 2 (f)* even if the seller has a meeting-competition defense, there was not a specific finding that Borden did in fact have such a defense. But it quite clearly did.

A

LEdHN[4][] [4]***HN10***[] The test for determining when a seller has a valid meeting-competition defense is whether a seller can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 759-760*. "A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the *§ 2 (b)* defense." *United States* ***[*83]*** *v. United States Gypsum Co., 438 U.S. 422, 453*.[16] **[***165] [****26]** Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition. *Id., at 454*.

B

LEdHN[5][] [5] **[****27]** Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid. The petitioner, despite its longstanding relationship with Borden, was dissatisfied with Borden's first bid and solicited offers from other dairies. The subsequent events are aptly described in the opinion of the Commission:

"Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy that was lower than Borden's August 13 offer. On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, 'I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park.' Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $ 50,000 improvement in Borden's bid 'would not be a drop in the [bucket].' Contrary to its usual practice, A&P then offered Borden the opportunity **[*84]** to submit another bid." *87 F. T. C., at 1048* (Footnotes and record citations omitted.)

Thus, Borden was informed by the petitioner that it was in danger of losing its **[****28] [**935]** A&P business in the Chicago area unless it came up with a better offer. It was told that its first offer was "not even in the ball park" and that a $ 50,000 improvement "would not be a drop in the bucket." In light of Borden's established business relationship with the petitioner, Borden could justifiably conclude that A&P's statements were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with the petitioner.

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the Court of Appeals mentioned it in considering the *§ 2 (f)* charge against A&P. This is quite understandable, since the comment was allegedly made *after* Borden made its second bid and therefore cannot be said to have induced the bid as in the *Kroger* case.

Because A&P was not a "lying buyer," we need not decide whether such a buyer could be liable under *§ 2 (f)* even if the seller has a meeting-competition defense.

[16] Recognition of the right of a seller to meet a lower competitive price in good faith may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers. As the Court stated in *Standard Oil Co*. v. *FTC, 340 U.S., at 249*:

"We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."

Borden was unable to ascertain the details of the Bowman bid. It requested more information about the bid from the petitioner, but this request was refused. It could not then attempt to verify the existence and terms of the competing offer from Bowman without risking Sherman Act liability. *United States v. United States Gypsum Co., supra.* Faced with a substantial loss of business and unable to find out the precise details of the competing bid, Borden made another offer stating that it was doing so in order to meet competition. Under these circumstances, the conclusion is virtually inescapable that in making that offer Borden acted in a reasonable and good-faith effort to meet **[****29]** its competition, **[***166]** and therefore was entitled to a meeting-competition defense. [17]

[**30]**

[*85] ***LEdHN[1C]***[] [1C]Since Borden had a meeting-competition defense and thus could not be liable under *§ 2 (b)*, the petitioner who did no more than accept that offer cannot be liable under *§ 2 (f)*. [18]

Accordingly, the judgment is reversed.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Concur by: WHITE (In Part)

Dissent by: WHITE (In Part); MARSHALL (In Part)

Dissent

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but dissent from Part IV. Because it was thought the issue was irrelevant where the buyer knows that the price offered is lower than necessary to meet competition, neither the Commission nor the Court of Appeals decided whether **[****31]** Borden itself would have had a valid meeting-competition defense. The Court should not decide this question here, but should remand to the Commission, whose job it is initially to consider such matters.

For the reason stated by the Commission and the Court of Appeals, I am also convinced that the United States made a sufficient, unrebutted showing that Borden would not have a cost-justification defense to a Robinson-Patman Act charge.

MR. JUSTICE MARSHALL, dissenting in part.

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[17] The facts of this case are thus readily distinguishable from *Corn Products Co*. v. *FTC, 324 U.S. 726*, and *FTC v. A. E. Staley Mfg. Co., 324 U.S. 746*, in both of which the Court held that a seller had failed to establish a meeting-competition defense. In the *Corn Products* case, the only evidence to rebut the prima facie case of price discrimination was testimony by witnesses who had no personal knowledge of the transactions in question. Similarly, in the *Staley Mfg. Co*. case, unsupported testimony from informants of uncertain character and reliability was insufficient to establish the defense. In the present case, by contrast, the source of the information was a person whose reliability was not questioned and who had personal knowledge of the competing bid. Moreover, Borden attempted to investigate by asking A&P for more information about the competing bid. Finally, Borden was faced with a credible threat of a termination of purchases by A&P if it did not make a second offer. All of these factors serve to show that Borden did have a valid meeting-competition defense. See *United States v. United States Gypsum Co., 438 U.S., at 454*.

[18] Because we hold that the petitioner is not liable under *§ 2 (f)*, we do not reach the question whether Borden might also have had a cost-justification defense under *§ 2 (a)*.

I agree with the Court that the Federal Trade Commission and the Court of Appeals applied the wrong legal standard in **[*86]** assessing A&P's liability under the Robinson-Patman Act. However, I cannot join the Court's interpretation of *§ 2 (f)* as precluding buyer liability under this Act unless the seller could also be found liable for price **[**936]** discrimination. Neither the language nor the sparse legislative history of *§ 2 (f)* justifies this enervating standard for the determination of buyer liability. To the contrary, the Court's construction disregards the congressional purpose to curtail the coercive practices of chainstores and other large buyers. **[***167]** Having formulated a new legal **[****32]** standard, the Court then applies it here in the first instance rather than remanding the case to the Commission. Given the numerous ambiguities in the record, I believe the Court thereby improperly arrogates to itself the role of the trier of fact.

I

Section 2 (f) provides that "[it] shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price *which is prohibited by this section*." (Emphasis added.) The Court interprets the italicized language as "plainly meaning" that a buyer can be found liable for knowingly inducing price discrimination only if his seller is first proved liable under *§§ 2 (a)* and *2 (b)*. *Ante*, at 76, 81. Under this construction, proceedings involving only the Commission and a buyer will turn upon proof of a seller's liability, and whenever a seller could successfully claim the meeting-competition defense, the buyer must be exonerated.

In my view, the language of *§ 2 (f)* does not compel this circuitous method of establishing buyer liability. *Sections 2 (a)* and *2 (b)* of the Act define the elements of price discrimination and the affirmative defenses available to sellers. When Congress extended liability to buyers **[****33]** who encourage price discrimination, a ready means of defining the prohibition was to rely on the elements and defenses already delineated in *§§ 2 (a)* and *2 (b)*. Thus, the phrase "which is prohibited by this section" in *§ 2 (f)* incorporates these elements and **[*87]** defenses by reference, making them applicable to buyers. So construed, *§ 2 (f)* simply means that the same elements of a prima facie case must be established and the same basic affirmative defenses available, whether buyer or seller liability is in issue. The section does not require that another party actually satisfy all of the conditions of *§§ 2 (a)* and *2 (b)* before buyer liability can even be considered. Determining buyer and seller liability independently, I believe, places less strain on the "plain meaning" of the language of *§ 2 (f)* than does the absolutely derivative standard the majority announces today.

In construing *§ 2 (f)*, the Court relies on Congress' delay in adding the section to the final bill and on a remark by Representative Utterback during the legislative debates. *Ante*, at 75-77, and n. 10. The delay provides little logical justification for the Court's interpretation; rather, it more **[****34]** likely reflects Congress' late realization that halting the abusive practices of buyers [1] could not be accomplished solely through imposition of liability on sellers. Representative Utterback's statement, 80 Cong. Rec. 9419 (1936), amounts to a slight paraphrase of *§ 2 (f)* and in no way supports **[***168]** the Court's derivative standard.

[**35]** I agree with the Court's suggestion, *ante*, at 80, that we must resolve the dilemma confronting a buyer who properly invites a seller to meet a competitor's price and then fortuitously **[*88]** obtains a lower bid. Congress could not have expected the buyer to choose between asking the seller to increase the bid to a specific price or accepting the lower bid and facing liability under *§ 2 (f)*. Rather, it must have intended some accommodation **[**937]** for buyers who act in good faith yet receive bids that beat competition. This does not mean, however, that a buyer should be liable under *§ 2 (f)* only if his seller also would be liable. That solution to the buyer's dilemma would enable him to manufacture his own defense by misrepresenting to a seller the response needed to meet a

[1] See S. Rep. No. 1502, 74th Cong., 2d Sess. (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3-7, 17 (1936); H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936); FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); *FTC v. Henry Broch & Co., 363 U.S. 166, 168-169 (1960)*; W. Patman, Complete Guide to the Robinson-Patman Act 7-10 (1963); F. Rowe, Price Discrimination Under the Robinson-Patman Act 8-14 (1962). See generally Hearings on Price Discrimination (S. 4171) before a Subcommittee of the Senate Committee on the Judiciary, 74th Cong., 2d Sess. (1936); Hearings on H. R. 8442, H. R. 4995, and H. R. 5062 before the House Committee on the Judiciary, 74th Cong., 1st Sess. (1935).

competitor's bid and then allowing the seller to rely in good faith on incorrect information. The Court purports to reserve this "lying buyer" issue, *ante*, at 81-82, n. 15, but the derivative standard it adopts today belies the reservation. If "prohibited by this section" means that a buyer's liability depends on that of the seller, then absent seller liability, the buyer's conduct and bad **[****36]** faith are necessarily irrelevant.

I would hold that under § 2 (f), the Robinson-Patman Act defenses must be available to buyers on the same basic terms as they are to sellers. To be sure, some differences in the nature of the defenses would obtain because of the different bargaining positions of sellers and buyers. With respect to the meeting-competition defense at issue here, a seller can justify a price discrimination by showing that his lower price was offered in "good faith" to meet that of a competitor. *Ante*, at 82-83; *United States v. United States Gypsum Co., 438 U.S. 422, 450-455 (1978)*. In my view, a buyer should be able to claim that defense -- independently of the seller -- if he acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happens to beat the competitor's. But a buyer who induces the lower bid by misrepresentation should not escape Robinson-Patman Act liability. See *Kroger Co*. v. *FTC, 438 F.2d 1372* (CA6) (Clark, J.), cert. denied, *404 U.S. 871 (1971)*. This definition of the meeting-competition defense both extricates buyers from an impossible **[****37]** dilemma and respects the congressional **[*89]** intent to prevent buyers from abusing their market power to gain competitive advantage. [2]

[**38]** **[***169]** *Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953)*, is entirely consistent with this interpretation of § 2 (f). The issue there concerned the allocation of "the burden of coming forward with evidence under § 2 (f) of the Act," *346 U.S., at 65*, not the precise contours of the elements and defenses that determine the scope of buyer liability. *Automatic Canteen*'s general discussion of § 2 (f)'s substantive requirements, quoted *ante*, at 77-78, merely explains that the affirmative defenses "available to sellers" must also be available to buyers. Far from pronouncing that buyer liability is derivative, *Automatic Canteen* began with the observation that § 2 (f) is *"roughly the counterpart*, as to buyers, of sections of the Act dealing with discrimination by sellers." *346 U.S., at 63* (emphasis added). [3]

[**39]** **[*90]** **[**938]** II

In my judgment, the numerous ambiguities in the record dictate that this case be remanded to the Commission. The Court, however, avoids a remand by concluding in the first instance that A&P's seller necessarily had a meeting-competition defense. [4] In so doing, the Court usurps the factfinding function best performed by the

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[2] See S. Rep. No. 1502, 74th Cong., 2d Sess., 3-4, 7 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3-7, 14-17 (1936); Patman, *supra*, at 7-10, 148-151; Rowe, *supra*, at 8-23.

The Court recently noted in *United States v. United States Gypsum Co., 438 U.S. 422, 455 n. 30 (1978)*, that "[it] may also turn out that sustained enforcement of § 2 (f) . . . will serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2 (b)." (Citation omitted.) But if neither a buyer nor a seller can be liable when the seller relies in good faith on the buyer's misrepresentations, then enforcement of § 2 (f) will not "bolster the credibility" of buyers. Thus, the derivative standard of liability adopted by the Court today is inconsistent with the premise underlying the Court's suggestion in *United States Gypsum*, see Note, The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 288, 291-294 (1978), and it eliminates one means of reassuring sellers that they may rely on buyer representations.

[3] Given this preface to *Automatic Canteen*, language in that opinion provides little support for the Court's adoption today of a derivative standard with respect to the buyer's meeting-competition defense. Moreover, to the extent the majority believes its resort to literal construction of § 2 (f) forecloses further inquiry, it ignores the broader teaching of *Automatic Canteen*. That case adopted a common-sense approach for interpreting the often ambiguous Robinson-Patman Act, tempering a "merely literal reading of the language" with considerations of "fairness and convenience" when necessary to achieve Congress' purpose. *346 U.S., at 79*, and n. 23. On that basis, *Automatic Canteen* allocated to the Commission the burden of production regarding a buyer's cost-justification defense, even though the Commission does not bear that burden in a proceeding against a seller. *Id., at 75-76*; *FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948)*. Indeed, the Court's interpretation of § 2 (f) today, which places buyers in the litigating position of their sellers, may also be incompatible with *Automatic Canteen*'s specific holding on the burden of production.

Commission. [5] Neither the Administrative Law Judge, the Commission, nor the Court of Appeals determined that Borden would have been entitled to claim the meeting-competition defense. Indeed, the Administrative Law Judge suggested the opposite, 87 F. T. C. 962, 1021 (1976), and the Commission stated:

"We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition **[*91]** defense, the record must demonstrate the existence of facts **[***170]** which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs. It should have asked A&P for more information **[****40]** about the competing bid. By not making the request, it was not acting prudently. As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs." 87 F. T. C. 1047, 1057 n. 19 (1976) (citations omitted; emphasis in original).

[**41]** Furthermore, if the Court truly intends to avoid deciding the "lying buyer" issue, then it should remand the case for determination of whether the exception applies here. Testimony before the Administrative Law Judge directly raised the possibility that A&P misled Borden to believe a still lower price was necessary than Borden had offered when it first responded to the Bowman bid. App. 117a-118a, 123a-124a, 141a-142a. [6] Both the Administrative Law **[**939]** Judge and the **[*92]** Commission credited that testimony, see 87 F. T. C., at 979, 1021-1022; 87 F. T. C., at 1049 n. 3, but since evidence of misrepresentation was not material under the standard they applied, there were no clear findings of fact on the point. Under these circumstances, this Court should not attempt to elide such testimony by the unsubstantiated conclusion that Borden's final bid was unaffected by any misrepresentation. *Ante*, at 81-82, n. 15; see n. 6, *supra*.

[**42]** Accordingly, I dissent from the Court's adoption of a derivative standard for determining buyer liability and its resolution of disputed factual issues without a remand.

References

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[4] Because the Court reverses the judgment without remanding for further consideration and does not expressly reach the merits of the cost-justification issue raised by A&P, *ante*, at 85 n. 18, I need not address that issue either.

[5] Considering the recent admonition in United States Gypsum, supra, at 456 n. 31, that "[the] case-by-case interpretation and elaboration of the § 2 (b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations," the Court's action is particularly inappropriate.

While I question the Court's decision to undertake resolution of this factual question, without even determining which party bore the burden of persuasion, I do not understand Part IV of its opinion as purporting to modify in any sense what was said last Term in *United States Gypsum* about the scope of the meeting-competition defense for sellers.

[6] The Court's opinion creates the impression that Borden submitted only two proposals, *ante*, at 81-82, n. 15, 83-84. In fact, A&P induced Borden to make a third proposal, even though the second was already more favorable than Bowman's.

When Borden initially responded to Bowman's bid, the A&P representative rejected Borden's offer on the ground that it included milk sold in glass gallon containers, whereas other bidders supposedly had not included that item. Actually, Bowman's bid had included glass gallons and A&P had subsequently decided against using glass containers. 87 F. T. C. 962, 979 (1976); App. 73a-74a, 116a-118a, 257a-260a, 774a-775a. The effect of forcing Borden to delete milk sold in glass gallons from the proposal without raising the overall bid, was to increase the savings to A&P on other products still covered because part of the promised savings had been derived from the sale of the cheaper glass gallons. See 87 F. T. C., at 979-980. In addition, while Borden was preparing a third proposal to reflect the deletion, A&P suggested that Borden make further price reductions, saying "'sharpen your pencil a little bit because you are not quite there.'" App. 118a. As a result, Borden reduced its prices still further to yield additional savings of approximately $ 5,000 to $ 8,000. The bid finally accepted by A&P incorporated these price reductions as well as those attributable to the deletion of glass gallons. See id., at 117a-118a, 123a-124a, 141a-142a.

Construction and application of "good faith meeting competition" defense of Clayton Act, as amended by Robinson-Patman Act (*15 USCS 13(b)*)

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 150

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:111

18 Am Jur Pl & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Form 29

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 13

US L Ed Digest, Restraints of Trade and Monopolies 36

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Robinson Patman Act

Annotation References:

Construction and application of "good faith meeting competition" defense of Clayton Act, as amended by Robinson-Patman Act (*15 USCS 13(b)*). **[****43]** *59 L Ed 2d 810*.

Robinson-Patman Act as construed by Supreme Court. *2 L Ed 2d 1737*.

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Group Life & Health Ins. Co. v. Royal Drug Co.

Supreme Court of the United States

October 11, 1978, Argued ; February 27, 1979, Decided

No. 77-952

Reporter

440 U.S. 205 *; 99 S. Ct. 1067 **; 59 L. Ed. 2d 261 ***; 1979 U.S. LEXIS 29 ****; 1979-1 Trade Cas. (CCH) P62,479

GROUP LIFE & HEALTH INSURANCE CO., AKA BLUE SHIELD OF TEXAS, ET AL. v. ROYAL DRUG CO., INC., DBA ROYAL PHARMACY OF CASTLE HILLS, ET AL.

Subsequent History: **[****1]** Petition For Rehearing Denied April 16, 1979.

Prior History: CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

Disposition: *556 F.2d 1375*, affirmed.

Core Terms

insurance business, Pharmacy, insurer, exemption, policyholders, McCarran-Ferguson Act, regulation, insurance company, underwriting, anti trust law, provider, plans, service-benefit, contracts, reliability, premiums, insurance industry, rates, benefits, costs, legislative history, participating, obligations, spreading, cooperative, drugs, insurance commissioner, transactions, agrees, risks

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN1[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See *15 U.S.C.S. § 1011*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN2[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The starting point in any case involving the meaning of a statute is the language of the statute itself.

Insurance Law > Contract Formation > General Overview

Insurance Law > Contract Formation

HN3[] **Insurance Law, Contract Formation**

The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Contract Formation > General Overview

HN4[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

In enacting the McCarran-Ferguson Act *15 U.S.C.S. § 1011*, Congress was concerned with: The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." The focus is on the relationship between the insurance company and the policyholder.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > Legislation > Enactment > Vetoes

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

HN5[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Congress provided in *15 U.S.C.S. § 1012(b)* that the antitrust laws shall be applicable unless the activities of insurance companies are the business of insurance and regulated by state law. Moreover, under *15 U.S.C.S. § 1013(b)* the Sherman Act, *15 U.S.C.S. § 1*, was made applicable in any event to acts of boycott, coercion, or intimidation. To allow the states time to adjust to the applicability of the antitrust laws to the insurance industry, Congress imposed a 3-year moratorium. After the expiration of the moratorium on July 1, 1948, however, Congress clearly provided that the antitrust laws would be applicable to the business of insurance to the extent that such business is not regulated by state law.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

HN6[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

While the power of the states to tax and regulate insurance companies was reaffirmed, the McCarran-Ferguson Act (the Act), *15 U.S.C.S. § 1011*, also established that the insurance industry would no longer have a blanket exemption from the antitrust laws. It is true that *§ 2 (b)* of the Act, *15 U.S.C.S. § 1012(b)* does create a partial exemption from those laws. Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN7[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

References to the meaning of the business of insurance in the legislative history of the McCarran-Ferguson Act, *15 U.S.C.S. § 1011*, strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN8[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Congress certainly did not intend the definition of the business of insurance to be broader than its commonly understood meaning.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Interpretation

HN9[] **Antitrust & Trade Law, Exemptions & Immunities**

Exemptions from the antitrust laws are to be narrowly construed. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

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

HN10[] **Collectives & Cooperatives, Capper-Volstead Act**

An exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties.

Lawyers' Edition Display

Decision

Insurer-pharmacy agreements implementing prescription drug benefit for insurer's policyholders, held not exempt from antitrust laws as "business of insurance" under McCarran-Ferguson Act (*15 USCS 1012(b)*).

Summary

In order to implement provisions of its insurance policies which entitled policyholders to obtain prescription drugs, a Texas insurance company entered into agreements with pharmacies in Texas whereby the pharmacies agreed to furnish the insurer's policyholders with prescription drugs at the price of two dollars per prescription and the insurance company agreed to reimburse the pharmacies for their costs in acquiring prescription drugs sold to policyholders. Alleging violations of federal antitrust laws arising from the insurer-pharmacy agreements, certain pharmacies which had not entered into agreements with the insurance company brought an action in the United States District Court for the Western District of Texas, claiming that the insurance company and pharmacies with which it had entered into agreements had violated 1 of the Sherman Act (*15 USCS 1*) by agreeing to fix the retail prices of drugs and pharmaceuticals, and that their activities had caused the insurance company's policyholders not to deal with certain of the plaintiffs. The District Court granted summary judgment to the defendants on the ground that the agreements were exempt from federal antitrust laws under the McCarran-Ferguson Act (*15 USCS 1011 et seq.*), which, through 2(b) of the Act (*15 USCS 1012(b)*), renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception of 3(b) of the Act (*15 USCS 1013(b)*), the District Court having found that for purposes of 2(b) of the Act, the agreements constituted the "business of insurance" regulated by Texas and that the agreements were not "boycotts" within the meaning of 3(b) of the *Act (415 F Supp 343*). The United States Court of Appeals for the Fifth Circuit reversed on appeal, holding that the agreements in question were not the "business of insurance" within the meaning of 2(b) of the *Act (556 F2d 1375*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stewart, J., joined by White, Blackmun, Rehnquist, and Stevens, JJ., it was held that the agreements between the insurance company and the pharmacies did not constitute the "business of insurance" for purposes of 2(b) of the McCarran-Ferguson Act, since the agreements did not involve any underwriting or spreading of risks, but were mere arrangements for the purchase of goods and services by the insurance company, and since the agreements were not between an insurer and insureds, but were separate contractual arrangements between the insurance company and parties engaged in the sale and distribution of goods and services other than insurance.

Brennan, J., joined by Burger, Ch. J., and Marshall, and Powell, JJ., dissenting, expressed the view that some "provider" agreements negotiated to carry out an insurer's policy obligations to its insureds should be considered part of the "business of insurance" for purposes of the McCarran-Ferguson Act, and that the specific agreements at issue in the case at bar should be considered part of such business.

Headnotes

MONOPOLIES §29 > McCarran-Ferguson Act -- "business of insurance" -- exemption from federal antitrust laws -- agreements between insurer and pharmacies -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]

Agreements between an insurance company and pharmacies, whereby the pharmacies agree to furnish the insurer's policyholders with prescription drugs at a stated, fixed, relatively small price per prescription in return for the insurer's agreeing to reimburse the pharmacies for their costs in acquiring such prescription drugs do not constitute the "business of insurance" for purposes of the McCarran-Ferguson Act (*15 USCS 1011 et seq.*), which operates so as to render the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law (*15 USCS 1012(b)*) and is not subject to the Act's "boycott" exception (*15 USCS 1013(b)*), since the agreements do not involve any underwriting or spreading of risk, but constitute mere arrangements for the purchase of goods and services by the insurer, and since the agreements are not between an insurer and insureds, but are separate contractual arrangements between an insurance company and parties engaged in the sale and distribution of goods and services other than insurance. (Brennan, J., Burger, Ch. J., and Marshall and Powell, JJ., dissented from this holding.)

COMMERCE §103(1) > STATUTES §163 > construction -- McCarran-Ferguson Act -- language -- > Headnote:
LEdHN[2][] [2]

The starting point in a case involving construction of the McCarran-Ferguson Act (*15 USCS 1011 et seq.*), setting forth the policy favoring regulation of the business of insurance by the state--like the starting point in any case involving the meaning of a statute--is the language of the statute itself.

MONOPOLIES §29 > McCarran-Ferguson Act -- exemption from federal antitrust laws -- "business of insurance" -- > Headnote:
LEdHN[3][] [3]

Section 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), declaring that a federal statute is not to be construed to invalidate state laws enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance, does not exempt the business of insurance companies from the scope of federal antitrust laws, the exemption being for the "business of insurance," not the "business of insurers"; 2(b) applies only when insurance companies are engaged in the "business of insurance."

INSURANCE §46 > contract -- primary elements -- policyholder's risk -- > Headnote:
LEdHN[4][] [4]

The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk.

INSURANCE §1 > underwriting or spreading of risk -- indispensable characteristic -- > Headnote:
LEdHN[5][] [5]

Underwriting or spreading of risk is an indispensible characteristic of insurance.

COMMERCE §103(1) > McCarran-Ferguson Act -- "business of insurance" -- agreement necessary for insurer's providing insurance -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

Simply because an agreement between an insurer and another party is necessary in order for the insurer to provide insurance does not mean that such an agreement constitutes the "business of insurance" for purposes of the provisions of 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), which direct that a federal law is not to be construed to invalidate, impair, or supersede state laws enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance; and thus, the fact that a line of credit agreement or other commercial arrangement with a bank is necessary in order for an indemnity insurer to pay off monetary claims does not mean that such an agreement constitutes the "business of insurance."

COMMERCE §103(1) > McCarran-Ferguson Act -- "business of insurance" -- acquisitions by insurer -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

For purposes of the provisions of 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), providing that a federal law is not to be construed to invalidate, impair, or supersede any state laws enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance, an insurance company's acquisition of a manufacturer or a retail chain in order to lower the insurer's cost of meeting its obligations to policyholders does not constitute the "business of insurance."

MONOPOLIES §7 > federal antitrust laws -- exemption -- construction -- > Headnote:
LEdHN[8][] [8]

The rule that exemptions from federal antitrust laws are to be narrowly construed is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.

MONOPOLIES §46 > labor unions -- pattern bargaining -- > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]

A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union interests, seek to obtain the same terms from other employers without violating federal antitrust laws.

MONOPOLIES §9 > labor unions -- agreement for pattern bargaining -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

A union forfeits its exemption from federal antitrust laws when it agrees with one set of employers to impose a certain wage scale on other bargaining units; one group of employers may not conspire to eliminate competitors from an industry, and the union is liable with the employers if it becomes a party to the conspiracy.

Syllabus

Petitioner Blue Shield, a Texas insurance company, offers policies that entitle the insured to obtain prescription drugs. The insured may obtain the drugs from a pharmacy participating in a "Pharmacy Agreement" with Blue Shield (in which case the insured must pay only $ 2 for every prescription drug, with the remainder of the cost being paid directly by Blue Shield to the participating pharmacy) or from a nonparticipating pharmacy (in which case the insured pays the full price and may be reimbursed by Blue Shield for 75% of the difference between that price and $ 2). Blue Shield offered to enter into a Pharmacy Agreement with each licensed **[****2]** pharmacy in Texas, the participating pharmacy to agree to furnish Blue Shield policyholders prescription drugs at $ 2 each, with Blue Shield to agree to reimburse the pharmacy for its cost in acquiring the drug. Respondents, nonparticipating pharmacies, brought this antitrust action alleging that Blue Shield and three participating pharmacies, also petitioners, had violated *§ 1* of the Sherman Act by entering into agreements fixing the retail prices of drugs and that petitioners' activities had caused Blue Shield policyholders to boycott certain respondents. The trial court granted petitioners summary judgment on the ground that the agreements are exempt from the antitrust laws under *§ 2 (b)* of the McCarran-Ferguson Act (Act), because the agreements are the "business of insurance," are regulated by Texas, and are not boycotts within the meaning of the Act. The Court of Appeals reversed. *Held*: The Pharmacy Agreements are not the "business of insurance" within the meaning of *§ 2 (b)*. Pp. 210-233.

(a) *Section 2 (b)* exempts the "business of insurance," not the "business of insurers." Pp. 210-211.

(b) A primary element of an insurance contract is the underwriting or spreading **[****3]** of risk, *SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65*, but that element is not involved in the Pharmacy Agreements, which are merely arrangements for the purchase of goods and services by Blue Shield, enabling it to effect cost savings. Pp. 211-215.

(c) The Pharmacy Agreements involve contractual arrangements between Blue Shield and the pharmacies, not its policyholders. Pp. 215-217.

(d) The legislative history of the Act confirms the conclusion that the "business of insurance" was understood by Congress to involve the underwriting of risk and the relationship and transactions between insurance companies and their policyholders, and no legislative intention is disclosed to exempt agreements or transactions between insurance companies and entities outside the insurance industry. Moreover, at the time of the Act's enactment health-care plans such as those of Blue Shield were not considered to constitute insurance at all, and it is difficult to assume that Congress, contrary to that contemporary view, could have considered such plans to be the "business of insurance" within the meaning of the Act. Even if Congress did consider certain aspects of such plans **[****4]** to be the "business of insurance," however, it still does not follow that the Pharmacy Agreements in this case are within the meaning of that phrase. Pp. 217-230.

(e) This result is consistent with the principle that exemptions from the antitrust laws are to be construed narrowly. Pp. 231-233.

Counsel: Keith E. Kaiser argued the cause for petitioners. With him on the briefs were J. Burleson Smith, R. Laurence Macon, Richard A. Whiting, Charles R. Shaddox, D. Dudley Oldham, Martin D. Beirne, William R. Pakalka, William C. Church, Jr., and Richard B. Moore.

Joel H. Pullen argued the cause and filed a brief for respondents.

Richard A. Allen argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General McCree, Assistant Attorney General Shenefield, and Barry Grossman. *

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* Briefs of amici curiae urging reversal were filed by Thomas E. Kauper, John A. Fillion, M. Jay Whitman, J. Albert Woll, and Laurence Gold for the International Union, UAW, et al.; by James W. Rankin and Roger G. Wilson for the Blue Shield Assn.; by Peter F. Sloss and Godfrey L. Munter, Jr., for the California Dental Service et al.; by Chester Inwald for the District Council 37 Health & Security Plan et al.; by John H. Pickering, Arnold M. Lerman, C. Loring Jetton, Jr., and William H. Crabtree for the Motor Vehicle Manufacturers Assn. of the United States, Inc.; and by Stephen F. Gordon for the United Federation of Teachers Welfare Fund.

Briefs of amici curiae urging affirmance were filed by William J. Brown, Attorney General, and Charles D. Weller for the State of Ohio; by Donald A. Randall and Jonathan T. Howe for the Automotive Service Councils, Inc.; by Richard M. Rindler and Phillip

[**5]**

Judges: STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which BURGER, C. J., and MARSHALL and POWELL, JJ., joined, post, p. 233.

Opinion by: STEWART

Opinion

[*207] [*266] [**1071]** MR. JUSTICE STEWART delivered the opinion of the Court.

LEdHN[1A][] [1A]The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a Federal District Court against the petitioners, Group Life and Health Insurance Co., known as Blue Shield of Texas (Blue Shield), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated *§ 1* of the Sherman Act, *15 U. S. C. § 1*, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the ground that the challenged **[****6]** agreements are exempt from the antitrust laws under *§ 2 (b)* of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 61 Stat. 448, *15 U. S. C. § 1012 (b)*, because the agreements are the "business of insurance," are "regulated by [Texas] law," and are not "boycotts" within the meaning of § 3 (b) of the Act, 59 Stat. 34, *15 U. S. C.* ***[*208]*** *§ 1013 (b)*. [1] **[****7]** *415 F.Supp. 343 (WD Tex.)*. **[**1072]** The Court of Appeals for the Fifth Circuit reversed the judgment. Holding that the agreements in question are not the "business of insurance" within the meaning of *§ 2 (b)*, the appellate

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A. Proger for the National Assn. of Retail Druggists; by A. Stewart Kerr for the Pharmacists Guild of Michigan; and by Roger Tilbury and Henry Kane for the Portland Retail Druggists Assn., Inc.

Briefs of amici curiae were filed by Max Thelen, Jr., for the Kaiser-Permanente Medical Care Program; and by Jon S. Hanson, Richard A. Hemmings, and David J. Brummond for the National Assn. of Insurance Commissioners.

[1] The Act provides in relevant part:

HN1[] "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"*Sec. 2*. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, . . . and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 33-34, as amended, 61 Stat. 448.

court did not reach the other questions decided by the trial court. 556 F.2d 1375. We granted certiorari because of intercircuit conflicts as to the meaning of the phrase "business of insurance" in § 2 (b) of the *Act.* [2] *435 U.S. 903*.

[*209] I

[*267]** Blue Shield offers insurance policies which entitle the policyholders to obtain prescription drugs. If the pharmacy selected by the insured has entered into a "Pharmacy Agreement" with Blue Shield, and is therefore a participating pharmacy, the insured is required to pay only $ 2 for every prescription drug. The remainder of the cost is paid directly by Blue Shield to the participating pharmacy. If, on the other hand, the insured selects a pharmacy which has not entered into a Pharmacy Agreement, and is therefore a nonparticipating pharmacy, he is required to pay the full price charged by the pharmacy. The insured may then **[****8]** obtain reimbursement from Blue Shield for 75% of the difference between that price and $ 2.

Blue Shield offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas. Under the Agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield's policyholders at $ 2 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy's cost of acquiring the amount of the drug prescribed. Thus, only pharmacies that can afford to distribute prescription drugs for less than this $ 2 markup can profitably participate in the plan. [3]

[**9]**

[*210] ***LEdHN[1B]***[] [1B]The only issue before us is whether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the "business of insurance" within the meaning of § 2 (b) of the McCarran-Ferguson Act. If that conclusion is correct, then the Agreements are not exempt from examination under the antitrust laws. [4] Whether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us. [5]

[**10]** **[***268]** **[**1073]** II

A

[2] The position of the Fifth Circuit is in conflict with that of the Third, Fourth, and District of Columbia Circuits. See *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 554 F.2d 1253 (CA3 1977); *Anderson* v. *Medical Service of District of Columbia*, 551 F.2d 304 (CA4 1977); *Proctor* v. *State Farm Mutual Automobile Ins. Co*., 182 U. S. App. D. C. 264, 561 F.2d 262 (1977).

[3] The *amicus curiae* brief of the United States provides a useful illustration of the operation of the Pharmacy Agreement:

"Suppose the usual and customary retail price for a quantity of Drug X charged both by 'participating' Pharmacy A and 'non-participating' Pharmacy B is $ 10.00, and the wholesale price (or acquisition cost) to both is $ 8.00. If an insured buys Drug X from Pharmacy A, the insured pays $ 2.00. Pharmacy A receives $ 2.00 from the insured and $ 8.00 from Blue Shield, or $ 10.00 total. If an insured buys Drug X from Pharmacy B, the insured pays Pharmacy B $ 10.00, and receives $ 6.00 (75 percent of the difference between the retail price and $ 2.00) from Blue Shield. While Pharmacy B receives the same as Pharmacy A, the insured must pay $ 4.00 for the drug and also must take steps to obtain reimbursement.

"If the pharmacy's acquisition cost for the drug is $ 5.00 rather than $ 8.00, the situations of Pharmacy B and the insured are unchanged. But now Pharmacy A will receive only $ 5.00 from Blue Shield, for a total of $ 7.00."

[4] Even if they are the "business of insurance," the Agreements are exempt from the antitrust laws only if they are also "regulated by State law" within the meaning of § 2 (b) and not "boycotts" or other conduct described by § 3 (b). See n. 1, *supra*. See also *St. Paul Fire & Marine Ins. Co*. v. Barry, 438 U.S. 531.

[5] It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal. The United States in its *amicus* briefs urging affirmance has taken the position that the Pharmacy Agreements probably do not violate the antitrust laws, though recognizing that that issue is not presented here.

LEdHN[1C][] [1C]**LEdHN[2]**[] [2]**LEdHN[3]**[] [3]As the Court stated last Term in *St. Paul Fire & Marine Ins. Co*. v. *Barry, 438 U.S. 531, 541*, [6] the starting point in a case involving construction of the McCarran-Ferguson Act, like **HN2**[] the starting point in any case involving the meaning of a statute, is the language of the statute itself. See also *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756* (POWELL, J., concurring). It is important, therefore, to observe at the outset that the statutory language in question **[*211]** here does not exempt the business of insurance companies from the scope of the antitrust laws. The exemption is for the "business of insurance," not the "business of insurers":

"The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language **[****11]** refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply." *SEC v. National Securities, Inc., 393 U.S. 453, 459-460*. (Emphasis in original.)

Since the law does not define the "business of insurance," the question for decision is whether the Pharmacy Agreements fall within the ordinary understanding of that phrase, illumined by any light to be found in the structure of the Act and its legislative history. Cf. *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199*, and n. 19.

B

LEdHN[4][] [4] **[****12]** **HN3**[] The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959). See also R. Keeton, Insurance Law § 1.2 (a) (1971) ("Insurance is an arrangement for transferring and distributing risk"); 1 G. Richards, The Law of Insurance *§ 2* (W. Freedman 5th ed. 1952). [7]

[**13]**

[*212] **LEdHN[5]**[] [5]The significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this Court in *SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65*. That case involved several corporations, representing themselves as "life insurance" companies, that offered variable annuity contracts for sale in interstate commerce. **[***269]** The companies were regulated by the insurance commissioners of several States. Purchasers of the contracts were not entitled to any fixed return, but only to a pro rata participation in the investment portfolios of the companies. Thus a policyholder could receive substantial sums if investment decisions were successful, but very little if they were not. One of the questions presented was whether these variable annuity contracts were the "business of insurance" under *§ 2 (b)* of the McCarran-Ferguson Act. [8] The

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[6] The issue in that case was the meaning of the "boycott" exception in § 3 (b) of the Act. The issue here, the meaning of the "business of insurance" exemption in *§ 2 (b)* of the Act, was not before the Court.

[7] Webster's New International Dictionary of the English Language 1289 (unabr. 2d ed. 1958) defines insurance as:

"Act of insuring, or assuring, against loss or damage by a contingent event; a contract whereby, for a stipulated consideration, called a *premium*, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a *risk*, the contract being set forth in a document called the *policy*. . . ."

[8] The issue in *SEC* v. *Variable Annuity Life Ins. Co*. was whether the variable annuity contracts were subject to regulation under the Securities Act of 1933 and the Investment Company Act of 1940. The Court held that the contracts were subject to such

Court held that the **[**1074]** annuity contracts were not insurance, even though they were regulated as such under state law and involved actuarial prognostications of mortality. Central to the **[****14]** Court's holding was the premise that "the concept of 'insurance' involves some investment risk-taking on the part of the company." *359 U.S., at 71*. Since the variable annuity contracts offered no guarantee of fixed income, they placed all the investment risk on the annuitant and none on the company. *Ibid*. The Court concluded, therefore, that the annuities involved "no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *Id., at 73* (footnote omitted). Cf. *German Alliance Ins. Co*. v. *Lewis, 233 U.S. 389, 412* ("The effect of insurance -- indeed **[*213]** it has been said to be its fundamental object -- is to distribute the loss over as wide an area as possible").

[**15]** The petitioners do not really dispute that the underwriting or spreading of risk is a critical determinant in identifying insurance. Rather they argue that the Pharmacy Agreements do involve the underwriting of risks. As they state in their brief:

"In *Securities and Exchange Commission v. Variable Annuity Life Insurance Co., 359 U.S. 65, 73 (1959)*, the 'earmark' of insurance was described as the 'underwriting of risks' in exchange for a premium. Here the risk insured against is the possibility that, during the term of the policy, the insured may suffer a financial loss arising from the purchase of prescription drugs, or that he may be financially unable to purchase such drugs. In consideration of the premium, Blue Shield assumes this risk by agreeing with its insureds to contract with Participating Pharmacies to furnish the needed drugs and to reimburse the Pharmacies for each prescription filled for the insured. In short, each of the fundamental elements of insurance is present here -- the payment of a premium in exchange for a promise to indemnify the insured against losses upon the happening of a specified contingency."

LEdHN[6A][] [6A] **[****16]** The fallacy of the petitioners' position is that they confuse the obligations **[***270]** of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations. [9] **[****17]** The **[*214]** benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $ 2 charge for each prescription. [10] So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies. [11]

[1075]** The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such **[****18]**

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regulation as securities since they were not "insurance" or "annuity" policies specifically exempt from the Securities Act, and because they were not the "business of insurance" within the meaning of the McCarran-Ferguson Act.

[9] ***LEdHN[6B]***[] [6B]It is true that some type of provider agreement is necessary for a service benefit plan to exist. But it does not follow that because an agreement is necessary to provide insurance, it is also the "business of insurance." Assume, for example, that an indemnity insurer must have a line of credit or other commercial arrangement with a bank in order to pay off monetary claims. Despite the fact that the line of credit is "necessary" for the insurer to fulfill its obligations, it is nevertheless not the "business of insurance."

[10] Thus, the benefit promised to Blue Shield policyholders under the policy is that they "shall be required to pay no more than the drug deductible for each of such covered drugs."

[11] As the Court of Appeals stated:

"Blue Shield's policyholders are basically unconcerned with the contract between the insurer and the Participating Pharmacy. They are obligated to pay a Participating Pharmacy two dollars ($ 2.00) for a prescription regardless of the presence or absence of a price fixing arrangement. Thus, by minimizing costs and maximizing profits, the Participating Pharmacy Agreements inure principally to the benefit of Blue Shield." *556 F.2d 1375, 1381*.

costsavings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance." [12]

[*215] ***LEdHN[7A]***[] [7A]The Pharmacy Agreements are thus legally indistinguishable from countless other business arrangements that may be made by insurance companies to keep their costs low and thereby also keep low the level of premiums charged to their policyholders. Suppose, for example, that an insurance company entered into a contract with a large retail drug chain whereby its policyholders **[****19]** could obtain drugs under their policies only from stores operated by this chain. The justification for such an agreement would be administrative and bulk-purchase savings resulting from obtaining all of the company's drug needs from a single dealer. Even though these cost savings might ultimately be reflected in lower premiums to policyholders, would such a contract be the "business of insurance"? Or suppose that the insurance company should decide **[***271]** to acquire the chain of drug stores in order to lower still further its costs of meeting its obligations to its policyholders. Such an acquisition would surely not be the "business of insurance." *SEC v. National Securities, Inc., 393 U.S. 453*. [13]

[**20]** C

Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured. ***HN4***[] In enacting the McCarran-Ferguson Act Congress was concerned with:

"The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, **[*216]** and enforcement -- these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was -- it was on the relationship between the insurance company and the policyholder." *SEC v. National Securities, Inc., supra, at 460*.

The Pharmacy Agreements are not "between insurer and insured." They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance.

The petitioners argue that nonetheless the Pharmacy Agreements so closely affect **[****21]** the "reliability, interpretation, and enforcement" of the insurance contract and "relate so closely to their status as reliable insurers **[**1076]** " as to fall within the exempted area. [14] This argument, however, proves too much.

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[12] As the United States points out in its *amicus* brief, there is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk.

[13]

LEdHN[7B][] [7B]In *National Securities*, the Arizona Director of Insurance approved, pursuant to statute, a merger between two insurance companies. This Court held, however, that the Arizona statute was not enacted for the purpose of regulating the "business of insurance." *393 U.S., at 460*. If a merger between two insurance companies is not the "business of insurance," then an acquisition by an insurer of a manufacturer or a retail chain, although conceptually indistinguishable from the Pharmacy Agreements in this case, is also not the "business of insurance."

[14] The petitioners argue that the absence of the Pharmacy Agreements "which permit the insured to obtain drugs on the terms and for the amounts stated in the policies would constitute a breach of the contract of insurance." But the benefit Blue Shield provides its policyholders is the assurance that they can obtain drugs in return for a direct maximum payment of $ 2 for each prescription. The Pharmacy Agreements are separate contractual arrangements between Blue Shield and certain pharmacists fixing the cost Blue Shield will pay for drugs. The wholly separate nature of the two categories of agreements is in no way affected by the fact that the Pharmacy Agreements are indirectly referred to in the insurance policies.

At the most, the petitioners have demonstrated that the Pharmacy **[****22]** Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a **[*217]** reliable insurer. The manager of an insurance company is no different from the manager of any enterprise with the responsibility to minimize costs and maximize profits. If terms such as "reliability" and "status as a reliable insurer" were to be interpreted in the broad sense urged by **[***272]** the petitioners, almost every business decision of an insurance company could be included in the "business of insurance." Such a result would be plainly contrary to the statutory language, which exempts the "business of insurance" and not the "business of insurance companies."

III

A

LEdHN[1D][] [1D]The conclusion that the Pharmacy Agreements are not the "business of insurance" is fully confirmed by the legislative history of the McCarran-Ferguson Act. The law was enacted in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533*. **[****23]** The indictment in that case charged that the defendants had conspired to fix insurance rates and commissions, and had conspired to boycott and coerce noncooperating insurers, agents, and insureds. In the District Court the defendants had successfully demurred to the indictment on the ground that the insurance industry was not a part of interstate commerce subject to regulation under the *Commerce Clause*. [15] On direct appeal, this Court reversed the judgment, holding that the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the insurance industry from its coverage.

B

The primary concern of Congress in the wake of that decision was in enacting legislation that would ensure that **[*218]** the States would continue to have the ability to tax and regulate **[****24]** the business of insurance. [16] **[****25]** This concern is reflected in *§§ 1* **[**1077]** and *2 (a)* of the Act, [17] neither of which is involved in this case. A secondary concern was the applicability of the antitrust laws to the insurance industry. [18] **[****26]** Months

[15] Since the leading case of *Paul v. Virginia, 8 Wall. 168, 183*, it had been understood that "[issuing] a policy of insurance is not a transaction of commerce."

[16] S. Rep. No. 20, 79th Cong., 1st Sess., 2 (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess., 2-3 (1945). The problem was that if insurance was interstate commerce, then the constitutionality of state regulation and taxation would be questionable. As the House Report stated:

"Inevitable uncertainties . . . followed the handing down of the decision in the *Southeastern Underwriters Association* case . . . .

"[Your] committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when *such laws may subsequently be held unconstitutional* in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds." *Ibid*. (Emphasis added.)

[17] See text of statute at n. 1, *supra*.

[18] There is no question that the *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case. The power of the States to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without

before **[*219]** this Court's **[***273]** decision in *South-Eastern Underwriters* was announced, proposed legislation to totally exempt the insurance industry from the Sherman and Clayton Acts had been introduced in Congress. [19] Less than three weeks after the actual decision, the House of Representatives passed a bill which would also have provided the insurance industry with a blanket exemption from the antitrust laws, thus restoring the state of law that had existed before the decision in *South-Eastern Underwriters*. [20]

Congress, however, rejected this approach. [21] Instead of a total exemption, ***HN5***[] Congress provided in *§ 2 (b)* that the antitrust laws "shall be applicable" unless the activities of insurance companies are the business of insurance and regulated by state law. Moreover, under § 3 (b) the Sherman Act was made applicable in any event to acts of boycott, coercion, or intimidation. To allow the States time to adjust to the applicability of the antitrust laws to the insurance industry, **[*220]** Congress imposed a 3-year moratorium. [22] After the expiration of the moratorium on July 1, 1948, however, Congress clearly provided that the **[****27]** antitrust laws would be applicable to the business of insurance "to the extent that such business is not regulated by State law." [23]

By making the antitrust laws applicable to the insurance industry except as to conduct that is the business of insurance, regulated **[****28]** by state law, and not a boycott, Congress did not intend to and did not overrule the *South-Eastern Underwriters* **[**1078]** case. [24] ***HN6***[] While the power of the States **[***274]** to tax and regulate insurance companies was reaffirmed, the McCarran-Ferguson Act also established that the insurance industry would no longer have a blanket exemption from the antitrust laws. It is true that *§ 2 (b)* of the Act does create a

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fear of *Commerce Clause* attack. The question in the present case, however, is one under the quite different *secondary* purpose of the McCarran-Ferguson Act -- to give insurance companies only a limited exemption from the antitrust laws.

The repeated insistence in the dissenting opinion that the McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated is thus entirely correct -- and entirely irrelevant to the issue now before the Court. See n. 38, *infra*. For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the *Commerce Clause*. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

In short, the McCarran-Ferguson Act freed the States to continue to regulate and tax the business of insurance companies, in spite of the *Commerce Clause*. It did not, however, exempt the business of insurance companies from the antitrust laws. It exempted only "the business of insurance." See *SEC v. National Securities, Inc., 393 U.S. 453*.

[19] H. R. 3270, 78th Cong., 1st Sess. (1943); S. 1362, 78th Cong., 1st Sess. (1943). These bills would have provided that nothing in the Sherman or Clayton Acts "shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States."

[20] 90 Cong. Rec. 6565 (1944).

[21] The total exemption bill failed in the Conference Committee because of a fear that it could not pass in the Senate and in any event would be vetoed by the President. 91 Cong. Rec. 1087 (1945) (remarks of Rep. Hancock). Also important was the opposition of the National Association of Insurance Commissioners to a blanket antitrust exemption. 90 Cong. Rec. 8482 (1944).

[22] See n. 1, *supra*. The purpose of the moratorium was to allow the States three years to take steps to regulate the business of insurance. 91 Cong. Rec. 1443 (1945) (remarks of Sen. McCarran).

[23] *Ibid*. (remarks of Sen. Ferguson); McCarran, Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1, 34 A. B. A. J. 539, 540 (1948).

[24] That Congress did not intend to restore the law to what it had been before *South-Eastern Underwriters* is made dramatically clear in the following exchange between Senator McKellar and Senator Ferguson:

"Mr. McKELLAR. As I understand the bill its purpose and effect will be to establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court of the United States. Is that correct?

"Mr. FERGUSON. No." 91 Cong. Rec. 478 (1945).

See also *id., at 1444* (exchange between Sens. Pepper and McCarran).

partial exemption from those laws. Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws -- a concept that had prevailed before the *South-Eastern Underwriters* decision.

[**29]** C

HN7[] References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act **[*221]** strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." H. R. Rep. No. 873, 78th Cong., 1st Sess., 8-9 (1943). [25] See also S. Rep. No. 1112, 78th Cong., 2d Sess., 6 (1944); 90 Cong. Rec. 6526 (1944) (remarks of Rep. Hancock).

[**30]** Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws. The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the National Association of Insurance Commissioners on November 16, 1944. [26] The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill. [27] The report emphasized that the concern of the insurance commissioners was that smaller enterprises and insurers other than life insurance companies were unable to underwrite risks accurately, and it therefore concluded:

"For these and other reasons this subcommittee believes it would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws to apply to the insurance business. *To prohibit combined* ***[*222]*** *efforts for statistical and rate-making purposes would be a backward step in the development* **[****31]** *of a progressive business*. We do not regard it as necessary to labor this point any **[***275]** further because Congress itself recently recognized *the necessity for concert of action in the collection of statistical data and rate making* when it enacted the District of Columbia Fire Insurance Rating Act." *Id*., at A4405 (emphasis added).

The bill proposed by the NAIC enumerated seven specific practices to which the Sherman Act was not to apply. [28] **[****32]** Each of the specific practices involved intra-industry cooperative or concerted activities. **[**1079]** None involved contractual arrangements that insurance companies might make with providers of goods or services to reduce the costs to the companies of meeting their underwriting obligations to their policyholders. [29]

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[25] The recognition by Congress that the ability to control costs was not within the ability of insurance companies is further evidence that the Pharmacy Agreements, which are solely designed to minimize costs, are not insurance.

[26] 90 Cong. Rec. A4403-4408 (1944).

[27] 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney).

[28] 90 Cong. Rec. A4406 (1944). This specific list of exempted activities was not included in the law ultimately enacted.

[29] The dissenting opinion makes the argument that because Congress rejected bills that would have limited the "business of insurance" to a specific list of insurance company practices, Congress intended that the exemption it finally enacted be interpreted "broadly." Precisely the opposite is true.

At the time Congress was considering one of the early versions of the Act, H. R. 3270, 78th Cong., 1st Sess. (1943), which would have wholly exempted from the antitrust laws "the business of insurance or . . . acts in the conduct of that business," an amendment was introduced which would have exempted specific activities. 90 Cong. Rec. 6561 (1944). The proponent of the amendment, Representative Anderson, explained that its purpose was to provide broader protection than provided by H. R. 3270: "But I say to this House that some legislation should be passed which asserts the right of the States to control the questions of risks, rates, premiums, commissions, policies, investments, reinsurance, capital requirements, and items of that nature. It is for that purpose I have insisted upon bringing this at this time to the attention of the House. If you pass H. R. 3270 as it now stands and go back home and any of your insurance friends ask you what you did to safeguard the protection of

[**33] [*223]** The floor debates also focused simply on whether cooperative ratemaking should be exempt. Thus, Senator Ferguson, in explaining the purpose of the bill, stated:

"This bill would permit -- and I think it is fair to say that it is intended to permit -- rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses." 91 Cong. Rec. 1481 (1945).

The consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws. *Id., at 1444* and 1485 (remarks of Sen. O'Mahoney); **[***276]** 485 (remarks of Sen. Taft). [30] **[****35]** President Roosevelt, in signing the bill, also emphasized **[*224]** that the bill would allow cooperative **[****34]** rate regulation. He stated that "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation **[**1080]** of rates by affirmative action of the States." S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1944-1945 Vol., p. 587 (1950). [31] There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the "business of insurance." [32]

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insurance by the State, you must answer them in all truth that all you did was to pass a bill which provided antitrust protection for companies now under indictment."

The amendment was defeated. 90 Cong. Rec. 6562 (1944).

Thus, Congress rejected an amendment which exempted specific activities of insurance companies (not including anything remotely resembling the Pharmacy Agreements in this case) which was perceived to be broader than H. R. 3270. Since H. R. 3270 was itself broader than the Act as eventually enacted, it necessarily follows that the exemption of the Act is narrower than the bills which would have exempted specific practices. This pattern is consistent with the entire legislative history of the McCarran-Ferguson Act, which was characterized by a continual narrowing of the original blanket exemption.

[30] The dissenting opinion states that the "compelling explanation" for the lack of discussion of provider agreements in the legislative history was the congressional concern about fire insurance companies. *Post*, at 234, n. 2. However, input from all types of insurance companies was sought through the Insurance Commissioners of the various States "because the Commissioners were aware of the chaotic condition which exists at the present time." 91 Cong. Rec. 484 (1945) (remarks of Sen. Ferguson). Moreover, the National Association of Insurance Commissioners, whose concern was surely not limited to fire insurance, was certainly aware of provider agreements since it drafted model state enabling legislation to govern service-benefit health plans. But this Association, which played a major role in the drafting of the McCarran-Ferguson Act, did not include provider agreements in its proposed bill exempting specific practices of insurance companies from the scope of the antitrust laws. 90 Cong. Rec. A4406 (1944). Given this background, the failure of Congress to mention provider agreements, or anything in any way resembling them, suggests that Congress did not intend that provider agreements were to be exempt.

[31] The dissenting opinion states that the *National Securities* case recognized that the legislative history of the Act "sheds little light" on the meaning of the "business of insurance." *Post*, at 234. In *National Securities*, however, the Court went on to state that the legislative history indicated that "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." *393 U.S., at 458-459*.

[32] One question not resolved by this legislative history is which of the various practices alleged in the *South-Eastern Underwriters* indictment Congress intended to be covered by the phrase "business of insurance." The indictment in that case had charged, for example, that the defendants had fixed their agents' commissions as well as premium rates. It is clear from the legislative history that the fixing of rates is the "business of insurance." The same conclusion does not so clearly emerge with respect to the fixing of agents' commissions.

The bills introduced before the *South-Eastern Underwriters* decision which would have totally exempted the insurance industry from the antitrust laws specifically included agreements regarding agents' commissions as an exempt practice. *E. g.*, H. R. 4444, 78th Cong., 2d Sess. (1944). Similarly, the bill proposed by the National Association of Insurance Commissioners two

[**36]** **[*225]** D

[*277]** At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their **[*226]** members with medical services and hospitalization were not considered to be engaged in the insurance business at all, and thus were not subject to state insurance laws. *E. g., Jordan v. Group Health Assn., 71 App. D. C. 38, 107 F.2d 239 (1939)*; *California Physicians' Service v. Garrison, 155 P. 2d 885 (Cal. App. 1945)*, aff'd, *28 Cal. 2d 790, 172 P. 2d 4 (1946)*; *Commissioner of Banking & Insurance v. Community Health Service, 129 N. J. L. 427, 30 A. 2d 44 (1943)*; *State ex rel. Fishback v. Universal Service Agency, 87 Wash. 413, 151 P. 768 (1915)*. [33] Similarly, States which regulated **[**1081]** prepaid health-service plans at the time the Act was enacted either exempted them from the requirements of the state insurance code or provided that they "shall not be construed as being engaged in the business of insurance" under state law. Rorem, Enabling Legislation for Non-Profit Hospital Service Plans, 6 Law & Contemp. Prob. 528, 534 (1939). **[****37]** [34] Since the legislative

months after the *South-Eastern Underwriters* case was decided would have also exempted agents' commissions. 90 Cong. Rec. A4406 (1944). The subsequent bill that followed the approach of the NAIC and exempted specific activities, however, was limited to traditional underwriting activities and made no mention of agreements with insurance agents:

§ 4 (b). "On and after March 1, 1946, the provisions of said Sherman Act shall not apply to any agreement or concerted or cooperative action between two or more insurance companies for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules . . . ." S. 12, 79th Cong., 1st Sess. (1945).

One inference that can be drawn from this pattern is that Congress was aware of the existence of agreements regarding agents' commissions, and chose not to include them within the exemption for the "business of insurance." On the other hand, the fact that the indictment in *South-Eastern Underwriters* had included a charge that insurance companies did boycott agents who insisted on selling other lines of insurance, together with the fact that § 3 (b) presumably removes an exemption that, but for its absence, would be conferred by *§ 2*, suggests that the "business of insurance" may have been intended to include dealings within the insurance industry between insurers and agents.

Even if it be assumed, however, that transactions between an insurer and its agents, including independent agents, are the "business of insurance," it still does not follow that the Pharmacy Agreements also fall within the definition. Transactions between an insurer and an agent, unlike the Pharmacy Agreements, are wholly intra-industry; an insurance agent sells insurance while a pharmacy sells goods and services. Moreover, there are historical reasons why the Pharmacy Agreements should not be considered the "business of insurance," whatever may be the status of agreements between an insurer and its agents. See Part III-D, *infra*.

[33] The only case to the contrary was *Cleveland Hospital Service Assn*. v. *Ebright, 142 Ohio St. 51, 49 N. E. 2d 929 (1943)*. There have been few cases dealing with the issue since the enactment of the McCarran-Ferguson Act; most of them have also held that Blue Cross and Blue Shield plans are not insurance. See, *e. g., Michigan Hospital Service v. Sharpe, 339 Mich. 357, 63 N. W. 2d 638 (1954)*; *Hospital Service Corp*. v. *Pennsylvania Ins. Co., 101 R. I. 708, 227 A. 2d 105 (1967)*.

[34] The dissenting opinion argues that "regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve." *Post*, at 240. It is not at all clear that States that passed enabling statutes regarded the plans as insurance. These statutes typically authorized the plans to operate but did not specify whether or not they were insurance. *E. g*., 1935 Ill. Laws, p. 621 ("An Act to provide for the Incorporation and Regulation of nonprofit Hospital Service Corporations"); 1939 Mich. Pub. Acts No. 109 ("An Act to provide for and to regulate the incorporation of non-profit hospital service corporations"); 1938 N. J. Laws, ch. 336 ("An Act concerning hospital service corporations and regulating the establishment, maintenance and operation of hospital service plans"); ch. 698, 53 Stat. 1412 (1939) ("Providing for the incorporation of certain persons as Group Hospitalization, Inc."). This latter statute enacted by Congress also provided in § 7: "This corporation shall not be subject to the provisions of statutes regulating the business of insurance in the District of Columbia, but shall be exempt therefrom unless specifically designated therein." The Senate Report stated: "This bill does not change existing law but merely creates a private corporation which did not heretofore exist in the District of Columbia." S. Rep. No. 1012, 76th Cong., 1st Sess., 2 (1939). At the time this statute was passed in 1939, the group health services plan in the District of Columbia had been construed not to be engaged in the business of insurance. *Group Health Assn*. v. *Moor, 24 F.Supp. 445 (DC 1938)*.

[*227] history makes clear that **[***278]** ***HN8***[] Congress certainly did not intend the definition of the "business of insurance" to be *broader* than its commonly understood meaning, the contemporary perception that health-care organizations were not engaged in providing insurance is highly significant in ascertaining congressional intent.

[**38]** The *Jordan* v. *Group Health Assn*. case, *supra*, is illustrative of the contemporary view of health-care plans. Group Health was organized as a nonprofit corporation to provide various medical services and supplies to members who paid a fixed annual premium. To implement the plan, Group Health contracted with physicians, hospitals, and others, to provide medical services. These groups were compensated exclusively by Group Health. By contracting with the various medical groups directly, Group Health was able to obtain **[*228]** services at a lower cost than if each member contracted separately. The plan, therefore, was somewhat similar to the Pharmacy Agreements in this case. The court in *Group Health* held that this type of arrangement was not insurance:

"Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance . . . require these elements. Hazard is essential and equally so a shifting of its incidence.

. . . .

"Although Group Health's **[****39]** activities may be considered in one aspect as creating security against loss from illness or accident, more truly they constitute the **[**1082]** quantity purchase of well-rounded, continuous medical service by its members. Group Health is in fact and in function a consumer cooperative. The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk . . . . On the other hand, the cooperative is concerned principally with *getting service rendered to its members* and doing so at lower prices made possible by quantity purchasing and economies in operation." *71 App. D. C., at 44, 46, 107 F.2d, at 245, 247*. (Emphasis supplied in part; footnotes omitted.) [35]

Indeed, courts have continued to hold that Blue Shield plans are not insurance even in States that have enacted enabling statutes. *E. g., Michigan Hospital Service v. Sharpe, supra.* In that case, the court specifically rejected the proposition that the existence of the enabling statute was sufficient to demonstrate that the plan was insurance.

But even if certain aspects of a Blue Shield plan are the "business of insurance," the Pharmacy Agreements in this case are not -- for all the reasons set out in this opinion. It is to be emphasized that the question whether provider agreements like the Pharmacy Agreements in this case, or other aspects of insurance companies, were in 1945 or are now regulated by state law is irrelevant to the issue before the Court in the present case. See n. 38, *infra*.

[35] Despite the fact that courts did not view plans like Blue Cross and Blue Shield as insurance at the time of the passage of the McCarran-Ferguson Act, the petitioners argue that Attorney General Biddle's remarks when testifying in the Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, and H. R. 3270, 78th Cong., 1st Sess., 41-42 (1943), indicate a congressional understanding that such plans were indeed insurance.

The thrust of Attorney General Biddle's remarks was that this Court's decision in *American Medical Assn*. v. *United States, 317 U.S. 519*, justified the indictment in the *South-Eastern Underwriters* case. In the *AMA* case, the Court had held that a health-maintenance organization was engaged in "trade" within the meaning of the Sherman Act. Based on this decision, Attorney General Biddle expressed the view that the plan was insurance and that therefore the Court had already held that insurance was commerce. Thus, he argued that the indictment in *South-Eastern Underwriters* was proper.

It seems clear, however, why this testimony does not demonstrate that Congress believed that Blue Cross or Blue Shield plans are insurance. First, the statement of the Attorney General that the plan in the *AMA* case was insurance was not accepted by Congress. Senator Bailey rejected the characterization, pointing out that the Court had not referred to the plan as insurance. To Senator Bailey, the plan was not insurance but a "group cooperative movement." (Indeed, the precise plan at issue was held not to be insurance in *Jordan v. Group Health Assn., 71 App. D. C. 38, 107 F.2d 239 (1939)*.) But even if it can nonetheless be inferred that some Members of Congress may have agreed with the Attorney General that prepaid health plans are insurance, his testimony did not remotely suggest that agreements between an insurer and a third party fixing the cost at which goods and services will be purchased is also insurance.

[**40] [*229] [***279]** Indeed, Blue Cross and Blue Shield organizations themselves have historically taken the position that they are not insurance companies in seeking to avoid state regulation and taxation. [36] **[****41]** It is thus difficult to assume that contrary to this historical position and a majority of court decisions, Congress in 1945 understood that advance-payment medical-benefits **[*230]** plans are the "business of insurance." [37] It is next to impossible to assume that Congress could have thought that agreements (even by insurance companies) which provide for the purchase of goods and services from third parties at a set price are within the meaning of that phrase. [38]

[**42] [*231] [***280] [**1083]** IV

LEdHN[8][] [8]***LEdHN[9A]***[] [9A]***LEdHN[10A]***[] [10A]It is well settled that ***HN9***[] exemptions from the antitrust laws are to be narrowly construed. *E. g., Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1*; *Connell Construction Co*. v. *Plumbers & Steamfitters, 421 U.S. 616*; *FMC v. Seatrain Lines, Inc., 411 U.S. 726*; *United States v. McKesson & Robbins, Inc., 351 U.S. 305*. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions. *E. g., Abbott Laboratories v. Portland Retail Druggists Assn., Inc., supra, at 11-12* (the Nonprofit Institutions Act); *FMC v. Seatrain Lines, Inc.,*

Similarly, the fact that a few years later some witnesses at a Senate Committee hearing referred to Blue Cross as insurance in discussing alternatives to national health insurance, *e. g*., Hearings before the Senate Committee on Education and Labor on S. 1606, 79th Cong., 2d Sess., pt. 1, pp. 172-176 (1946), does not establish that Congress shared this view, let alone that provider agreements like the Pharmacy Agreements in this case are insurance.

[36] Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 Duke L. J. 587, 624 n. 174. As one commentator has stated about the effectiveness of the traditional opposition of these organizations to being characterized as insurance:

"[Insurance] experts are fond of expressing amazement at Blue Cross and Blue Shield opinion that the Blues are not insurance but something else, such as 'pre-payment plans.' The insurance experts should control their incredulity of this view, or at least save some for the courts. For the fact is that the majority of cases have in effect upheld these so-called 'outrageous' opinions of Blue Cross adherents." Denenberg, The Legal Definition of Insurance, 30 J. Ins. 319, 322 (1963).

[37] This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements with participating pharmacies, may not be the "business of insurance" within the meaning of the Act.

[38] This conclusion is in no way affected by the existence of state enabling statutes regulating advance-payment medical-benefits plans at the time the McCarran-Ferguson Act was enacted. *E. g*., 1937 Cal. Stats., ch. 882, as amended by 1941 Cal. Stats., ch. 311; 1939 Conn. Pub. Acts, ch. 150; 1935 Ill. Laws, p. 621; 1936 Miss. Gen. Laws, ch. 177; 1939 Mich. Pub. Acts, No. 109; 1938 N. J. Laws, ch. 719. These statutes generally provided that the plans were not insurance. See *supra, at 226-227*, and n. 34. Even if it is assumed that some state legislatures believed that these plans are insurance, however, it still does not follow that provider agreements like the Pharmacy Agreements in this case were considered by Congress to be the "business of insurance."

Many aspects of insurance companies are regulated by state law, but are not the "business of insurance." Similarly, the enabling statutes in existence at the time the Act was enacted typically regulated such diverse aspects of the plans as the composition of their boards of directors, when their books and records could be inspected, how they could invest their funds, when they could liquidate or merge, as well as how they could purchase goods and services by entering into provider agreements.

Provider agreements are no more the "business of insurance" because they were regulated by state law at the time of the McCarran-Ferguson Act than are these other facets of the plans which were similarly regulated. If Congress had exempted the "business of insurance companies," then these aspects of the plans which are not themselves insurance as that term is commonly understood would nevertheless be arguably exempt. But since Congress explicitly rejected this approach, they are not within the exemption even though they are the subject of state regulation.

This Court has implicitly recognized that state regulation of a practice of an insurance company does not mean that the practice is the "business of insurance" within the meaning of the McCarran-Ferguson Act. In both cases, *SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65*, and *SEC v. National Securities, Inc., 393 U.S. 453*, the challenged conduct was regulated by the State Insurance Commissioner, but this Court held that the practices were not the "business of insurance."

supra, at 733 (§ 15 of the Shipping Act); United States v. McKesson & Robbins, supra, at 316 **[****43]** (the Miller-Tydings and McGuire Acts).

Application of this principle is particularly appropriate in this case because the Pharmacy Agreements involve parties wholly outside the insurance industry. In analogous contexts, the Court has held that ***HN10***[] an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties. The Court has held, for example, that an exempt agricultural cooperative under the Capper-Volstead Act loses its exemption if it conspires with nonexempt parties. *Case-Swayne Co*. v. Sunkist Growers, Inc., 389 U.S. 384; United States v. Borden Co., 308 U.S. 188. Similarly, the Court has consistently stated that a union forfeits its exemption from the antitrust laws if it agrees with one set of employers to impose a wage scale on other bargaining units. Ramsey v. Mine Workers, **[*232]** 401 U.S. 302, 313; Mine Workers v. Pennington, 381 U.S. 657, 665-666. [39]

[**44] [***281] [**1084]** If agreements between an insurer and retail pharmacists are the "business of insurance" because they reduce the insurer's costs, then so are all other agreements insurers may make to keep their costs under control -- whether with automobile body repair shops or landlords. [40] **[****45]** Such agreements **[*233]** would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the "business of insurance companies." [41] But that is precisely what Congress did not do.

For all these reasons, the judgment of the Court of Appeals is

Affirmed.

Dissent by: BRENNAN

Dissent

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LEdHN[9B][] [9B] ***LEdHN[10B]***[] [10B]As the Court stated in Pennington, 381 U.S., at 665-666 (footnote omitted):

"[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

40 There is no principled basis upon which a line could rationally be drawn that would extend the McCarran-Ferguson Act exemption only to an insurer's agreement with providers of goods and services to be furnished to its policyholders -- such as agreements with hospitals, doctors, lawyers, and the like. But assuming that such a line could rationally be drawn, to hold that even such provider agreements are the "business of insurance" is to ignore the language and purpose of the Act not to exempt the insurance industry as such from the antitrust laws.

Moreover, exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences. Recent studies have concluded that physicians and other health-care providers typically dominate the boards of directors of Blue Shield plans. Thus, there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level. This domination of Blue Shield by providers is said to have resulted in rapid escalation of health-care costs to the detriment of consumers generally. See Skyrocketing Health Care Costs: The Role of Blue Shield, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 4-34 (1978) (remarks of Michael Pertschuk, Chairman, Federal Trade Commission).

41 It might be argued that some such agreements are exempt from the antitrust laws under the state-action exemption of Parker v. Brown, 317 U.S. 341. But that exemption would exist because of the extent of state regulation and not because the agreements are the "business of insurance."

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE **POWELL** join, dissenting.

The McCarran-Ferguson Act, 59 Stat. 33, as amended, *15 U. S. C. §§ 1011-1015*, renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in *§ 1013 (b)*. [1] The single question presented by this case is whether the "business of insurance" **[*234]** **[***282]** includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third parties to provide benefits owed to the insurer's policyholders. **[****46]** The Court today holds that it does not.

[**47]** I disagree: Since (a) there is no challenge to the status of Blue Shield's drug-benefits *policy* as the "business of insurance," I conclude (b) that some provider agreements negotiated to carry out the policy obligations of the insurer to the insured should be considered part of such business, and (c) that the specific Pharmacy Agreements at issue in this case should be included in such part. Before considering this analysis, however, it is necessary to set forth the background of the enactment of the McCarran-Ferguson Act.

[1085]** I

SEC v. National Securities, Inc., 393 U.S. 453, 459 (1969), recognized that the legislative history of the McCarran-Ferguson Act sheds little light on the meaning of the words "business of insurance." See S. Rep. No. 20, 79th Cong., 1st Sess. (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945). But while the legislative history is largely silent on the matter, [2] **[****49]** it does indicate that Congress deliberately chose **[*235]** to phrase the exemption broadly. Congress had draft bills before it which would have limited the "business of insurance" to a

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[1] *Section 2 (b)* of the Act, as set forth in *15 U. S. C. § 1012 (b)*, provides:

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 U. S. C. 41 et seq.*], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

Section 3 (b), as set forth in *15 U. S. C. § 1013 (b)*, provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

[2] The Court argues that the silence with respect to agreements between insurers and third parties, coupled with the fact that Congressmen did discuss horizontal agreements between insurance companies, establishes by negative inference that third-party agreements were not considered "the business of insurance." There is, however, a compelling explanation for the lack of mention of provider agreements. As the Court has noted in several cases, see, *e. g., SEC v. National Securities, Inc., 393 U.S. 453, 459 (1969)*; *St. Paul Fire & Marine Ins. Co*. v. *Barry, 438 U.S. 531, 538-539 (1978)*, the McCarran-Ferguson Act was a reaction to the decision in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944)*. See *infra*, at 236-237. That case involved an organization of fire insurance companies, and much of the congressional discussion accordingly concerned alleged abuses by and regulation of such companies. See, *e. g*., 91 Cong. Rec. 1091-1092, 1479 (1945); 90 Cong. Rec. 6449-6455, 6527 (1944). Indeed, health insurers did not even participate in the hearings on the Act. See Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362 et al., 78th Cong., 1st Sess. (1943). Since fire insurers paid their policyholders cash indemnities, these companies had no reason to contract with third parties for the provision of goods or services. That fact fully explains the absence of discussion of such contracts in the congressional debates. Such absence no more indicates a congressional intent to exclude provider agreements from the "business of insurance" than does the absence of any mention of health insurance companies indicate a congressional intent arbitrarily to exclude all health insurance from the "business of insurance."

narrow range of specified insurance company practices, but chose **[****48]** instead the more general language which ultimately became law. [3]

[**50]** **[*236]** The **[***283]** historical background of the statute's enactment, developed by the Court in *SEC v. National Securities, Inc., supra*, provides the guide to congressional purpose:

"The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944)*. Prior to that decision, it had been assumed, in the language of the leading case, that '[issuing] a policy of insurance is not a transaction of commerce.' *Paul v. Virginia, 8 Wall. 168, 183 (1869)*. Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation **[**1086]** under the *Commerce Clause*, and that the antitrust laws, in particular, were applicable to them. Congress reacted quickly . . . [, being] concerned about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first **[****51]** section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest.' 59 Stat. 33 (1945), *15 U. S. C. § 1011*. As this Court said shortly afterward, '[obviously] Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.' *Prudential Insurance Co*. v. *Benjamin, 328 U.S. 408, 429 (1946)*.

"The . . . Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *393 U.S., at 458-459*.

See also *St. Paul Fire & Marine Ins. Co*. v. *Barry, 438 U.S. 531, 538-539 (1978)*; 90 Cong. Rec. 6524 (1944) (Cong. Walter) **[*237]** ("[The] legislation . . . is designed to restore to the status quo the position the insurance business of this Nation occupied before the Supreme Court recently legislated [in *South-Eastern Underwriters*]").

Since continuation of state regulation as it existed before *South-Eastern* was Congress' goal, [4] **[****52]** evidence of **[***284]** what States **[*238]** might reasonably have considered to be and regulated as insurance at the time the

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[3] S. 12, 79th Cong., 1st Sess. (1945), would have specified

"any agreement or concerted or cooperative action *between two or more insurance companies* for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules." (Emphasis added.)

See also § 4 (b) of a draft bill of the National Association of Insurance Commissioners, 90 Cong. Rec. A4406 (1944). A significant Senate floor debate with regard to such limiting bills is the following:

"MR. PEPPER. Would it not be better that those agreements, if there are such that are legitimatized, be identified in the statute?

"MR. O'MAHONEY. I quite agree with the Senator, and I endeavored to the very best of my ability to induce the committees of Congress to write into the law specific exemptions from the ***antitrust law***, but I was unable to prevail in the Committee on the Judiciary and I was unable to prevail on the floor of the Senate." 91 Cong. Rec. 1444 (1945).

The Court challenges the conclusion that Congress intended to phrase the exemption broadly by referring to the legislative history of one obscure amendment to an early House version of the Act. *Ante*, at 222-223, n. 29. Closer examination of the short debate surrounding that amendment reveals only the Representatives' repeated expressions of their confusion over what the amendment meant. See 90 Cong. Rec. 6562 (1944) (remarks of Reps. Summers, Hobbs, and Fernandez).

[4] There can be no quarrel with the Court's statement, *ante*, at 220, and n. 24, that the McCarran-Ferguson Act was not intended to restore the law, *in all respects*, to what it had been before *South-Eastern Underwriters*. But the principal differences between pre-*South-Eastern* and post-McCarran-Ferguson law are irrelevant for purposes of this case, and do not detract from the Court's oft-repeated statement that the purpose of the Act was to preserve state regulatory schemes as they existed before *South-Eastern Underwriters*.

McCarran-Ferguson Act was passed in 1945 is clearly relevant to our decision. This does not mean that a transaction not viewed as **[**1087]** insurance in 1945 cannot be so viewed today.

"We realize that . . . insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation. And we would not undertake to freeze the [concept] of 'insurance' . . . into the mold [it] fitted when these Federal Acts were passed." *SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71 (1959)*.

It is thus logical to suppose that if elements common to the ordinary understanding of "insurance" are present, new forms of the business should constitute the "business of insurance" for purposes of the McCarran-Ferguson Act. The determination of the scope of the Act, therefore, involves both an analysis of the proximity between the challenged transactions and those well recognized as elements of "insurance," and an examination of the historical setting of the Act. On both counts, Blue Shield's **[****53]** Pharmacy Agreements constitute the "business of insurance."

[**54]** **[*239]** II

I start with common ground. Neither the Court, **[***285]** *ante*, at 230 n. 37, nor the parties challenge the fact that the drug-benefits policy offered by Blue Shield to its policyholders -- as distinguished from the contract between Blue Shield and the pharmacies -- is the "business of insurance." Whatever the merits of scholastic argument over the technical definition of "insurance," the policy both transfers and distributes risk. The policyholder pays a sum certain -- the premium -- against the risk of the uncertain contingency of illness, and if the company has calculated correctly, the premiums of those who do not fall ill pay the costs of benefits above the premiums of those who do. See R. Mehr & E. Cammack, Principles of Insurance 31-32 (6th ed. 1976). An important difference between Blue Shield's policy and other forms of health insurance is that Blue Shield "pays" the policyholder in goods and services (drugs and their dispensation), rather than in cash. Since we will not "freeze the [concept] of 'insurance' . . . into the

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Before *South-Eastern*, insurance companies might boycott, coerce, and intimidate without violating federal antitrust statutes since insurance was not considered "commerce" and hence was beyond the reach of federal law. For the same reason, even unregulated insurance transactions were free from antitrust attack. Finally, Congress, because of the "commerce" problem, could not otherwise regulate insurance. None of these elements survived the decision in *South-Eastern*, and none was revived by McCarran-Ferguson. These differences between pre-*South-Eastern* and post-McCarran-Ferguson law were what Senator Ferguson had in mind when he answered "no" to Senator McKellar's question, cited by the Court, *ante*, at 220 n. 24, asking whether the effect of the Act was to re-establish the law as it stood prior to *South-Eastern*. This is revealed by quotation of Senator Ferguson's full answer to Senator McKellar.

"MR. FERGUSON. No. I would say that subsection (b), at the bottom of page 2, would allow the provisions of the Sherman Act to apply to all agreements or acts of boycott, coercion, or intimidation, and subsection 4 (a) would suspend the application of the provisions of the Sherman Act and the Clayton Act, insofar as States may regulate and tax such companies, until certain dates or until Congress may act in the meantime in respect to what Congress thinks should be done with the business of insurance." 91 Cong. Rec. 478 (1945).

These discrete differences between pre-*South-Eastern* and post-McCarran-Ferguson law are not applicable here, and do not conflict with the holdings of this Court's prior opinions that, with respect to *state-regulated* insurance practices *not constituting boycotts*, McCarran-Ferguson was intended to preserve pre-existing state insurance regulation.

This analysis also explains, and renders irrelevant for this case, Congress' rejection of the "total" exemption bills cited by the Court, *ante*, at 218-219, and n. 21. Those bills, unlike the one that passed, would have exempted boycotts and unregulated transactions. It was this aspect of the "total" exemption bills to which the National Association of Insurance Commissioners objected. See 90 Cong. Rec. 8482 (1944). These bills were rejected not because of a decision to narrow the scope of the nonboycott activities to be exempted, but because Congress determined that the business of insurance should be exempted only where regulated by the States, rather than unconditionally.

mold it fitted" when McCarran-Ferguson was passed, this difference cannot be a reason for holding that the drug-benefits policy **[****55]** falls outside the "business of insurance" even if our inquiry into the understandings of what constituted "insurance" in the 1930's and 1940's were to suggest that a contrary view prevailed at that time. [5]

Fortunately, logic and history yield the same result. It is true that the first health insurance policies provided only cash indemnities. However, although policies that specifically provided drug benefits were not available during the 1930's and 1940's, analogous policies providing hospital and medical services -- rather than cash -- were available.

The hospital service-benefit concept originated in Texas in **[*240]** 1929; medical services were first offered in 1939. R. Eilers, Regulation of Blue Cross and Blue Shield Plans 10, 15 (1963) (hereinafter **[****56]** Eilers). In 1940, 4,500,000 people in 60 communities were covered by Blue Cross or related hospital-benefits plans. C. Rorem, Non-Profit Hospital Service Plans 1-2 (1940) (hereinafter Rorem I). During the 1940's, health insurance became a subject of collective bargaining, with unions demanding the service-benefit approach of Blue Cross and Blue Shield. S. Law, Blue Cross 11 (1974) (hereinafter Law). By 1945, the year the McCarran-Ferguson Act was enacted, over 20 million people were enrolled in service-benefit programs, with service-benefit plans comprising 61% of the total hospitalization insurance market. See Hearings before the Senate Committee on Education and Labor, A National Health Program, 79th Cong., 2d Sess., pt. 1, p. 173 (1946); Eilers 19; Law 11.

[1088]** Moreover, regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve. Led by New York in 1934, 24 States passed enabling Acts by 1939 which, while relieving the plans of certain reserve requirements and tax obligations, specifically subjected service-benefit plans to the supervision and control of state departments **[****57]** of insurance. [6] **[****58]** **[***286]** See Rorem, Enabling Legislation for Non-Profit Hospital Service Plans, 6 Law & Contemp. Prob. 528, 531, 534 (1939) (hereinafter Rorem II); N. Sinai, O. Anderson, & M. Dollar, Health Insurance in the United States **[*241]** 48-49 (1946) (hereinafter Sinai); Comment, Group Health Plans: Some Legal and Economic Aspects, 53 Yale L. J. 162, 174 (1943). Another 16 States apparently limited the issuance of hospitalization insurance to stock and mutual insurance companies. Nine acted on the premise that the plans were not "insurance" and authorized operation under general corporation laws, exempt from reserve requirements. Rorem II, p. 532. By the time the McCarran-Ferguson Act was passed, 35 States had enabling legislation. [7] During this period, the National Association of Insurance Commissioners (NAIC), the organization of state insurance directors which played a major role in drafting the McCarran-Ferguson Act, [8] was also drafting model state enabling legislation to govern service-benefit health plans. Proceedings of the NAIC, 75th Sess., 226 (1944); *id., 76*th Sess., 250 (1945). [9]

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[5] See *SEC v. National Securities, Inc., 393 U.S., at 460* ("The relationship between insurer and insured, [and] *the type of policy which could be issued* . . . [are] the core of the 'business of insurance'"). (Emphasis added.)

[6] See 1935 Ala. Acts No. 544; 1935 Cal. Stats., ch. 386; 1939 Conn. Pub. Acts, ch. 150; ch. 698, 53 Stat. 1412 (1939) (District of Columbia); 1937 Ga. Laws, p. 690; 1935 Ill. Laws, p. 621; 1939 Iowa Acts, ch. 222; 1938 Ky. Acts, ch. 23; 1939 Me. Acts, ch. 149; 1937 Md. Laws, ch. 224; 1936 Mass. Acts, ch. 409; 1939 Mich. Pub. Acts No. 109; 1936 Miss. Gen. Laws, ch. 177; 1939 N. H. Laws, ch. 80; 1938 N. J. Laws, ch. 366; 1939 N. M. Laws, ch. 66; 1934 N. Y. Laws, ch. 595; 1939 Ohio Leg. Acts, p. 154; 1937 Pa. Laws No. 378; 1939 R. I. Acts, ch. 719; 1939 S. C. Acts No. 296; 1939 Tex. Gen. Laws, p. 123; 1939 Vt. Laws No. 174; 1939 Wis. Laws, ch. 118.

[7] F. Hedinger, The Social Role of Blue Cross as a Device for Financing the Costs of Hospital Care 51 (1966). The additional statutes were: 1945 Ariz. Sess. Laws, ch. 13 (1st Spec. Sess.); 1939 Fla. Laws, ch. 19108; 1941 Kan. Sess. Laws, ch. 259; 1940 La. Acts No. 267; 1941 Minn. Laws, ch. 53; 1941 Neb. Laws, ch. 43; 1941 N. C. Pub. Laws, ch. 338; 1943 N. D. Laws, ch. 103; 1945 Tenn. Pub. Acts, ch. 98; 1940 Va. Acts, ch. 230; 1943 W. Va. Acts, ch. 8.

[8] See 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney).

[9] Debate arose during this period as to whether service-benefit plans were technically insurance. See *ante*, at 225-230. Most state insurance commissioners ruled during the 1930's that the plans constituted insurance, and therefore had to meet the capital stock, reserve, and assessment requirements applicable to the commercial stock and mutual insurance companies which offered cash indemnity policies. Eilers 101. In addition, this meant that the plans were subject to special state taxation. *Ibid*.

[**59] [*242] [***287] [**1089]** Thus, when the McCarran-Ferguson Act became law, service-benefit plans similar to the Blue Shield plan at issue here were a widespread and well-recognized form of insurance, subject to regulation in most of the States. Congress itself treated these important programs as insurance. In 1939, Congress adopted an enabling Act incorporating a hospitalization-benefits plan in the District of Columbia, with supervisory **[*243]** authority placed in the hands of the Superintendent of Insurance. See H. R. 6266, 76th Cong., 1st Sess. (1939); H. R. Rep. No. 1247, 76th Cong., 1st Sess. (1939); 84 Cong. Rec. 11224 (1939). And in hearings held the year after passage of the McCarran-Ferguson Act, the same Congress that approved that Act debated Blue Shield-type programs as alternatives to national health insurance, with participating Congressmen frequently referring to them as "insurance." Hearings before the Senate Committee on Education and Labor, A National Health Program, 79th Cong., 2d Sess., pt. 1, pp. 55, 83, 108, 172, pt. 2, p. 558 (1946). [10] The status of service-benefit policies as "insurance," both logically and historically, is therefore sufficiently **[****60]** established to make that the first premise in an analysis of the status of the Pharmacy Agreements at issue in this case.

III

The next question is whether at least some contracts with third parties to procure delivery of benefits to Blue Shield's insureds would also constitute the "business of insurance." Such contracts, like those between Blue Shield and the druggists in this case, are known as "provider agreements." The Court, adopting the view of the Solicitor General, today holds that no provider agreements can be considered part of the "business of insurance." [11] It contends that the "underwriting or **[****61]** spreading of risk [is] an indispensable characteristic of **[*244]** insurance," *ante*, at 212, [12] and that **[***288]** "[another] commonly understood aspect of the business of insurance

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Such holdings limited the feasibility of the plans at a time when they were widely perceived as being socially beneficial. Moreover, it was argued that these rulings were inappropriate to service-benefit plans, which were generally "nonprofit," and often included guarantees by hospitals to provide services regardless of the financial state of the insurer -- potentially an adequate substitute for the cash reserves needed by indemnity plans. *Id., at 135-136, 239*.

Some courts, and even some Blue Cross-type organizations, attempted to surmount these barriers to effectuation of plans deemed to be in the public interest by arguing that the plans were not technically "insurance" subject to the jurisdiction of state insurance commissioners, and hence were not bound by the requirements of the stock and mutual insurance companies. See, *e. g., Jordan v. Group Health Assn., 71 App. D. C. 38, 107 F.2d 239 (1939)*. But see *Cleveland Hospital Service Assn*. v. *Ebright, 142 Ohio St. 51, 49 N. E. 2d 929 (1943)* (hospital service plans *are* insurance); *McCarty v. King County Medical Service Corp., 26 Wash. 2d 660, 175 P. 2d 653 (1946)* (same). But contemporary commentators questioned the soundness of such views and argued that the plans should be treated as insurance, although as a special kind not subject to the traditional requirements. See, *e. g*., Note, The Legal Problems of Group Health, 52 Harv. L. Rev. 809, 815 (1939); Comment, Group Health Plans: Some Legal and Economic Aspects, 53 Yale L. J. 162, 172 (1943). The 35 state enabling Acts governing service-benefit health plans reflected the States' agreement that the plans were "a special type of insurance" differing from the stock and mutual companies. Rorem II, p. 534; Sinai 48. This is most clearly demonstrated by the fact that the vast majority of the state statutes, while relieving the plans of "other" insurance law requirements (primarily the reserve requirements and special insurance taxes), subjected their activities to the control of the state insurance commissioner. The 1939 New Mexico Statute, for example, amended the State's *Insurance* Code by adding a new section entitled "Non-Profit Hospital Service Plans." The amendment subjected the plans, and in particular both their premiums and rates of payment to hospitals, to the approval of the *Superintendent of Insurance*, while exempting them from "all *other* provisions of the insurance law." 1939 N. M. Laws, ch. 66 (emphasis added). This approach was in accord with the commonly held view that such plans were forms of "insurance," as reflected by the statements of numerous Congressmen in the congressional hearings on the proposed National Health Program, see *infra*, at 243. And everyday meaning, rather than some technical term of art, is what Congress intended by its use of the word "insurance" in the McCarran-Ferguson Act.

[10] Messages of two Presidents to the Congress on the subject of national health care also referred to service-benefit plans as forms of insurance. Message from the President of the United States, Report and Recommendations on National Health, H. R. Doc. No. 120, 76th Cong., 1st Sess., 63 (1939); Message from the President, A National Health Program, H. R. Doc. No. 380, 79th Cong., 1st Sess., 9, 10 (1945).

[11] The respondents do not argue this view. They agree that some provider contracts may constitute the "business of insurance." Brief for Respondents 33.

relates to the contract between the insurer and the insured." *Ante*, at 215. Because provider agreements neither themselves spread risk, nor involve transactions between insurers and insureds, the Court excludes them from the "business of insurance."

The argument fails in light of this Court's **[****62]** prior decisions and the legislative history of the Act. The Court has held, for example, *FTC v. National Casualty Co., 357 U.S. 560 (1958)*, that the advertising of insurance, a unilateral act which does not involve underwriting, is within the scope of the McCarran-Ferguson **[**1090]** Act. And the legislative history makes it abundantly clear that numerous horizontal agreements between insurance companies which do not technically involve the underwriting of risk were regarded by Congress as within the scope of the Act's exemption for the "business of insurance." For example, rate agreements among insurers, a conspicuous congressional illustration, see, *e. g*., 91 Cong. Rec. 1481, 1484 (1945) (remarks of Sens. Pepper and Ferguson), and the subject of the *South-Eastern Underwriters* case, see *SEC v. National Securities, Inc., 393 U.S., at 460*, do not themselves spread risk. Indeed, the Court apparently concedes that arrangements among insurance companies respecting premiums and benefits would constitute the "business of insurance," despite their failure to fit within its formula. *Ante*, at 221 and 224-225, n. 32.

But the Court's **[****63]** attempt to limit its concession to horizontal transactions still conflicts with the legislative history. Compelling evidence is the fact that Congress actually rejected a proposed bill to limit the exemption to agreements between **[*245]** insurance companies. S. 12, 79th Cong., 1st Sess. (1945). See n. 3, *supra*. Moreover, vertical relationships between insurance companies and independent sales agencies were a subject of the indictment in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 535 (1944)*, were the object of discussion in the House, 90 Cong. Rec. 6538 (1944) (remarks of Cong. Celler), and were expressly included as part of the "business of insurance" in an early draft of the Act, *id*., at A4406 (NAIC bill, § 4 (b)(5)). Again, the Court concedes that such transactions, between insurers and agents, might fall within the "business of insurance," despite the inconsistency with the Court's own theory. *Ante*, at 224-225, n. 32. [13]

[**64]** The Court's limitation also ignores the significance of pervasive state insurance regulation -- prevailing when the Act was passed -- of hospitalization-benefits plans whose "distinctive feature," Rorem I, p. 64; Proceedings of the NAIC, 75th Sess., 228 (1944), was the provider contract with the participating hospital to provide service when needed. The year prior to adoption of the Act the **[***289]** NAIC emphasized the relationship between provider agreements and service-benefit policies:

"A hospital service plan is designed to provide service rather than to indemnify and this can only be guaranteed through contractual arrangements between plans and hospitals." *Ibid*.

The Association also proposed, in the year McCarran-Ferguson passed, a model state enabling Act requiring "full approval of . . . contracts with hospitals . . . by the insurance commissioner." Proceedings of the NAIC, 76th Sess., 250 **[*246]** (1945). That proposal reflected well the actual contents of existing state enabling Acts which armed insurance commissioners with considerable authority to regulate provider agreements. [14] Congress itself authorized the service-benefit plan it incorporated in **[****65]** the District of Columbia "to enter into contracts with hospitals for

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[12] "Underwriting," the Solicitor General argues, means "[spreading] risk more widely or [reducing] the role of chance events." Brief for United States as *Amicus Curiae* 17 (hereinafter Government Brief). For purposes of argument I will assume that this is a correct definition of "underwriting." But see R. Holtom, Underwriting Principles and Practices 11 (1973).

[13] The effort to distinguish insurer/agent transactions from provider agreements on the ground that the former are "wholly intra-industry" while the latter are not, *ante*, at 225 n. 32, constitutes argument by tautology. The former are "intra-industry" and the latter not, only because the Court so holds today.

[14] See, *e. g*., 1935 Cal. Stats., ch. 386; 1939 Iowa Acts, ch. 222; 1937 Md. Laws, ch. 224; 1939 Me. Acts, ch. 149; 1939 N. H. Laws, ch. 80; 1939 S. C. Acts No. 296. See also Rorem I, pp. 67-68; Sinai 48-49. Such provisions were often quite extensive, *e. g*., requiring approval by the insurance commissioner of contracts between hospitals and the corporation, including rates of payment, *ibid*.; requiring that the contracts contain guarantees of services by the hospitals to policyholders despite financial difficulties of the insurer, Rorem I, p. 67; or even limiting the kind of hospitals with which contracts could be made, *id., at 68*.

the care and treatment of [its subscribers]." H. R. 6266, 76th Cong., 1st Sess. (1939). In light of Congress' objective through the McCarran-Ferguson Act to insure the continuation of existing state regulation, the conclusion **[**1091]** that at least some provider agreements were intended to be within the "business of insurance" is inescapable.

[**66]** Logic compels the same conclusion. *Some* kind of provider agreement becomes a necessity if a service-benefits insurer is to meet its obligations to the insureds. The policy before us in this case, for example, promises payment of benefits in drugs. Thus, some arrangement must be made to provide those drugs for subscribers. [15] Such an arrangement obtains **[*247]** the very benefits promised in the policy; it does not simply relate to the general operation of the company. A provider contract in a service-benefit plan, therefore, is critical to "the type of policy which could be issued" as well as to its "reliability" and "enforcement." It thus comes within the terms of *SEC v. National Securities, Inc., 393 U.S., at 460*. That case explained that the "business of insurance" involves not only **[***290]** the "relationship between insurer and insured," but also "other activities of insurance companies [that] *relate so closely* to their status as reliable insurers that they too must be placed in the same class." Thus, "[statutes] aimed at protecting or regulating . . . [the insurer/insured] relationship, *directly or indirectly*, are laws regulating **[****67]** the 'business of insurance.'" *Ibid*. (emphasis added).

[**68]** The Congress that passed McCarran-Ferguson was composed of neither insurance experts nor dictionary editors. Rather than use the technical term "underwriting" to express its meaning, Congress chose "the business of insurance," a common-sense term connoting not only risk underwriting, but contracts closely related thereto. [16] Since Congress knew of service-benefit policies, and viewed them as insurance, it would strain common sense to suppose Congress viewed contracts **[*248]** necessary to effectuate those policies' commitments as being outside the business it sought to exempt from the antitrust laws.

[**69]** IV

The remaining question is whether the provider agreement in *this* case constitutes the "business of insurance." Respondents contend that even if some contract between Blue Shield and the pharmacies is necessary, this one is not. Under the contract at issue, the druggist agrees to dispense drugs to Blue Shield's insureds for a $ 2 payment, and Blue Shield agrees to reimburse the druggist for the acquisition cost of each drug so dispensed. The pharmacy is thus limited to a $ 2 "markup." With support from the Court of Appeals, respondents argue that only the first half of the bargain is necessary for Blue Shield to fulfill its policy obligations. Those are fulfilled when Blue Shield binds the pharmacy to dispense the requested drug for $ 2. The second half of **[**1092]** the agreement, the amount Blue Shield reimburses the druggist, is assertedly irrelevant to the policyholder. As an alternative to the existing plan, the respondents and the Court of Appeals suggest that Blue Shield could simply pay the pharmacist his usual charge (minus the $ 2 paid by the policyholder). The present plan, which limits reimbursement to acquisition cost

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[15] Indeed, unions negotiating for drug-coverage plans have requested that the plans include contractual arrangements with pharmacies, in order to guarantee that the policy's promises are kept. See Brief for Motor Vehicle Manufacturers Assn. as *Amicus Curiae* 10-11.

It might be argued that the drug-benefits policy could operate successfully without any agreement between Blue Shield and the pharmacies. The consumer could simply pay the pharmacist his full price, whereupon he would normally receive the drugs without hesitation. Blue Shield could then reimburse the policyholder for the full price minus the $ 2 deductible. This would not, however, be the policy bargained for in this case. That policy guarantees provision of drugs upon a minimal $ 2 payment, without requiring the policyholder to advance the full price when the contingency of illness occurs -- a time when he may not be able to afford the out-of-pocket payment. Moreover, such cash-reimbursement plans almost inevitably include payment ceilings, again distinguishing them from the full-coverage service plan bargained for in this case. See discussion, *infra*, at 252, and n. 20.

[16] The Court errs in its reading of *SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959)*. There a "variable annuity" plan was held not to be "the business of insurance" because all risk remained on the policyholder and no underwriting of risk occurred. The key to *Variable Annuity* is that neither the agreement at issue nor *any* with which it was involved effectuated a transference of risk. *Id., at 71*. That is not the case here, where the policyholder has successfully transferred his risk by trading his premium for the certainty of benefits in the event of illness.

and freezes the markup at $ 2, is said **[****70]** to set a "fixed" price. From this premise respondents argue that such fixed-price plans are "anticompetitive," and therefore not the "business of insurance."

Respondents' argument is directly contradicted by history. The service-benefit plans available when the McCarran-Ferguson Act was passed actually "fixed" more of the payment to their participating providers than does the plan here, which "fixes" only the markup. Those early plans **[***291]** usually paid established and equal amounts to their participating hospitals, rather than paying whatever each hospital charged. Rorem I, p. 64. Moreover, under the typical state enabling Act, those **[*249]** payments were subject to the approval of the state department of insurance. [17] The 1937 Pennsylvania statute, for example, provided that "all rates of payments to hospitals made by such [service-benefit plan] corporations . . . and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department." 1937 Pa. Laws No. 378. Therefore, as insurer/provider fee agreements were part of the system of state regulation which the McCarran-Ferguson **[****71]** Act sought to preserve, there is no historical reason to exclude Blue Shield's Pharmacy Agreements from the ambit of the exemption; there is instead a good historical reason for including them.

Nor does respondents' claim that the Pharmacy Agreements are "anticompetitive" exclude them from constituting the "business of insurance." The determination of whether Blue Shield's Pharmacy Agreements actually involve antitrust violations or are otherwise anticompetitive has been held in abeyance, pending final decision as to whether the agreements fall within the scope of the McCarran-Ferguson Act. But even if the agreements were anticompetitive, that alone could not be the basis for excluding them from the "business of insurance." An antitrust exemption by its very nature must protect some **[****72]** transactions that are anticompetitive; an exemption that is extinguished by a finding that challenged activity violates the antitrust laws is no exemption at all.

While this reason for excluding the Pharmacy Agreements from the circle of exempt provider agreements is unconvincing, there are substantial reasons, in addition to history, for including them within that circle. First, it is clear that the contractual arrangement utilized by Blue Shield affects its **[*250]** costs, and thus affects both the setting of rates and the insurer's reliability. This is definitely a factor relevant to the determination of whether a transaction is within the "business of insurance." See *SEC v. National Securities, Inc., 393 U.S., at 460*. See also *Proctor v. State Farm Mutual Automobile Ins. Co., 182 U. S. App. D. C. 264, 561 F.2d 262 (1977)*. True, that factor alone is not determinative, for as argued by the Court, innumerable agreements, including the lease on the insurance company's offices, affect cost. This contract, however, has more than a mere incidental connection to the policy and premium. It is a direct arrangement to provide the very goods **[****73]** and services whose purchase is the risk assumed in the insurance policy. It is therefore integral to the insurer's rate-setting process, as the correlation between rates and drug prices in a drug-benefits policy is necessarily high. Moreover, the ability of state insurance commissioners to regulate rates, an important concern of the Act, is measurably enhanced by their ability **[**1093]** to control the formulas by which insurers reimburse **[***292]** providers. [18] The same is true of state efforts to ensure that plans are financially reliable. See *Travelers Ins. Co*. v. *Blue Cross of Western Pennsylvania, 481 F.2d 80, 83 n. 9 (CA3 1973)* (quoting the Pennsylvania Insurance Commissioner). This close nexus between the Pharmacy Agreements and both the rates and fiscal reliability of Blue Shield's plan speaks strongly for their inclusion within the "business of insurance." See generally *Proctor v. State **[*251]** Farm Mutual Automobile Ins. Co., supra, at 271-272, 561 F.2d, at 269-270*.

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[17] Sinai 49. See, *e. g.*, 1937 Ga. Laws, p. 690; 1939 Iowa Acts, ch. 222; 1939 Mich. Pub. Acts No. 109; 1939 N. M. Laws, ch. 66; 1939 Tex. Gen. Laws, p. 123. The same is true of the modern state statutes. See Eilers 106-107.

[18] Indeed, some state insurance commissioners have made aggressive use of their authority over provider contracts as a means of controlling premium rates. See *Frankford Hospital v. Blue Cross of Greater Philadelphia, 417 F.Supp. 1104, 1106 (ED Pa. 1976)*, aff'd, *554 F.2d 1253* (CA3), cert. denied, ***434 U.S. 860 (1977)***; State of Michigan, Commissioner of Ins., No. 77-R-101 (Mar. 3, 1977); State of Illinois, Dept. of Ins., Hearing No. 1607 (Apr. 8, 1977). This may also explain why the Federal Government, in programs in which it functions as a health insurer, requires that its provider agreements include specified fee formulas. See, *e. g.*, ***42 U. S. C. §§ 1395u***, ***1395x (v)*** (Medicare).

[**74]** Another reason, in addition to this nexus to basic insurance elements, also supports the conclusion that fixed-price provider agreements are the "business of insurance." Such agreements themselves perform an important insurance function. It may be true, as the Court contends, that conventional notions of insurance focus on the underwriting of risk. But they also include efforts to reduce the unpredictable aspects of the risks assumed. Traditional plans achieve this end by setting ceilings on cash payments or utilizing large deductibles. R. Mehr & E. Cammack, Principles of Insurance 222 (6th ed. 1976). Even if the insurer cannot know how often a policyholder might become ill, it can know the extent of its exposure in the event of illness. The actuarial uncertainty, therefore, is greatly reduced. A fixed-price provider agreement attempts to reach the same result by contracting in advance for a price, rather than agreeing to pay as the market fluctuates. The agreement on price at least minimizes the variance of the "payoff" variable, even if the probability of its occurrence remains an unknown. Indeed, if examined carefully, this function comes within the latter half of the **[****75]** definition of "underwriting" offered by the Solicitor General: "[spreading] risk more widely or [reducing] the role of chance events." See n. 12, *supra*. Of course, the Pharmacy Agreements in this case do not totally control "the role of chance" in drug prices since acquisition costs may fluctuate even if "markup" is fixed, but they are at least an attempt to reduce the role of chance to manageable proportions. [19]

Moreover, a service-benefit plan which "[pays] the cost . . . whatever it might be," as hypothesized by the Court of **[*252]** Appeals, 556 F.2d, at 1381, would run grave risks of bankruptcy. Since it would expose the insurer to unknown liability, it would measurably increase the probability that an incorrect assessment of exposure would occur. This could lead to a failure to cover actual losses **[****76]** with premiums. Respondents argue that this fiscal-reliability problem could be solved by placing a dollar limit on benefits. But such a **[***293]** plan would be almost indistinguishable from a cash-indemnity policy. It would not be the full-service-regardless-of-price plan for which the policyholders bargained. [20] The Pharmacy Agreements are thus "other activities of insurance companies [related] so closely to their status as reliable insurers that they too must be placed in the same class." *SEC v. National Securities, Inc., supra, at 460*.

[1094]** V

The process of deciding what is and is not the "business of insurance" is inherently a case-by-case problem. It is true that the conclusion advocated here carries with it line-drawing problems. That **[****77]** is necessarily so once the provider-agreement line is crossed by holding some to be within the "business." But that is a line which history and logic compel me to cross. I would hold that the *concept* of a provider agreement for benefits promised in the policy is within the "business of insurance" because some form of provider agreement is necessary to fulfill the obligations of a service-benefit policy. I would hold that *these* provider agreements, Blue Shield's Pharmacy Agreements, are protected because they (1) directly obtain the very benefits promised in the policy [21] **[****78]** and therefore **[*253]** directly affect rates, cost, and insurer reliability, and (2) themselves constitute a critical element of risk "prediction." [22] The conclusion that these kinds of agreements are the "business of insurance" is that reached by every Court of Appeals except the Court of Appeals in this case. [23]

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[19] The pharmacist respondents would not be better off if Blue Shield set acquisition cost as well as markup. In that event they might not even meet the cost of their own outlays.

[20] The plan here was "bargained for" in the literal sense. It had its origins in a 1967 collective-bargaining agreement between the United Auto Workers and the three largest domestic automobile manufacturers. Brief for Petitioners 6.

[21] The Solicitor General suggests that this test could be subverted by an insurer's decision to list all kinds of incidental and even unrelated transactions in its policy. As with other forms of antitrust immunity, I have no difficulty concluding that "sham" arrangements should not be honored. Cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)*; *California Motor Transport Co*. v. *Trucking Unlimited, 404 U.S. 508 (1972)*.

[22] These factors together are sufficient to decide this case. I need not decide whether either would independently suffice, nor whether in the absence of these factors others might also be capable of bringing a provider agreement within the exemption.

[**79]** I would not suggest, however, that *all* provider agreements come within the McCarran-Ferguson Act proviso. Given the facts found by the District Court upon summary judgment, this is not a case where the petitioner pharmacies themselves conspired to exclude others from the market, and either pressured Blue Shield to go along, or were voluntarily joined by the insurer. See also Government Brief 13 n. 6. Such an agreement among pharmacies, itself neither necessary nor related to the insurer's **[***294]** effort to satisfy its obligations to its policyholders, would be outside the "business of insurance." An insurance company cannot immunize an illegal conspiracy by joining it. Cf. *Parker v. Brown, 317 U.S. 341, 351-352 **[*254]** (1943)*. Moreover, since in this case the Blue Shield plan was offered to all San Antonio pharmacies and was in fact agreed to by at least 12, I am not called upon to decide whether an exclusive arrangement with a single provider would be so tenuously related to providing policyholder benefits as to be beyond the exemption's protection. See generally *Proctor v. State Farm Mutual Automobile Ins. Co., 182 U. S. App. D. C., at 270 n. 10, 561 F.2d, at 268 n. 10*. **[****80]** [24]

Finally, the conclusion that Blue Shield's Pharmacy Agreements should be held within the "business of insurance" [25] **[****82]** **[*255]** does not alone establish **[***295]** whether the agreements enjoy **[**1095]** an exemption from

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[23] See *Proctor v. State Farm Mutual Automobile Ins. Co., 182 U. S. App. D. C. 264, 561 F.2d 262 (1977)*, aff'g *406 F.Supp. 27 (DC 1975)*, cert. pending, No. 77-580; *Doctors, Inc*. v. *Blue Cross of Greater Philadelphia, 557 F.2d 1001 (CA3 1976)*, aff'g *431 F.Supp. 5 (ED Pa. 1975)*; *Frankford Hospital v. Blue Cross of Greater Philadelphia, 554 F.2d 1253 (CA3 1976)*, aff'g *417 F.Supp. 1104* (ED Pa.), cert. denied, ***434 U.S. 860 (1977)***; *Anderson v. Medical Service of District of Columbia, 551 F.2d 304 (CA4 1977)*, aff'g 1976-1 Trade Cases para. 60,884 (ED Va); *Travelers Ins. Co*. v. *Blue Cross of Western Pennsylvania, 481 F.2d 80* (CA3), aff'g *361 F.Supp. 774 (WD Pa. 1972)*, cert. denied, ***414 U.S. 1093 (1973)***.

[24] Such an arrangement could not be suspect simply because it would be anticompetitive, see discussion, *supra, at 249*. Rather, that means of providing policy benefits might be regarded as so unnecessary, and so likely to have its principal impact on pharmacies rather than policyholders, as to cross the boundary line of what constitutes the "business of insurance." I intimate no view upon the question.

[25] The analogies to other antitrust exemptions referred to by the Court, *ante*, at 231-232, are inapt. It is true that as a general rule an "exempt" party loses its immunity when it makes an agreement that is outside the scope of the exemption. But that general rule has no application here unless one assumes what the respondents need to prove -- that the Pharmacy Agreements are outside the scope of the McCarran-Ferguson Act. Reference to the cases under the Capper-Volstead Act is not helpful on the matter, as that Act limits its exemption to those who are "engaged in the production of agricultural products *as farmers, planters, ranchmen, dairymen, nut or fruit growers*." 42 Stat. 388, *7 U. S. C. § 291* (emphasis added). As a result, this Court has held that agreements involving nonfarmers are not exempt. *National Broiler Marketing Assn*. v. *United States, 436 U.S. 816 (1978)*. As the Court emphasizes, however, the McCarran-Ferguson Act exemption was not written in terms of "insurance companies," but extends instead to the "business of insurance." Hence, the participation of pharmacies does not automatically vitiate the exemption, as does the participation of nonfarmers in the Capper-Volstead "analogy."

Nor is reference to the labor exemption helpful to the Court. The quotation from *Mine Workers v. Pennington, 381 U.S. 657, 665-666 (1965)*, cited by the Court, *ante*, at 232 n. 39, is in complete accord with what I would conclude here: "[A] union [read 'insurer'] may make wage [pharmacy] agreements with a multi-employer bargaining unit [a group of pharmacies] . . . . But . . . [one] group of employers [pharmacies] may not conspire to eliminate competitors from the industry and the union [insurer] is liable with the employers [pharmacies] if it becomes a party to the conspiracy." The labor exemption is a particularly poor analogy for the Court to stress because in yet another footnote, *Pennington* expressly approved a set of transactions virtually identical to those complained of in this case. Here, respondents contend that Blue Shield adopted a uniform fee policy, even though it may have suspected that some pharmacies would not be able to compete if required to limit their markup to that demanded by Blue Shield. There was, however, no additional evidence of a conspiracy among the participating pharmacies to drive out their less able brethren, which Blue Shield then joined. This was precisely the set of circumstances held by the *Pennington* Court to be *within* the scope of the exemption:

"Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." *381 U.S., at 665 n. 2*.

the antitrust laws. To be entitled to an exemption, petitioners still would have to demonstrate that the transactions are in fact truly regulated by the State, *15 U. S. C. § 1012 (b)*, and that they do not fall within the "boycott" exception of *15 U. S. C. § 1013 (b)*. The District Court held for petitioners on both issues. Neither **[****81]** issue was reached by the Court of Appeals, however, in light of its holding that the contracts were not the "business of insurance." Accordingly, **[*256]** I would reverse the judgment of the Court of Appeals and remand the case for further proceedings. [26]

[**83]**

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 225

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1012

US L Ed Digest, Restraints of Trade and Monopolies 29

L Ed Index to Annos, Insurance; Restraints of Trade and Monopolies

ALR Quick Index, Insurance; Restraints of Trade and Monopolies

Federal Quick Index, Insurance; McCarran-Ferguson Act; Monopolies and Restraints of Trade

Annotation References:

Validity, construction, and application of McCarran-Ferguson Act (15 USCS 1011-1015), dealing with regulations of insurance business by state or federal law. *21 L Ed 2d 938*.

Union activities violating the federal antitrust laws. *9 L Ed 2d 998, 20 L Ed 2d 1528*.

Employer activities, beneficial or detrimental to organized labor, as violating federal antitrust laws. *93 L Ed 811*.

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Thus, the approach taken by the Court today does not merely "narrowly" construe "insurance" in accordance with our general practice. Rather, that approach actively discriminates between kinds of insurance, effectively confining "insurance" to traditional forms and effectively excluding forms that provide full-service coverage via provider agreements. It thereby places a significant obstacle in the path of the latter.

[26] The Court argues, *ante*, at 232 n. 40, that provider agreements may have anticompetitive consequences which could lead to escalation of health-care costs. The argument is not without force, but I must note that the very purpose of an antitrust exemption is to protect anticompetitive conduct. The argument, therefore, is better directed to the legislature, which has the power to modify or repeal McCarran-Ferguson, rather than to this Court. Referral to the legislators is particularly appropriate in this case, as the policy aspects may not be as one-sided as those painted by the Court. There is authority for the proposition that provider agreements, far from increasing costs, constitute an effective means for reduction in health-care prices and premiums. Council on Wage and Price Stability, Employee Health Care Benefits: Labor and Management Sponsored Innovations in Controlling Cost, *41 Fed. Reg. 40298, 40305 (1976)*. And the argument that "there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level" overlooks the vital consideration that many if not most of these plans originate in collective-bargaining agreements where "the consumer power and negotiating expertise of organized labor" combine to "reduce the unit price of health services." *Ibid*. Control over provider agreements by state insurance commissioners constitutes a second "incentive" operating in the same direction. See n. 18, *supra*. Whether or not the potential anticompetitive impact of McCarran-Ferguson outweighs these positive effects on health-care costs is a judgment properly to be made by Congress.

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.

United States Court of Appeals for the Eighth Circuit

September 14, 1978, Submitted ; February 27, 1979, Decided

No. 78-1229

Reporter
594 F.2d 1179 *; 1979 U.S. App. LEXIS 16598 **; 1979-1 Trade Cas. (CCH) P62,485; 47 A.L.R. Fed. 694

Professional Beauty Supply, Inc., a Minnesota corporation, v. National Beauty Supply, Inc., a Minnesota corporation, Appellant, v. La Maur Inc., Appellee.

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

Core Terms

indemnification, anti trust law, antitrust, joint tort feasor, third-party, deterrent, district court, cases, monopolize, violators, wrongdoer, antitrust violation, antitrust case, wrongdoing, circumstances, tortfeasors, parties, business relationship, antitrust action, damages, beauty, treble damages, proceedings, sections, lawsuit, courts

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Impleader

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

HN1[] **Pleadings, Impleader**

In the dismissal of a third-party complaint, the facts alleged in the third-party complaint must be accepted as true and the district court's dismissal upheld only if it appears beyond doubt that third-party plaintiff can prove no set of facts which would entitle it to relief.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

HN2[] **Regulated Practices, Private Actions**

Federal law governs the issue of whether there is a right to contribution in an antitrust case.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

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

Torts > Procedural Matters > Multiple Defendants > General Overview

HN3[] **Federal & State Interrelationships, Federal Common Law**

The traditional federal common law rule is that contribution is not available from joint tortfeasors.

Torts > ... > Multiple Defendants > Contribution > General Overview

HN4[] **Multiple Defendants, Contribution**

Contribution is an equitable doctrine based on the principle of justice between the parties.

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

Torts > ... > Multiple Defendants > Contribution > General Overview

HN5[] **Private Actions, Remedies**

Contribution may be enforced among joint tortfeasors in an antitrust action.

Securities Law > ... > Registration of Securities > False Registration Statements > Right to Contribution

Torts > ... > Multiple Defendants > Contribution > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Securities Law > Civil Liability Considerations > Right to Contribution

HN6[] **False Registration Statements, Right to Contribution**

The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case.

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

Torts > ... > Multiple Defendants > Contribution > General Overview

HN7[] **Private Actions, Remedies**

The subject of indemnification under federal ***antitrust law*** is governed by federal law.

Torts > ... > Multiple Defendants > Contribution > General Overview

HN8[] Multiple Defendants, Contribution

Indemnification, unlike contribution, permits a wrongdoer to escape loss by shifting his entire responsibility to another party.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

HN9[] Securities Act Actions, Civil Liability

Where a party has been found guilty of misconduct in violation of the public interest as embodied in the securities laws, it would offend public policy to allow indemnification.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

HN10[] Securities Act Actions, Civil Liability

Indemnification is not available even if the security violation was merely negligent.

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

Torts > ... > Multiple Defendants > Contribution > General Overview

HN11[] Private Actions, Remedies

The threshold question in a claim for indemnification under a separate state law theory is whether allowing it would be inconsistent with the purpose of the antitrust laws.

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

HN12[] Commercial Interference, Business Relationships

Indemnity is appropriate where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged or where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.

Counsel: Jane A. McTaggart, of Gainsley, Squier & Korsh, Minneapolis, Minn., for appellant; Thomas J. Squier, Minneapolis, Minn., on brief.

Robert L. Barrows, of Leonard, Street & Deinard, Minneapolis, Minn., for appellee; Charles A. Mays, Minneapolis, Minn., on brief.

Judges: Before HEANEY and STEPHENSON, Circuit Judges, and HANSON, [*] Senior District Judge.

Opinion by: STEPHENSON

Opinion

[*1180] National Beauty Supply, Inc. (National) appeals from the dismissal by the district court [1] of its third-party complaint against **[*1181]** La Maur Inc. (La Maur) for failure to state a claim upon which relief could be granted. [2] At this stage of the proceedings the issue is whether under any set of facts National could be entitled to contribution or indemnification from La Maur pursuant to either federal or Minnesota law. By dismissing the third-party complaint the district court held that neither contribution nor indemnification was available to National. **[**2]** We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This action was originally commenced by Professional Beauty Supply, Inc. (Professional) against National. In its complaint, Professional, a wholesaler of beauty supplies, alleged that National, also a wholesaler of beauty supplies, demanded that La Maur, a manufacturer of beauty supplies, grant National an exclusive dealership for La Maur's products in Minnesota. It was further alleged that as a result of these demands Professional was terminated as a La Maur dealer on April 2, 1973. In Count I of its complaint Professional claimed that the acts of National were done to monopolize **[**3]** or in an attempt to monopolize or to combine or conspire with another person to monopolize a part of trade or commerce in violation of federal ***antitrust law***, *15 U.S.C. § 2*. In Counts II and III, respectively, Professional claimed that the same acts constituted a violation of Minnesota ***antitrust law***, *Minn.Stat.Ann. §§ 325.8014*, *325.8015*, and a tortious interference with Professional's business relationship with La Maur.

On this appeal National states that after filing an answer and undertaking initial discovery it became apparent that Professional's entire claim was based on the alleged joint wrongdoing of La Maur and National. At that time National requested and was granted permission to file a third-party complaint against La Maur. In its third-party complaint National alleged that "La Maur solicited National to become a distributor of La Maur's products in the State of Minnesota," and that "National had no responsibility for, or control over La Maur's decision to terminate Professional." National further alleged that in the event it is found liable to Professional for violation of either federal or state antitrust laws, it is entitled to contribution from **[**4]** La Maur to the extent of at least one-half of the recovery. On appeal, National also argues that since it had no control over La Maur's decision to terminate Professional, it is at most secondarily liable to Professional and is thus entitled to indemnification from La Maur. Finally, National alleged that La Maur had a duty, which it failed to perform, to reveal to National the nature and extent of all business relationships between La Maur and others which might be unlawfully interfered with if National were granted an exclusive dealership in Minnesota. Thus, National claims that La Maur's failure to make such disclosure entitles it to indemnification from La Maur in the event National is found to have tortiously interfered with Professional's business relationships.

La Maur filed a motion under *Fed.R.Civ.P. 12(b)(6)* to have the third-party complaint dismissed for failure to state a claim upon which relief could be granted. On January 26, 1978, the district court entered an order dismissing the third-party complaint for failure to state a claim. The order was not accompanied by a memorandum opinion, but entry of final judgment was directed pursuant to *Fed.R.Civ.P. 54(b)*. This **[**5]** appeal followed.

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[*] The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] The Honorable Edward J. Devitt, Chief Judge, United States District Court for the District of Minnesota.

[2] The district court expressly determined "that there is no just reason for delay" and directed entry of final judgment dismissing the third-party complaint against third-party defendant La Maur Inc. See *Fed.R.Civ.P. 54(b)*.

Since this matter is before the court as an appeal from ***HN1***[] the dismissal of the third-party complaint, the facts alleged in the third-party complaint must be accepted as true and the district court's dismissal upheld only if it appears beyond doubt that National can prove no set of facts which would entitle it to relief. See *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 468 (8th Cir.* ***[*1182]*** *1976)*, Cert. denied, *433 U.S. 914, 97 S. Ct. 2986, 53 L. Ed. 2d 1100 (1977)*.

I. Contribution Under Federal ***Antitrust Law***

We note at the outset that ***HN2***[] federal law governs the issue of whether there is a right to contribution in an antitrust case. El Camino Glass v. Sunglo Glass Co., (1977-1)Trade Reg.Rep. (CCH) P 61,533 (N.D.Cal.1976); *Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y.1969)*. [3] **[**6]** ***HN3***[] The traditional federal common law rule is that contribution is not available from joint tortfeasors. However, National urges that we adopt a rule which would allow contribution from joint tortfeasors in federal antitrust cases. We believe that sound policy reasons dictate such a result and accordingly hold that under certain circumstances an antitrust defendant may be entitled to pro rata [4] **[**7]** contribution from other joint tortfeasors. [5]

To our knowledge no circuit court has directly decided the precise issue before us. [6] At least four federal district courts have confronted the issue and have unanimously held that there is no right to contribution under federal ***antitrust law***. Olson Farms, Inc. v. Safeway Stores, Inc., (1977-2)Trade Reg.Rep. (CCH) P 61,698 (D.Utah 1977); Wilson P. Abraham Constr. Co. v. Texas Indus., Inc., No. 75-2820 (E.D.La. Oct. 5, 1977); El Camino Glass v. Sunglo Glass Co., supra; *Sabre Shipping Corp. v. American President Lines, Ltd., supra.* See also *Baughman v.*

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3 When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176, 63 S. Ct. 172, 174, 87 L. Ed. 165 (1942).

4 Among courts allowing contribution in other areas of the law there is a conflict as to whether contribution is available on a pro rata or comparative fault basis. Compare *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 & n. 58 (S.D.N.Y.1974)*, Aff'd in part, rev'd in part, *540 F.2d 27 (2d Cir. 1976)*, And *Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 958 (S.D.N.Y.1970)*, ***Aff'd, 442 F.2d 1346*** (2d Cir.), Cert. denied, ***404 U.S. 941, 92 S. Ct. 286, 30 L. Ed. 2d 254 (1971)***, And cases cited in W. Prosser, Law of Torts § 50, at 310 n. 84 (4th ed. 1971), With *Kohr v. Allegheny Airlines, 504 F.2d 400, 405 (7th Cir. 1974)*, And *Gomes v. Brodhurst, 394 F.2d 465, 469-70 (3d Cir. 1968)*. Because of the administrative difficulties of assessing exact percentages of fault in complicated antitrust actions and because we believe a rule of pro rata contribution will serve as a more effective deterrent to antitrust violations (I. e., under a comparative fault rule some parties may feel they have little to lose in joining in an antitrust violation in a minor capacity), we adopt a rule of pro rata contribution except in unusual circumstances. See *Wassel v. Eglowsky, 399 F. Supp. 1330, 1370-71 (D.Md.1975)*, *Aff'd 542 F.2d 1235 (4th Cir. 1976)*; W. Prosser, Law of Torts § 50, at 310 (4th ed. 1971); P. Corbett, Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions, 31 Ford.L.Rev. 111, 138-39 (1962).

5 In light of our holding we do not pass on National's claim that to deny it both contribution and indemnification would violate the due process clause.

6 In *Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960)*, the Third Circuit stated: "there would seem to be strong justification for appellee's contention that the tort asserted to lie in the third party complaint is governed by federal common law with no right of contribution between tort feasors" (footnotes omitted). However, this statement was dictum since the holding of the case was that the defendants-third-party plaintiffs and the third-party defendants were not joint tortfeasors. Further, this case is not persuasive authority for the position of no contribution in that no reasoning was provided to support the court's statement. *American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975)*, and *Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963)*, were also cited by the court in Wilson P. Abraham Constr. Co. v. Texas Indus., Inc., No. 75-2820 (E.D.La. Oct. 5, 1977), as holding that there is no right of contribution in federal antitrust cases. These cases only state the general rule, with which we do not disagree, that a plaintiff may choose to not join all coconspirators in an anti-trust action. *American Motor Inns, Inc. v. Holiday Inns, Inc., supra, 521 F.2d at 1244-45 n. 42*; *Walker Distrib. Co. v. Lucky Lager Brewing Co., supra, 323 F.2d at 8*. Such a statement stops far short of holding that one conspirator is not entitled to contribution from other coconspirators.

Cooper-Jarrett, Inc., 391 F. Supp. 671, 678 n. 3 (W.D.Pa.1975), Aff'd in part, rev'd in part, 530 F.2d 529 (3d Cir.), **[*1183]** Cert. denied, *429 U.S. 825, 97 S. Ct. 78, 50 L. Ed. 2d 87 (1976)* (dictum); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D.Ga.1973) (arguably by implication); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804-05 (S.D.Cal.1968) **[**8]** (arguably by implication). Nevertheless, we are not persuaded that a rule barring contribution is correct. Of the above cited cases, only El Camino Glass, supra, and *Sabre Shipping Corp., supra*, provide any insight into the reasoning of the court.

[9]** In *Sabre Shipping Corp. v. American President Lines, Ltd., supra*, the primary case authority relied on by the court was *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952)*. Halcyon is a 1952 admiralty case which has been widely cited for the proposition that there is no federal common law right to contribution and that it should be up to Congress, rather than the courts, to alter the rule. E. g., *Sabre Shipping Corp. v. American President Lines, Ltd., supra, 298 F. Supp. at 1344*. However, the vitality of Halcyon was seriously eroded by Cooper Stevedoring Co. v. Kopke, Inc., 417 U.S. 106, 94 S. Ct. 2174, 40 L. Ed. 2d 694 (1974), decided after Sabre Shipping. In Cooper Stevedoring, the Supreme Court limited the application of Halcyon to those cases where the joint tortfeasor from whom liability is sought is immune from tort liability by statute. In limiting the breadth of Halcyon, the Court stated: "(A) "more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers **[**10]** to bear the entire loss, though the other may have been equally or more to blame." Cooper Stevedoring Co. v. Kopke, Inc., supra, 417 U.S. at 111, 94 S. Ct. at 2177. The Court further stated "(since) (plaintiff) could have elected to make (third-party defendant) bear its share of the damages caused by its negligence, we see no reason why (defendant-third-party plaintiff) should not be accorded the same right." Id. at 113, 94 S. Ct. at 2178. As a minimum Cooper Stevedoring and earlier admiralty cases demonstrate that under certain circumstances the Supreme Court is willing to fashion a rule allowing contribution without express direction from Congress. See id. at 110-11, 94 S. Ct. 2174.

El Camino Glass v. Sunglo Glass Co., supra, relies on Sabre Shipping, and in addition discusses many of the policy reasons both for and against contribution in antitrust cases. We do not disagree with much of the court's discussion but do take exception to its conclusion that "(w)hile the above arguments in favor of permitting contribution are persuasive, the court concludes that on balance the ends of justice will be better served by holding **[**11]** that contribution is not available in an antitrust suit." El Camino Glass v. Sunglo Glass Co., supra, Trade Reg.Rep. (CCH) at 72,112.

From an examination of La Maur's brief and the El Camino Glass and Sabre Shipping cases we discern five principal reasons advanced in support of the rule not allowing contribution. First, it is argued that it was the intent of Congress to exclude contribution. The essence of this argument is that since Congress put provisions for contribution in certain sections of the Security Acts of 1933 and 1934, but not in the Antitrust Acts, there was congressional intent to not allow contribution in antitrust cases. Furthermore, Congress has not acted in the face of the longstanding common law rule against contribution or the lower court decisions which hold that contribution is not available in antitrust cases.

We initially note that the antitrust statutes are not purported to be comprehensive and, possibly as a result, courts have not been prone to await congressional action to resolve many of the questions left unanswered by these statutes, such as the nature of the cause of action, apportionment of judgments, assignment, survival and limitations. **[**12]** Additionally, contrary to La Maur's assertions, it is our view that the presence of contribution provisions in the security laws is some indication that if the question were presented today, Congress would include a right to contribution as part of the **[*1184]** antitrust laws. We further observe that there is a dearth of case law on this issue and comment that a complicated legal issue which is raised so infrequently is unlikely to spur immediate congressional action. Finally, we find further support for our position from the fact that federal courts have been willing to formulate rules for contribution in other areas of the law without express congressional direction. [7] E. g.,

[7] The trend among the states has been to allow contribution. A minimum of 23 states have enacted statutes which permit at least limited contribution and 6 other states are generally cited as having case law which recognizes the right to contribution

Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974) (contribution and indemnification available on a comparative negligence basis in aviation collisions); *Chicago & N. W. Ry. v. Minnesota Transfer Ry., 371 F.2d 129 (8th Cir. 1967)* (contribution available in FELA case if state law provides); *Knell v. Feltman, 85 U.S.App.D.C. 22, 174 F.2d 662 (1949)* (contribution available in ordinary negligence cases in District of Columbia); *Grogg v. General Motors Corp., 72 F.R.D. 523, 527-28 (S.D.N.Y.1976)* **[**13]** (contribution available in federal sex discrimination cases); *Gould v. American-Hawaiian Steamship Co., 387 F. Supp. 163, 168-69 (D.Del.1974)*, Vacated on other grounds, *535 F.2d 761 (3d Cir. 1976)* (contribution available under section 14(a) of the Securities Exchange Act of 1934, *15 U.S.C. § 78n(a)*); *Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y.1970)*, *Aff'd, 442 F.2d 1346* (2d Cir.), Cert. denied, *404 U.S. 941, 92 S. Ct. 286, 30 L. Ed. 2d 254 (1971)* (contribution available under section 17(a) of the Securities Act of 1933, *15 U.S.C. § 77q(a)* and *section 10(b)* of the Securities Exchange Act of 1934, *15 U.S.C. § 78j(b)*).

[14]** Second, it is contended that allowing contribution will interfere with the plaintiff's ability to maintain control of his lawsuit. The fear expressed, which is indeed a legitimate one, is that a defendant may attempt to complicate the issues and confuse the jury by impleading numerous third-party defendants or fundamentally alter the lawsuit by impleading a third-party defendant with financial resources far superior to the plaintiff or the original defendant. Without downplaying the seriousness of this fear, we are confident that such problems can be avoided by the district court's prudent use of its power to sever where necessary to insure justice. In the present case Professional has not objected to the adding of La Maur as a third-party defendant.

A third reason advanced is that a right to contribution might serve as a possible deterrent to settlement. We are not convinced that a holding permitting contribution need undermine the judicial policy in favor of settlement. The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case. However, in the proper case the court should be able to fashion a rule of contribution which will protect **[**15]** the rights of settling defendants. See, e. g., *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27, 38-39 (2d Cir. 1976)*; *Gomes v. Brodhurst, 394 F.2d 465, 468-70 (3d Cir. 1968)*. See also *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (if plaintiff recovered damages in settlement from one defendant he could not recover for the same damages from another defendant); *Leach v. Mon River Towing, Inc., 363 F. Supp. 637, 642-43 (W.D.Pa.1973)* (effect of release on amount of damages recoverable from remaining defendants); W. Prosser, Law of Torts § 50, at 309-10 (4th ed. 1971); F. James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv.L.Rev. 1156, 1161-62 (1941); C. Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 Harv.L.Rev. 1170, 1172-73 (1941); F. Bohlen, Contribution and Indemnity Between Tortfeasors, 21 Corn.L.Q. 522, 567-68 (1936).

A fourth argument against contribution in antitrust cases is that antitrust suits are already enormously complex and it is unwise to further complicate matters **[**16]** by adding the issue of contribution among defendants. **[*1185]** We reemphasize that district courts have the ability to sever issues and parties if the need arises. More importantly, the vitality of this argument is somewhat suspect since contribution is allowed by statute under certain sections of the Security Acts, and security cases are often as complex as antitrust cases. We are aware of no unmanageable administrative problems which have been caused by allowing contribution in security cases. On the contrary, the trend has been to allow contribution in security actions which are brought under sections of the Security Acts which do not have express contribution provisions. See, e. g., *Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 957-58 (S.D.N.Y.1975)*; *Liggett & Myers Inc. v. Bloomfield, 380 F. Supp. 1044 (S.D.N.Y.1974)*; *Globus, Inc. v. Law Research Serv., Inc., supra, 318 F. Supp. 955*; *DeHaas v. Empire Petroleum Co., 286 F. Supp. 809 (D.Colo.1968)*, Aff'd in part, rev'd in part on other grounds, *435 F.2d 1223 (10th Cir. 1970)*. See also *Getter v. R. G. Dickinson & Co., 366 F. Supp. 559, 569 (S.D.Iowa 1975)*. **[**17]**

The final reason urged by La Maur for a rule of no contribution is that the deterrent effect of the antitrust laws is increased by not permitting defendants to redistribute the cost of an antitrust action. We believe that the question of deterrence actually cuts both ways and on balance a rule allowing contribution is actually a greater deterrent. The

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where there is not intentional misconduct. See P. Corbett, Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions, 31 Ford.L.Rev. 111, 113 (1962).

fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

This possibility significantly increases where a large or powerful tortfeasor has sufficient economic influence to prevent a plaintiff from including it as a defendant. National alleges that this is precisely what happened in the present case. National claims that in their depositions the principal shareholders of Professional stated that they were persuaded not to name La Maur as a defendant because of La Maur's decision to renew Professional's franchise. Whether such allegations are true can only be determined upon further factual **[**18]** development. However, such allegations are indicative of the exact abuses which are encouraged by a rule which automatically denies contribution to antitrust violators and which could be avoided by the formulation of a rule allowing contribution in certain cases. To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

HN4[] Contribution is an equitable doctrine based on the principle of justice between the parties. See *Dawson v. Contractors Transport Corp., 151 U.S.App.D.C. 401, 405-406* & n. 7, *467 F.2d 727, 731-32 & n. 7 (1972)*. "The governing principle of contribution throughout has been that one of two or more joint wrongdoers should not be required to pay more than his share of a common burden, or to put it another way, that no obligor should be unjustly benefitted at the expense of another." *Gould v. American-Hawaiian Steamship Co., supra, 387 F. Supp. at 170*. In *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, **[**19]** the Supreme Court cautioned against broad application of common law doctrines to prevent recovery if such application will defeat important public purposes. We are convinced that the result of automatically prohibiting contribution among antitrust defendants in all circumstances would be to allow a significant number of antitrust violators to escape liability for their wrongdoing and thereby undermine the policy of the antitrust laws.

The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or **[*1186]** his collusion with the other wrongdoer. See, e. g., *Gomes v. Brodhurst, supra, 394 F.2d at 467-68* & n. 1.

In sum, we adopt for ***HN5***[] the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors **[**20]** in an antitrust action. Because of the deterrent policy of the antitrust laws, even intentional tortfeasors may obtain contribution so that tortfeasors will not escape liability. Cf. *Odette v. Shearson, Hammill & Co., supra, 394 F. Supp. at 958*; *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 238 (S.D.N.Y.1974)*; *Globus v. Law Research Serv., Inc., supra, 318 F. Supp. at 955* (contribution under the security laws even for intentional tortfeasors); sections 9(e), 18(b) of the Securities Exchange Act of 1934, *15 U.S.C. §§ 78i(e)*, *78r(b)*. We do not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution. ***HN6***[] The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case, including the factors specified by Justice White in his concurring opinion in *Perma Life Mufflers, Inc. v. International Parts Corp., supra.* **[**21]** [8] Cf. Section 11(f) of the Securities Act of 1933, *15 U.S.C. § 77k(f)* (contribution unless one party guilty of fraudulent misrepresentation and not the other). At this stage of the proceedings contribution in favor of National is a possibility. Therefore, the district court erred in dismissing its third party complaint.

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[8] The factors listed by Justice White in connection with whether an in pari delicto defense should be allowed in an antitrust action are "facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement." *Perma Life Mufflers v. International Parts Corp., supra, 392 U.S. at 146-47, 88 S. Ct. at 1988* (White, J., concurring).

[22]** II. Indemnification Under Federal ***Antitrust Law***

HN7[] The subject of indemnification under federal ***antitrust law***, like contribution, is governed by federal law. National claims that on remand it should be allowed to obtain indemnification from La Maur on the federal antitrust claim if it can prove that if any antitrust violation was committed, it was at La Maur's suggestion and urging, and thus La Maur was the "primary" wrongdoer and National was only "secondarily" liable. ***HN8***[] Indemnification, unlike contribution, permits a wrongdoer to escape loss by shifting his entire responsibility to another party. If indemnification were allowed, those found liable for breach of a statutory obligation might escape liability as effectively as if contribution were denied. We hold, therefore, that contribution may be allowed, but not indemnification. Thus, the loss will be apportioned among the joint wrongdoers so that the deterrent effect of the judgment will be felt by all culpable parties.

In *Perma Life Mufflers, Inc. v. International Parts Corp., supra, 392 U.S. at 138-39, 88 S. Ct. 1981*, **[**23]** the Supreme Court emphasized that the public interest and statutory aim of deterring antitrust violations and enforcing the antitrust laws are of paramount importance. To allow indemnification would dilute the deterrent impact of the antitrust laws. Only a realistic possibility of liability for damages will encourage compliance with the antitrust laws and will protect the public interest in preserving competition. Consequently, even if one joint tortfeasor bears greater responsibility for the wrongdoing, a person who violates the antitrust statutes should not be entitled to full indemnification from the more culpable third party. [9]

[24]** The only case cited by National as direct support of its position is *Wilshire Oil* ***[*1187]*** *Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969)*. Without accepting or rejecting the Tenth Circuit's analysis in that case, we note that it is distinguishable from the present case. In Wilshire, the court allowed a suit for indemnification by a corporation against its officers who had allegedly caused the firm to commit antitrust violations which resulted in the corporation paying fines, penalties, and other expenditures. The court was careful to point out that the indemnification suit was based on a separate state claim for breach of a fiduciary duty and the court was not deciding the question of whether indemnification is generally available in antitrust actions. *Id. at 1284*. In the present case no separate cause of action by National against La Maur under state law has been alleged in connection with the antitrust violation. We caution, however, that ***HN11***[] the threshold question in a claim for indemnification under a separate state law theory is whether allowing it would **[**25]** be inconsistent with the purpose of the antitrust laws. Under no circumstance should indemnification be allowed where such allowance would be inconsistent with the purpose of the antitrust laws.

III. Contribution and Indemnification Under Minnesota Law

Counts II and III of Professional's complaint involve pendent state claims. Count II alleged that National violated Minnesota's antitrust statutes, *Minn.Stat.Ann. §§ 325.8014*, *325.8015*, and Count III alleged tortious interference with its business relationships.

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[9] Furthermore, in its complaint Professional alleges that National violated *section 2* of the Sherman Act by intentionally doing acts designed to exclude Professional as a competitor. Thus for Professional to prevail against National it will have to show that National was an intentional wrongdoer. Thus, the sound reasoning of the security cases which deny indemnity to tortfeasors who have committed a wrong graver than ordinary negligence is equally applicable here. These cases have held that ***HN9***[] where a party has been found guilty of misconduct in violation of the public interest as embodied in the securities laws, it would offend public policy to allow indemnification. See, e. g., *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., supra, 385 F. Supp. at 238-39*; *Herzfield v. Laventhol, Krekstein, Horwath & Horwath, supra, 378 F. Supp. at 135*; *Globus v. Law Research Serv., Inc., 287 F. Supp. 188, 199 (S.D.N.Y.1968)*, Aff'd in part, rev'd in part, *418 F.2d 1276 (2d Cir. 1969)*, Cert. denied, ***397 U.S. 913, 90 S. Ct. 913, 25 L. Ed. 2d 93 (1970)***. See also *Odette v. Shearson, Hammill & Co., supra, 394 F. Supp. at 954-57*, And *Gould v. American-Hawaiian Steamship Co., supra, 387 F. Supp. at 166-68*, where the courts held that ***HN10***[] indemnification was not available even if the security violation was merely negligent. National should not be permitted to secure indemnity on a theory inconsistent with the theory on which it is ultimately held liable, I. e., that it was secondarily liable only because of La Maur's wrongdoing.

Minnesota is one of a minority of states where the common law has developed to allow contribution among joint tortfeasors under certain circumstances. Under Minnesota law, National will be entitled to contribution if it can show on remand that it was not guilty of conscious wrongdoing, even if there has been a finding that a violation of the Minnesota antitrust statutes has been committed. Cf. *Skaja v. Andrews Hotel Co., 281 Minn. 417, 161 N.W.2d 657 (1968)*; *Farmers Ins. Exch. v. Village of Hewitt, 274 Minn. 246, 143 N.W.2d 230, 235-39 (1966)*; *Hardware Mut. Cas. Co. v. Danberry, 234 Minn. 391, 48 N.W.2d 567, 570-72 (1951)* (application **[**26]** of contribution in personal injury cases). See also W. Prosser, Law of Torts § 50, at 306-08 & n. 68 (4th ed. 1971).

National also argues that it has stated a claim for indemnification under Count III, tortious interference with business relationships. In Minnesota, the leading case on indemnification is *Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960)*. [10] In Hendrickson the court listed several situations in which ***HN12***[] indemnity is appropriate, two of which are relevant here:

> (2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.

[27]**

> (3) Where the one seeking indemnity has incurred liability because of a breach **[*1188]** of duty owed to him by the one sought to be charged.

Id. at 848 (footnotes omitted).

With regard to Count III, National, in its third-party complaint, alleged that if it is found liable it will be "by action at the direction, in the interest of, and in reliance upon" La Maur; that La Maur had a duty to reveal to National the nature and extent of the business relationship between La Maur and Professional that might be interfered with by granting National an exclusive dealership; and that La Maur breached that duty. Since National may demonstrate that it falls within one of the exceptions to the no indemnification rule listed in *Hendrickson v. Minnesota Power & Light Co., supra*, the district court acted prematurely in dismissing National's claim under Minnesota law for indemnification under Count III.

The issue, whether if sufficient evidence is presented by Professional to hold National liable under Count III, such evidence will also be sufficient to preclude National from receiving indemnification from La Maur under Minnesota law, is not free from doubt. Since the **[**28]** case must be remanded on other grounds, we believe that the best course is to have this determination made in the first instance by the district court after more complete factual development.

IV. Conclusion

As we have indicated, this case is before us on appeal from the grant of a motion to dismiss. We conclude that it cannot be said beyond doubt at this stage of the proceedings that National can prove no set of facts in support of its claim for contribution under the federal antitrust laws, and for contribution or indemnification under Minnesota law. We affirm the dismissal of National's claim for indemnification under the federal antitrust laws.

Affirmed in part; reversed in part, and remanded for further proceedings not inconsistent with this opinion.

Dissent by: HANSON(In part)

Dissent

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[10] See also *Bjerk v. Universal Eng'r Corp., 552 F.2d 1314, 1318-19 (8th Cir. 1977)*, Citing *Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (Minn.1977)*, for latest application of Hendrickson.

HANSON, Senior District Judge, dissenting in part.

I respectfully dissent from the holding in Part I of the majority's opinion permitting contribution among joint tortfeasors in an antitrust action. I concur in the result reached in Part II of the opinion and in the Court's reasoning to the extent it is not inconsistent with my views expressed below concerning the issue of contribution. In view **[**29]** of the Court's holdings in Part I and Part II, I concur in the result reached in Part III of the majority opinion and in the judgment, but with the understanding that the district court retains discretion to dismiss pendent state claims.

Because I discern no compelling reason to allow contribution in antitrust causes, and strongly suspect that antitrust policy may be adversely affected by it, I would affirm the district court's dismissal of National's claim for contribution from La Maur under federal ***antitrust law***.

As an initial observation, this cause of action is an inopportune one in which to fashion a broad rule allowing contribution among joint tortfeasors, in an antitrust action. The only violation of federal ***antitrust law*** alleged by Professional is found in Count I of its complaint. That count alleges a violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. *Section 2* proscribes monopolization, attempts to achieve a monopoly, and conspiracies to monopolize; and provides criminal penalties for those who violate its provisions. Under Section 4 of the Clayton Act, *15 U.S.C. § 15*, a plaintiff such as Professional may recover treble **[**30]** damages for a *Section 2* violation. The Court notes that under the allegations in Professional's complaint Professional will have to show that National was an intentional wrongdoer in order to prevail. Ante at 1186-1187 n. 9. This is clearly correct, for the substance of Professional's complaint as I read it is that National's acts were pursuant to an attempt or conspiracy to monopolize the sale of wholesale beauty supplies in Minnesota. Intent is an essential element of the proof of a *Section 2* attempt or conspiracy to monopolize. See **[*1189]** e. g., *United States v. Griffith, 334 U.S. 100, 105, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*; *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, 578 F.2d 1256, 1262 (8th Cir. 1978)*; *United States v. Empire Gas Corp., 537 F.2d 296, 298-99 (8th Cir. 1976)*, Cert. denied, *429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977)*; *International Railways of Central America v. United Brands Co., 532 F.2d 231, 239* (2d Cir.), Cert. denied, *429 U.S. 835, 97 S. Ct. 101, 50 L. Ed. 2d 100 (1976)*. If National is found liable to Professional, National will have been found to **[**31]** have conspired or committed an unlawful attempt to monopolize trade with "an intent to control prices or restrict competition unreasonably." *United States v. Empire Gas Corp., supra at 302*. See *United States v. DuPont & Co., 351 U.S. 377, 389, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

If found to be an antitrust violator under these circumstances, I believe that National is in a poor position to complain of any unfairness in being forced to assume the burden of restitution for the loss occasioned by its intentional wrongdoing, and it is in even worse position to complain about being penalized to the full extent of the treble damages allowed to a plaintiff by the Clayton Act. At least since Lord Kenyon's opinion in Merryweather v. Nixan, 8 Term.Rep. 186, 101 Eng.Rep. 1337 (K.B.1799), the common law has not allowed contribution in favor of an intentional wrongdoer on the theory that intentional wrongdoing is deterred by refusing to invoke equity to diminish the burden of liability otherwise incurred. See *Wright v. Haskins, 260 N.W.2d 536, 538-39 (Iowa 1977)*. Whatever trend may exist in favor of contribution among nonintentional **[**32]** tortfeasors, the rule against contribution as between intentional wrongdoers is still generally adhered to. See W. Prosser, Law of Torts § 50, at 308 (4th ed. 1971).

With respect to *Section 2* conspirators, the majority's partial reliance on trends in contribution law and equitable principles is misplaced.

I realize, however, that allegiance to common law rules cannot be allowed to undermine the purposes of the antitrust laws. *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-39, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*. In making the decision whether contribution is to be permitted or rejected in antitrust actions, the primary inquiry must be which course best furthers the public policy in favor of competition, or least detracts from it. *Id. at 139, 88 S. Ct. 1981*. The majority concludes that "(to) deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing."

Ante, at 1185. I am not convinced that this is so. First, the likelihood that a participant may escape responsibility for his antitrust violations is at **[**33]** best a speculative concern (particularly in non-class actions) since in any given case there may be any number of other potential plaintiffs who were damaged by the particular restraint of trade or monopoly in which the prospective third-party defendant has been a participant. Moreover, as the majority candidly observes, the question of deterrence "cuts both ways," and it could well be argued that potential antitrust violators would be more likely to refrain from anticompetitive activities if they know that any injured party may impose the full burden of a treble damage recovery on them even though, for instance, the violator played a relatively minor part in a conspiracy to monopolize. See El Camino Glass v. Sunglo Glass Co., (1977-1)Trade Reg.Rep. (CCH) P 61,533 (N.D.Cal.1976), Or, inversely, the possibility of dissipating the impact of a treble damage award among antitrust coconspirators may actually encourage anticompetitive activity. To me the arguments on either side of the deterrence question are inconclusive and as a result I find deterrence of potential violators insufficient as a basis on which to predicate a new rule permitting contribution.

In other respects, however, **[**34]** such a rule presents a substantial risk that antitrust lawsuits may become more difficult for trial courts to manage and, more importantly, the net result may be to deter private plaintiffs of relatively limited means from bringing **[*1190]** or maintaining a meritorious suit. Of particular concern in my mind is the potential for confusion, delay, and complexity inherent in permitting antitrust defendants a right to implead other alleged antitrust violators who may distort the litigation because of their size, nature of involvement, or position in the marketplace. It is not difficult to conceive of many circumstances in which the original plaintiff may simply be overwhelmed by embroilment in a lawsuit of a scope and size it never contemplated and is ill-equipped to handle. See *Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339, 1346 (S.D.N.Y.1969)*. Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will decide to forego a legitimate cause of action. Though district courts have the power to superintend complex litigation, the multiplication of issues and parties remains to be grappled with, and the chilling **[**35]** effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion.

To a substantial extent, the enforcement of public antitrust policy depends on the attractiveness of litigation to private attorneys general. See *Hawaii v. Standard Oil of California, 405 U.S. 251, 262, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*. Mindful of this, the Supreme Court has recently shown itself to be sensitive to the danger of complicating issues in antitrust litigation to the point where a reduction in the incentive to sue is likely to result. See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Before formulating a rule which permits additional parties and issues to be joined in an antitrust case, we should be sure that we do not thereby counterbalance the motivation to sue provided by the treble damage award.

In any event, as the examples of the Antitrust Improvement Act of 1976, *15 U.S.C.A. §§ 15c-15h (Supp.1978)*, and the contribution sections of the Security Acts of 1933 and 1934 show, there is ample precedent for **[**36]** statutorily expanding the scope of antitrust litigation to include a right to seek contribution should Congress choose to do so. Congress has never acted despite the fact that those courts which have dealt with the issue have held against contribution, and despite the fact that the issue of contribution would appear to be fairly obvious. In view of the implications with respect to the effectiveness of ***antitrust law***, and with no strong policy reason in favor of contribution, I believe this is an appropriate instance to await congressional directive without risk of abdicating judicial function.

Century Hardware Corp. v. Acme United Corp.

United States District Court for the Eastern District of Wisconsin

February 28, 1979

No. 77-C-316

Reporter

467 F. Supp. 350 *; 1979 U.S. Dist. LEXIS 14133 **; 1979-1 Trade Cas. (CCH) P62,554

CENTURY HARDWARE CORPORATION, Plaintiff, v. ACME UNITED CORPORATION, Defendant

Core Terms

distributors, discount, school supplies, schools, damages, sales, jobbers, purchasers, scissors, price discrimination, Dealership, customers, products, catalog, price discount, regular, selling, differential, competitors, allowance, qualify, argues, prices, stock, designated

LexisNexis® Headnotes

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

Business & Corporate Law > Distributorships & Franchises > Remedies > Equitable Relief

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

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

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN1[] **Remedies, Damages**

Jurisdiction over Robinson-Patman Act claims is conferred by *28 U.S.C.S. § 1337* and *15 U.S.C.S. §§ 15*, *22*, *26*.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

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

HN2[] Amount in Controversy, Determination

Federal court jurisdiction over state law claims is conferred by *28 U.S.C.S. § 1332*, when there is diversity of citizenship and allegations of the requisite amount in controversy, and under the doctrine of pendent jurisdiction.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Business & Corporate Law > ... > Remedies > Equitable Relief > Injunctions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

Business & Corporate Law > Distributorships & Franchises > Termination > Notice Requirements

HN3[] Standards of Performance, Discharge & Termination

Wis. Stat. § 135.03 provides that a grantor of a dealership may not terminate the dealership agreement without good cause, and § 135.04 requires notice of a termination to be given in a specified manner. Section 135.06 allows an action for damages and injunctive relief for violations of the Wisconsin Fair Dealership Law.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

HN4[] Contract Formation, Acceptance

An acceptance is not effective unless the offeree accepts in the manner prescribed by the offeror.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Regulated Practices > Price Discrimination > 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 > Defenses

HN5[] Defenses, Cost Justification Defense

15 U.S.C.S. § 13(a) covers price discrimination such as discounts. *15 U.S.C.S. § 13(d)* covers payments by the seller to the buyer in consideration of services or facilities provided by the buyer.

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

HN6[] Antitrust & Trade Law, Robinson-Patman Act

For purposes of proving a prima facie case under the Robinson-Patman Act, the plaintiff need only show contemporaneous sales at different prices are sufficient. The sales at different prices need only be reasonably contemporaneous.

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

HN7[] Antitrust & Trade Law, Robinson-Patman Act

A discount is functionally available when objective standards exist to guide regular jobbers in qualifying for the category of purchasers receiving the discount.

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

HN8[] Antitrust & Trade Law, Robinson-Patman Act

The seller must take affirmative action to inform customers of the availability of promotional payments and services.

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

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

HN9[] Price Discrimination, Competitive Injuries

Having established that the defendant engaged in price discrimination, the plaintiff must also show that the effect of the price discrimination may be substantially to lessen competition or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN10[] Defenses, Cost Justification Defense

Price differentials which make due allowance for differences in the cost of sale or delivery resulting from different methods by which the commodities are sold or delivered to buyers, are not prohibited. *15 U.S.C.S. § 13(a)*. The burden of proving this cost-justification defense is on the defendant-seller.

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

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

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

HN11[] **Remedies, Damages**

If a buyer is unable to pass on the higher price to its own customer, the price differential is a proper measure of damages in Robinson-Patman Act cases.

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

HN12[] **Antitrust & Trade Law, Robinson-Patman Act**

In a case in which competing purchasers seek to resell the commodity in question through a bid-award procedure, the winner being the lowest bidder, it is probable that there is little or no opportunity for the winning bidder to pass on the higher price. An attempt to pass on the higher price necessarily raises the bid and increases the chance that a competitor's bid will be lower. Accordingly, the price differential is an appropriate measure of damages in such a case.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Education Law > Administration & Operation > School Property > Competitive Bids

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

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

HN13[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act prohibits two sales of the same product to different purchasers at different prices. No single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination. One who merely seeks to purchase does not qualify as a purchaser.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN14[] **Robinson-Patman Act, Claims**

Damages for violations of the Robinson-Patman Act are trebled pursuant to *15 U.S.C.S. § 15*.

Counsel: **[**1]** Michael, Best & Friedrich by David J. Cannon, Milwaukee, Wis., for plaintiff.

Foley & Lardner by Robert Christensen, Michael A. Bowen, Milwaukee, Wis., for defendant.

Opinion by: GORDON

Opinion

[*352] DECISION AND ORDER

A bench trial was held in this action on January 11, 1979. The matter is before me for the resolution of the merits on the basis of certain stipulated facts, the evidence adduced at trial and the parties' briefs. The following decision constitutes my findings of fact and conclusions of law pursuant to *Rule 52(a), Federal Rules of Civil Procedure*.

This is an action under the Robinson-Patman Act, *15 U.S.C. § 13*, charging unlawful price discrimination, and under the Wisconsin Fair Dealership Law, Chapter 135, Wis.Stats., alleging an improper termination of a dealership agreement between the parties. The plaintiff seeks damages and equitable relief in connection with both causes of action. ***HN1***[] Jurisdiction over the Robinson-Patman claim is conferred by *28 U.S.C. § 1337* and *15 U.S.C. §§ 15*, *22* and *26*. ***HN2***[] Jurisdiction over the Wisconsin Fair Dealership Law claim is conferred by *28 U.S.C. § 1332*, there being diversity of citizenship and allegations of the requisite amount **[**2]** in controversy, and under the doctrine of pendent jurisdiction.

The plaintiff is a Wisconsin corporation with its offices and principal place of business in Milwaukee, Wisconsin. It is engaged in the wholesale hardware business.

The defendant is a corporation with its principal place of business in Connecticut. The defendant manufactures scissors and sells them to the plaintiff and others in Wisconsin, who resell them to schools, school boards and other customers.

For a period of over 20 years, the defendant has maintained a customer classification called "distributor of school supplies." (Hereinafter "distributors"). Distributors specialize in selling arts and crafts supplies **[*353]** to schools. Such distributors are entitled to receive a 5% Discount or promotional allowance off the regular jobber's prices when they purchase certain school supplies. It is agreed that the 5% Discount gives distributors a competitive advantage over other customers who purchase the defendant's products at the regular jobbers' prices.

The specific products in question are scissors and shears used by schools. At all pertinent times, there were six designated distributors in the relevant market, **[**3]** Wisconsin and Upper Michigan. The plaintiff was not one of them. The two major distributors by volume, Sax Arts & Crafts and Valley Schools Suppliers, Inc., had been receiving the 5% Discount for at least 20 years prior to 1977 based on an oral agreement with the defendant.

The plaintiff sells a large range of hardware items. It does a substantial amount of business with schools throughout the state of Wisconsin. In addition to scissors, items sold to schools by the plaintiff vary from plumbing supplies to shop tools; in the words of Mr. Gendelman, the plaintiff's president, it sells "anything and everything" needed by schools. The plaintiff's business with the Milwaukee schools alone involves over 1,000 bids a year and amounts to nearly $ 250,000 per year.

Although the plaintiff has sold the defendant's products for several years, no consideration was given by the defendant as to whether the plaintiff should be designated as a distributor and thus become eligible for the 5% Discount until November, 1976. At that time, Mr. Gendelman telephoned Mr. Farrington, the defendant's vice president of marketing, and informed him that the plaintiff was being underbid by competitors for sales **[**4]** of scissors to schools. Mr. Farrington stated that this was probably because the plaintiff was not a distributor of school supplies. Mr. Gendelman argued that the plaintiff should be considered a distributor of school supplies, and Mr. Farrington stated that he would investigate the plaintiff's eligibility for that status.

Mr. Farrington testified that as a result of Mr. Gendelman's phone call, the defendant reevaluated its discount system and decided to substitute written agreements with its distributors for the existing oral agreements. On or about January 1, 1977, the defendant circulated to the six designated distributors who had been receiving the 5%

Discount a letter announcing the 5% Promotional allowance on certain school supply items for school-line distributors. A form agreement entitled "agreement to provide promotional services" was enclosed. Neither the letter nor an agreement was sent to the plaintiff, and the requirements for eligibility for distributor status were not explained nor offered to the plaintiff until February 11, 1977, when Mr. Farrington wrote to Mr. Gendelman informing him why the defendant did not consider the plaintiff a distributor of school supplies. **[**5]** A copy of the new standard agreement used for distributors was enclosed.

On April 11, 1977, Mr. Gendelman executed the agreement to provide promotional services and returned it to the defendant the following day. Although the agreement recites on its face that "A copy of our latest catalog is submitted herewith," no catalog was submitted by the plaintiff.

On April 26, 1977, Mr. Farrington wrote to the plaintiff and informed it that it was not eligible for classification as a distributor because it failed to submit a copy of its latest catalog and because there was no evidence that the plaintiff was maintaining a stock of school supplies manufactured by the defendant.

Wisconsin Fair Dealership Law

The plaintiff attempted to show that the defendant violated the Wisconsin Fair Dealership Law, Chapter 135, Wis.Stats., by cancelling what it claims to be an "agreement" whereby the plaintiff would be a distributor of the defendant's school supplies and entitled to the 5% Discount.

HN3[] *Section 135.03* provides that a grantor of a dealership may not terminate the dealership agreement without good cause, and section 135.04 requires notice of a termination to be given in a specified manner. Section **[**6]** 135.06 allows an action for damages and injunctive relief for violations of the Act.

[*354] The plaintiff argues that the written agreement form executed by its president on April 11, 1978, was a binding contract which could only be terminated in compliance with the provisions of Chapter 135.

In my opinion, the plaintiff has failed to prove a violation of the Act because it did not establish that a dealership agreement was ever entered into by the parties. The agreement form prepared by the defendant and signed by Mr. Gendelman states that "the undersigned, a distributor of school supplies, in consideration of a promotional allowance to be given by Acme United Corporation, hereby agrees to provide the following services on behalf of Acme United Corporation: . . . The publication and distribution of a Catalog of School Supplies . . . A copy of our latest catalog is submitted herewith." It is undisputed that the plaintiff never provided a copy of such a catalog as required. It is elementary contract law that ***HN4***[] an acceptance is not effective unless the offeree accepts in the manner prescribed by the offeror. *Nelson, Inc. v. City of Milwaukee Sewerage Commission, 72 Wis.2d 400, 419,* ***[**7]*** *241 N.W.2d 390 (1976)*. The terms of acceptance were specified in the form agreement prepared by the defendant. They were not complied with by the plaintiff, and therefore no contract was formed. Consequently, the Wisconsin Fair Dealership Law claim must fail.

Robinson-Patman Act Claims

The Plaintiff contends that the discount is either an illegal price discrimination under *15 U.S.C. § 13(a)*, for which there is no cost justification, or an illegal promotional allowance under *15 U.S.C. § 13(d)*, or both. I believe that the case comes within the ambit of *§ 13(a)* but not within *§ 13(d)*. ***HN5***[] The former section covers price discrimination such as discounts; the latter section covers payments by the seller to the buyer in consideration of services or facilities provided by the buyer. See *Chicago Spring Products Co. v. U. S. Steel Corp., 254 F. Supp. 83, 84-85*, affirmed, *371 F.2d 428 (7th Cir. 1966)*. This case involves a price discount, although it is denominated a "promotional allowance," and therefore the case will be considered only under *§ 13(a)*.

The defendant does not dispute that several of the jurisdictional elements of a *§ 13(a)* claim are present: the defendant is a "person" covered **[**8]** by the Act; the alleged discrimination is attributable to the same seller in its dealings with different purchasers; the scissors in question are "commodities of like grade and quality"; and the alleged discrimination involves interstate commerce. See, 3 Von Kalinowski, ***Antitrust Law*** and Trade Regulation,

§ 23.02(1). The plaintiff also has met the contemporaneous-sales jurisdictional requirement. The uncontested facts reveal that the plaintiff was successful in receiving orders from schools in 1974 and 1975 at a time when the defendant was selling scissors to the designated distributors of school supplies at the discounted price. ***HN6***[] For purposes of proving its prima facie case, these contemporaneous sales at different prices are sufficient. The sales at different prices need only be reasonably contemporaneous. *Loren Specialty Mfg. Co. v. Clark Mfg. Co., 241 F. Supp. 493, 498 (N.D.Ill.1965)*, affirmed *360 F.2d 913* (7th Cir.), cert. denied *385 U.S. 957, 87 S. Ct. 392, 17 L. Ed. 2d 303 (1966)*.

The central issue in this case is whether there has been a substantive violation of the Robinson-Patman Act. That is, has there been a discrimination in price? The defendant argues that its price **[**9]** discount is functionally available to all purchasers who choose to qualify as distributors, and therefore the discount is not prohibited by the Act. *FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1025 (2d Cir. 1976)*; *Chapman v. Rudd Paint and Varnish Co., 409 F.2d 635 (9th Cir. 1969)*; *Mueller v. F.T.C., 323 F.2d 44 (7th Cir. 1963)*, cert. denied, *377 U.S. 923, 84 S. Ct. 1219, 12 L. Ed. 2d 215 (1964)*. The plaintiff argues that the discount is not functionally available to all purchasers and was not available to Century Hardware in this case.

In *Mueller Co., supra*, the petitioner-seller of parts for water and gas distribution systems sold some of its products through two classes of jobbers: "stocking jobbers" and "regular jobbers." Both classes of jobbers received a 15% Discount in direct shipments to end users. The "stocking jobbers" received **[*355]** an additional 10% Discount on the stock they warehoused. The FTC charged that the additional 10% Discount on the petitioner's products was an illegal price discrimination, and after the commission found a violation of *§ 13(a)*, a cease and desist order was issued. Mueller Co. had argued that regular jobbers were free to **[**10]** enter the stocking jobber status, but the commission found to the contrary. Affirming, the court of appeals for the seventh circuit reasoned:

> "There were no objective standards to guide regular jobbers in qualifying as acceptable and there is substantial evidence to support the Commission's finding as well as evidence that petitioner's decisions on this point were influenced by whether it had already adequate distribution "in that particular area' and by its concern to protect "old established jobbers.' Theoretically, these discounts were available to all, but functionally they were not. *Federal Trade Comm. v. Morton Salt Co., 334 U.S. 37, 42, 68 S. Ct. 822, 92 L. Ed. 1196 (1948)*." *323 F.2d at 46*.

Under Mueller Co., therefore, ***HN7***[] a discount is functionally available when objective standards exist to guide regular jobbers in qualifying for the category of purchasers receiving the discount.

The defendant argues that the plaintiff "never was, is not, and probably never will be a "school distributor' as defendant uses that term." The defendant stresses the fact that the plaintiff's business wholesaling hardware products is qualitatively different from that of the designated distributors **[**11]** of school supplies because the plaintiff carries a large selection of products, most of which are unrelated to arts and crafts needs. Also, the plaintiff fails to carry many of the items carried by the distributors. A comparison of the plaintiff's catalog with those of the distributors demonstrates this difference. The defendant also showed that the plaintiff does not belong to the same trade associations and does not attend the same trade conventions as the distributors.

While these differences were satisfactorily proved, I find them to be irrelevant. The defendant never suggested to its customers that in order to qualify as a distributor, a dealer had to belong to particular trade associations, to attend conventions, or to specialize Only in arts and crafts supplies for schools. These contingencies were not shown to be part of the oral understanding between the defendant and its distributors, and they certainly were not specified in the standard agreement to provide promotional services which the defendant began using in 1977.

The standard agreement listed three requirements for distributors: (1) the maintenance of a stock of school supplies and equipment manufactured by the defendant **[**12]** throughout the year; (2) the publication and distribution of a catalog of school supplies featuring the defendant's school supplies on at least a biennial basis, and (3) sales personnel to promote the defendant's products through personal contact with purchasers. Facially, these requirements constitute objective standards which provide sufficient guidance to a dealer seeking to become a school supplies distributor.

Nevertheless, the defendant did not inform the plaintiff of these requirements until February 11, 1977. In fact, the plaintiff was completely unaware of the price discount which his competitors had been receiving until November, 1976, when Mr. Farrington so informed Mr. Gendelman. The defendant candidly concedes that in actions under *§ 13(d)* of the Act, courts have held that ***HN8***[] the seller must take affirmative action to inform customers of the availability of promotional payments and services. *Alterman Foods, Inc. v. F.T.C., 497 F.2d 993, 1001 (5th Cir. 1974)*; *Fred Meyer, Inc. v. F.T.C., 359 F.2d 351, 360 n. 10 (9th Cir. 1966)*, rev'd in part on other grounds, *390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968)*. The defendant argues that this requirement cannot be uncritically **[**13]** injected into actions under *§ 13(a)*, but it fails to suggest any meaningful reason why such a notification requirement should not be applied in this case. No matter how facially objective the defendant's requirements for distributor status are, if only some purchasers are aware of their existence, it cannot **[*356]** be said that the distributor status and price discount are practically available to all.

The defendant may not be required to offer its price discount to a customer it knows will be uninterested or who will be unwilling to comply with its requirements for distributor. However, the defendant knew that the plaintiff was competing with its distributors for sales of scissors to schools and that it would be interested in receiving a price discount its competitors were receiving. Under the circumstances, I believe the defendant engaged in price discrimination in its sales of scissors.

HN9[] Having established that the defendant engaged in price discrimination, the plaintiff must also show that the effect of the price discrimination "may be substantially to lessen competition . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives **[**14]** the benefit of such discrimination, or with customers of either of them." *15 U.S.C. § 13(a)*. The defendant argues that the plaintiff is not in competition with the distributors since they operate at different functional levels. The defendant contends that the distributors operate at the retail level and that the plaintiff is a wholesale operation that performs none of the functions of a school supplies distributor.

I disagree. With respect to sales to schools, the plaintiff operates at the same level of distribution as do the distributors of school supplies. The character of the plaintiff's selling is no different from the character of the distributors' selling indeed, they bid for the same sales contracts to schools. *Kirby v. P. R. Mallory Co., Inc., 489 F.2d 904, 909 (7th Cir. 1973)*. The plaintiff has established that it competes with the favored purchasers.

I also find that the price discrimination has an adverse effect on competition and that the plaintiff has been damaged thereby. One of the stipulated facts is that the discount gives the recipient a competitive advantage in sales of scissors to schools. The fact that the plaintiff has been underbid by the favored distributors **[**15]** since 1976 supports this finding of adverse effect on competition.

The defendant contends that even if price discrimination is found, it has a complete defense because the price discount is cost-justified within the meaning of the first proviso of *§ 13(a)*. Such proviso states, in part, that ***HN10***[] price differentials which make due allowance for differences in the cost of sale or delivery resulting from different methods by which the commodities are sold or delivered to buyers, are not prohibited.

The defendant concedes that the burden of proving this cost-justification defense is on the defendant-seller. In my opinion, the defendant's proof on this point was inadequate. No cost analysis was introduced to demonstrate the actual savings, if any, resulting from the discount. The requirements set forth in the standard agreement in order to qualify as a distributor obligated the distributors to perform functions which would surely result in some savings to the defendant since it will not have to undertake these functions itself. However, this is not a substitute for specific evidence of cost savings. The defendant points to no such evidence in the record. For these reasons, I believe that **[**16]** the defendant has not established a cost-justification defense.

The plaintiff claims that it has been injured as a result of the defendant's unlawful conduct and is entitled to damages of two general types: (1) the difference between the discount and regular price for its sales to the Milwaukee public school district, and (2) lost profits on "anticipated sales" it would have made to the Milwaukee public schools had it received the discount. The plaintiff has not attempted to prove damages flowing from sales to other schools.

The defendant challenges the plaintiff's right to recover the first of the two types of damages set forth above on the basis that the price differential is not the proper measure of damages in a Robinson-Patman case. The courts are divided on the question whether the amount of a discrimination in prices between business competitors can be recovered as damages. Compare *Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F.2d 988* (8th Cir.), cert. **[*357]** denied *326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467 (1945)*, with *Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457* (2d Cir.), cert. denied *353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957)*. See also **[**17]** *Fowler Manufacturing Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969)*. From these cases, however, it appears that ***HN11***[] if the buyer is unable to pass on the higher price to its own customer, the price differential is a proper measure of damages.

I believe that ***HN12***[] in a case in which competing purchasers seek to resell the commodity in question through a bid-award procedure, the winner being the lowest bidder, it is probable that there is little or no opportunity for the winning bidder to pass on the higher price. An attempt to pass on the higher price necessarily raises the bid and increases the chance that a competitor's bid will be lower. Accordingly, I believe that the price differential is an appropriate measure of damages in this case. In the years 1974-1976, the plaintiff purchased $ 6,732.54 worth of school scissors for which it should have received the 5% Discount. The price differential on these purchases, therefore, is $ 336.63.

The second type of damages sought by the plaintiff lost profits on anticipated sales for the years 1974-1978 are not recoverable. Because of the nature of the bid-award sale procedure through which the plaintiff and its competitors sold to the Milwaukee schools, **[**18]** a bidder who does not win the contract award in question does not make a purchase since it has no order to fill. ***HN13***[] The Robinson-Patman Act prohibits two sales of the same product to different purchasers at different prices. *Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 34-35 (7th Cir. 1976)*. "No single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination." *Bruce's Juices v. American Can Co., 330 U.S. 743, 755, 67 S. Ct. 1015, 1021, 91 L. Ed. 1219 (1947)*. One who merely seeks to purchase does not qualify as a purchaser. *Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949)*. For this reason, the plaintiff is not entitled to damages for lost sales.

Thus, the only damages the plaintiff may recover are the $ 336.63, representing the price differential. Such ***HN14***[] amount trebled pursuant to *15 U.S.C. § 15*, yields a total damage award of $ 1,009.89.

The plaintiff has also requested injunctive relief restraining the defendant from discriminating against the plaintiff and in favor of the distributors. I am not convinced that there is a significant threat of injury from a violation that is likely **[**19]** to continue or reoccur. The plaintiff now knows what the requirements are for attaining the status of distributor and can receive the discount if it meets those requirements. Under the circumstances, I do not believe that an injunction is warranted.

The plaintiff, having succeeded in proving its antitrust claim, is entitled to an award of attorney's fees as part of its costs. *15 U.S.C. § 15*. However, in view of the modest actual damages established by the plaintiff and the absence of any special complexity in the case, attorney's fees in the sum of only $ 250 will be awarded to the plaintiff. *In re Clark Oil & Refining Corp. Antitrust Litigation, 422 F. Supp. 503 (E.D.Wis.1976)*.

Therefore, IT IS ORDERED that judgment be entered in favor of the plaintiff in the amount of $ 1,009.89, with costs, including attorney's fees of $ 250.

End of Document

Huron Valley Hospital, Inc. v. Pontiac

United States District Court for the Eastern District of Michigan, Southern Division

March 2, 1979

Civ. No. 78-72970

Reporter

466 F. Supp. 1301 *; 1979 U.S. Dist. LEXIS 14043 **; 1979-1 Trade Cas. (CCH) P62,520

HURON VALLEY HOSPITAL, INC., a Michigan non-profit corporation, Plaintiff, v. CITY OF PONTIAC, a Michigan municipal corporation, City of Pontiac Hospital Building Authority, a municipal corporate entity, Comprehensive Health Planning Council of Southeastern Michigan, a regional health planning agency, North Oakland County Planning Steering Committee, a planning group under the auspices of Greater Detroit Area Hospital Council, Inc., a Michigan corporation, Michigan Department of Public Health, an executive agency of the State of Michigan, Department of Health, Education and Welfare, an executive agency of the federal government, Defendants

Core Terms

Certificate, anti trust law, Sherman Act, recommendation, allegations, conspiracy, antitrust, capital expenditures, defendants', Appeals, planning agency, Planning, health facility, due process, state law, proceedings, regulation, circuit court, facilities, conspired, exemption, immunity, license, induce, government action, regulatory scheme, anticompetitive, remedies, protest, notice

LexisNexis® Headnotes

Public Health & Welfare Law > Healthcare > General Overview

Public Health & Welfare Law > Social Security > Medicaid > General Overview

Public Health & Welfare Law > Social Security > Medicare > General Overview

HN1[] **Public Health & Welfare Law, Healthcare**

Congress has established a Capital Expenditure Review program to assure that federal funds appropriated for Medicare, Medicaid and other federal programs are not used to support unnecessary capital expenditures for health care facilities.

Public Health & Welfare Law > Social Security > Medicaid > General Overview

Public Health & Welfare Law > Social Security > Medicare > General Overview

HN2[] **Social Security, Medicaid**

The federal Capital Expenditure Review program requires the Secretary of Health, Education and Welfare (HEW) to enter into an agreement with the governor of a state whereby a state health planning agency is established within the state. The state planning agency is to consider the findings and regulations of the appropriate regional planning agency, per *42 U.S.C.S. § 1320a-1(d)(1)(B)(ii)*. The regulations of the state planning agency are forwarded to the Secretary of HEW. An applicant receiving an adverse recommendation has the right to an appellate administrative hearing.

Public Health & Welfare Law > Healthcare > General Overview

Public Health & Welfare Law > Social Security > Medicaid > General Overview

Public Health & Welfare Law > Social Security > Medicare > General Overview

HN3[] **Public Health & Welfare Law, Healthcare**

Under *42 U.S.C.S. §§ 300L(a)*, *300L(b)*, the governor of each state, subject to the approval of the Secretary of Health, Education, and Welfare, designates health service areas within his or her state. A health systems agency corresponding to each health service area is to be established pursuant to *42 U.S.C.S. § 300L-1* and § 300L-4. Only states complying with these requirements may receive federal funding for a wide variety of purposes relating to health care.

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

Public Health & Welfare Law > Healthcare > General Overview

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN4[] **Facility Planning, Certificates of Need**

Under Michigan law, persons wishing to engage in certain health care facility construction must first obtain a state Certificate of Need. Such a certificate is required for construction where no facility previously existed as well as for replacement of existing health care facilities. In determining whether to issue such certificate the Director of the Michigan Department of Public Health is to consider the recommendations of the relevant regional planning agency, and both planning agencies are directed to consider a variety of factors set out in the statute.

Administrative Law > Judicial Review > Reviewability > Standing

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

HN5[] **Reviewability, Standing**

Michigan law provides that a Certificate of Need for one seeking to establish a healthcare facility shall be consistent with but need not follow exactly the state plan for hospital and medical facilities construction and the policies and procedures governing the issuance of Certificates of Need required under federal grant-in-aid programs or federal loan guarantee programs. Michigan law also establishes a State Health Facilities Commission within the Michigan

Department of Public Health, and charges that body with advising the Director of the Department. An applicant or the local health systems agency aggrieved by a decision of the Director with respect to a Certificate of Need application may request a hearing by the Commission and may appeal a final order of the Commission to the appropriate county circuit court.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Failure to Exhaust

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

HN6[] **Reviewability, Exhaustion of Remedies**

Where a litigant has failed to exhaust administrative remedies (where such is explicitly provided or implicitly assumed to exist), judicial review is inappropriate.

Constitutional Law > Substantive Due Process > Scope

HN7[] **Constitutional Law, Substantive Due Process**

To have a cognizable property interest in a government benefit, there must be more than an abstract need or desire for it. A person must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

HN8[] **Justiciability, Standing**

A mere subjective intent to establish a new enterprise or to expand an already existing business is not enough on which to base standing to sue; there must be overt and objective preparations.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

HN9[] **Exemptions & Immunities, Parker State Action Doctrine**

Legislation is not invalid merely because it may have an anticompetitive effect; otherwise, the states' power to engage in economic regulation would be effectively destroyed. Legislative bodies have broad scope to experiment with economic problems. Moreover, the right to conduct a business, or to pursue a calling, may be conditioned.

Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they enter into agreements, are within the state's competency.

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

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Federal precedent protects attempts to influence governmental units and instrumentalities in order to obtain legislation, redress, or action favorable to particular interests. That precedent does not protect affirmative attempts to block access to adjudicatory tribunals. That precedent does shield from federal antitrust laws a concerted effort to influence public officials regardless of intent or purpose.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

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

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

HN11[] **Parker State Action Doctrine, Local Governments & Private Parties**

If a governmental or agency action is valid as under state authority (despite anticompetitive effects), then seeking to influence the action and a successful outcome are exempt from federal antitrust laws. Conversely, for federal antitrust laws to be applicable to such actions, the parties induced must be public, as opposed to private, entities and legitimately acting as such.

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

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

A violation of a state law, albeit a regulatory scheme affecting commercial activity, is not by that fact alone a violation of the federal antitrust statutes. A plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > General Overview

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

Tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of federal ***antitrust law***.

Counsel: **[**1]** Donald J. Gasiorek, Lawrence S. Jackier, Southfield, Mich., for plaintiff.

Larry J. Saylor, Detroit, Mich., Samuel Mostkoff, Southfield, Mich., Grady Avant, Jr., Detroit, Mich., William Perrone, Asst. Atty. Gen., Lansing, Mich., Nancy M. Floreen, U. S. Dept. of Justice, Washington, D. C., for defendants.

Opinion by: KENNEDY

Opinion

[*1304] OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Huron Valley Hospital, Inc. (Huron Valley or plaintiff) is a non-profit organization formed for the purpose of building a new hospital in northwest Oakland County, Michigan. It has filed this action alleging that all defendants with the exception of the Department of Health, Education and Welfare (HEW) have conspired to exclude it from the market of providing hospital facilities and services, in violation of the federal antitrust laws. It seeks treble damages and injunctive relief against all defendants except HEW and declaratory relief against HEW and the Michigan Department of Public Health (MDPH). All defendants have moved to dismiss and in the alternative for summary judgment.

In September, 1976, plaintiff made a combined application to the MDPH for a Certificate **[**2]** of Need under *M.C.L.A. § 331.451 Et seq.*, M.S.A. § 14.1179(51) Et seq. (the Certificate of Need Act), and for Capital Expenditure Review under *42 U.S.C. § 1320a-1* requesting approval for the construction of a new 153-bed hospital in the western part of Service Area 76 (an administrative area within Oakland County). The Michigan Legislature has established a hospital and medical facilities division within the Michigan Department of Public Health and vested it with various health facilities planning responsibilities.

HN1[] The Congress has established a "Capital Expenditure Review" program to assure that federal funds appropriated for medicare, medicaid and other federal programs are not used to support unnecessary capital expenditures for health care facilities. ***HN2***[] This program requires the Secretary of Health, Education and Welfare to enter into an agreement with the governor of a state whereby a state health planning agency is established within the state. MDPH has been designated in accordance with this procedure as the state health planning agency in Michigan. Among other duties it is to review applications from health care **[*1305]** providers for proposed capital expenditures **[**3]** to determine whether the proposals are consistent with plans developed pursuant to the Hill-Burton Act (*42 U.S.C. § 291 Et seq.*). The state planning agency is to consider the findings and regulations of the appropriate regional planning agency (*42 U.S.C. § 1320a-1(d)(1)(B)(ii)*). The regulations of the state planning agency are forwarded to the Secretary of HEW. An applicant receiving an adverse recommendation has the right to an appellate administrative hearing. ***HN3***[] The governor of each state, subject to the approval of the Secretary of HEW, designates health service areas within a state (*42 U.S.C. § 300L (a)*, *§ 300L (b)*). A Health Systems Agency corresponding to each health service area is to be established pursuant to *42 U.S.C. § 300L* -1 and *§ 300L -4*. Defendant Comprehensive Health Planning Counsel of Southeastern Michigan (CHPC-SEM) has been conditionally designated as the health systems agency for a seven-county area which includes Oakland County. It is charged with assembling and analyzing data regarding the health care delivery system in the area, developing a plan outlining regional goals and reviewing and making recommendations to the state planning agency with respect **[**4]** to proposed new institutional health services in its planning area (*42 U.S.C. § 300L* -2(f)). Only states complying with these requirements may receive federal funding for a wide variety of purposes relating to health care.

In 1972 the Michigan Legislature established the requirement that ***HN4***[] persons wishing to engage in certain health care facility construction must first obtain a state "Certificate of Need." 1972 P.A. 256 as amended, *M.C.L.A. § 331.451-462*, M.S.A. § 14.1179(51)-.1179(62). Such a certificate is required for construction where no facility previously existed as well as for replacement of existing health care facilities. In determining whether to issue such certificate the Director of MDPH is to consider the recommendations of the relevant regional planning agency, and both planning agencies are directed to consider a variety of factors set out in the statute. M.C.L.A. § 331.455a, M.S.A. § 14.1179(55a). The Act further provides that:

> A Certificate of Need shall be consistent with but need not follow exactly the state plan for hospital and medical facilities construction and the policies and procedures governing the issuance of Certificates of Need required **[**5]** under federal grant-in-aid programs or federal loan guarantee programs. M.C.L.A. § 331.454, M.S.A. § 14.1179(54).

HN5[] Act 256 further establishes a State Health Facilities Commission within the MDPH, M.C.L.A. § 331.452, M.S.A. § 14.1179(52), and charges that body with advising the Director, M.C.L.A. § 331.453(1), M.S.A. § 14.1179(53)(1). An applicant or the local Health Systems Agency "aggrieved" by a decision of the Director with respect to a Certificate of Need application may request a hearing by the Commission and may appeal a final order of the Commission to the appropriate county circuit court, M.C.L.A. §§ 331.453(2), 331.458, M.S.A. §§ 14.1179(53)(2), 14.1179(58).

The Plan Implementation Committee of the Comprehensive Health Planning Council of Southeastern Michigan, the regional health planning agency under *42 U.S.C. § 300L* -1 Et seq., reviewed plaintiff's application and recommended denial; the Health Facilities Commission of the MDPH endorsed this recommendation. The MDPH Director then reviewed the application for Certificate of Need and denied it on July 5, 1977. The Director also recommended that the Secretary of HEW deny the application for Capital Expenditure **[**6]** Review, and the Secretary acted in accord with this recommendation. Plaintiff then filed notices of administrative appeals of both denials which contained, Inter alia, allegations that the actions of the MDPH were in restraint of trade.

Defendant Pontiac General Hospital (Pontiac or PGH) filed an application for a Certificate of Need and Capital Expenditure Review with MDPH on December 1, 1977. MDPH has identified many deficiencies in the existing physical plant of Pontiac **[*1306]** General and if these deficiencies are not remedied it cannot continue to be licensed to operate under 1968 P.A. 17, *M.C.L.A. § 331.411 Et seq.*, M.S.A. § 14.1179(1) Et seq. The application for Certificate of Need and Capital Expenditure Review submitted by Pontiac General Hospital seeks the necessary state and federal approval for a replacement-renovation of the existing hospital. This replacement-renovation would reduce the number of medical-surgical beds from 383 to 350 and would correct existing defects in the physical plant in order to insure continued full licensing under Act 17. It is proposed that the construction program be financed through a combination of general obligation bonds of **[**7]** the City of Pontiac and revenue bonds of the State of Michigan Hospital Building Authority.

Pontiac's application was submitted to CHPC-SEM for review; the CHPC-SEM Plan Implementation Committee recommended approval and CHPC-SEM endorsed this recommendation on January 12, 1978. MDPH in turn recommended that the Secretary of HEW approve Pontiac's Capital Expenditure Review, and the Secretary issued his approval.

On February 4, 1978, plaintiff filed a complaint in the Oakland County Michigan Circuit Court seeking immediate judicial relief and alleging, Inter alia, that its administrative appeal was futile and that the imminent approval by MDPH of Pontiac's Certificate of Need application would moot the issues raised in its appeal. Plaintiff also alleged that the administrative actions were in restraint of trade and tended to create a monopoly. The Oakland County Circuit Court entered a preliminary injunction restraining the grant of Pontiac's application for a Certificate of Need. However, that court dismissed the remaining counts of plaintiff's complaint, including those alleging monopoly and restraint of trade, holding that plaintiff had failed to exhaust its administrative remedies **[**8]** and that all of these claims "can be heard and determined in said administrative proceedings." The Circuit Court initially retained jurisdiction of the action to preserve its preliminary injunction and to permit plaintiff to appeal (pursuant to Michigan's Certificate of Need Act) any final adverse administrative decision. The Oakland Circuit Court concluded on August 25, 1978 that since Pontiac's financial capability to construct the proposed replacement-renovation would be jeopardized if the Certificate of Need were not issued it would suffer immediate and irreparable harm if the preliminary injunction were allowed to remain in effect. The court therefore dissolved the preliminary injunction and certified its decision as final. Pontiac's Certificate of Need was then approved by MDPH. Plaintiff filed a timely notice of appeal to the Michigan Court of Appeals. That appeal is still pending.

Hearings on the administrative appeal from the MDPH Director's recommendation of Capital Expenditure Review denial have been indefinitely adjourned at plaintiff's request. Presentation of evidence to the hearing examiner in connection with the Certificate of Need appeal has been concluded, **[**9]** but the hearing examiner has not yet made his recommendations. When those recommendations are made they must then be forwarded to the Health Facilities Commission, which will review the entire record before entering a final order.

Huron Valley alleges in its complaint that defendant Pontiac General Hospital conspired with its co-defendants and certain other unnamed co-conspirators to allocate hospital beds within the market area (Pontiac Service Area 76) in order to restrain plaintiff from entering the market and to fix prices at non-competitive levels, all in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. The means employed toward this end, plaintiff alleges, include (1) forming the North Oakland County Hospital Planning Steering Committee; (2) inducing CHPC-SEM and MDPH to act in concert with the conspirators in the denial of plaintiff's application and the approval of defendant Pontiac's application; and (3) creating publicity adverse to plaintiff (Count I). Plaintiff further alleges that each of the other acts complained of was taken at the instigation of Pontiac, and that these actions thus constitute monopolization, an **[*1307]** attempt to monopolize, and a conspiracy **[**10]** to monopolize on the part of Pontiac, in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2* (Count II).

During review of plaintiff's application by CHPC-SEM, the president of Pontiac General Hospital was invited to comment on the pending application and did so in writing. Defendants assert by affidavit that there was no other formal or informal influence by Pontiac upon Huron Valley's application.

During the relevant period, Pontiac also participated in the North Oakland County Planning Steering Committee, an unincorporated voluntary organization composed of representatives from four hospitals in Service Area 76 with a non-voting representative of defendant Greater Detroit Area Hospital Council (GDAHC). The function of the Steering Committee is to study and make recommendations concerning the provision of medical-surgical acute-care services by hospitals in the Oakland County area. GDAHC is composed of representatives of hospitals throughout the greater Detroit metropolitan area. Defendant Steering Committee denies any actions by itself or its members designed to influence the administrative consideration of plaintiff's application, other than the letter to CHPC-SEM from the **[**11]** then-President of Pontiac General Hospital.

Plaintiffs have requested the right to take discovery depositions of the persons involved in the various procedures referred to above as well as to examine the records of defendants. It has further responded to defendants' motions for summary judgment with affidavits. These affidavits, in brief, aver that plaintiff had to face more rigorous standards for approval than did defendant Pontiac, and that due to various other policies and procedures of GDAHC and CHPC-SEM which favor existing over new ("from ground up") facilities, plaintiff's fate was sealed in advance. It is alleged in addition that plaintiff's application was denied because of personal animosity on the part of certain members of CHPC-SEM toward Dr. Martin Trepel, a consultant to plaintiff's staff. Dr. Trepel states in his affidavit that an Assistant Executive Director of CHPC-SEM told him that plaintiff's getting its Certificate of Need depended on "twisting the proper arms" of CHPC-SEM's Executive Committee. Dr. Trepel also alleges that at a meeting with the city manager and the mayor of Pontiac, he was told by the latter that they could not afford politically to reach **[**12]** a public accommodation with plaintiff. In his affidavit, Ralph W. Wiese, Chairman of the Board of Directors of Huron Valley, states that on February 22, 1977, a group called "Pontiac Citizens Coalition on PGH" wrote to CHPC-SEM opposing plaintiff's application on the grounds that the granting of a Certificate of Need to plaintiff would undermine PGH's development plan. Wiese also alleges that at CHPC-SEM's executive hearing on plaintiff's application, Paul Masseron, Chairman of the Plan Implementation Committee of CHPC-SEM, acted as an advocate for PGH. Although disputed in part by defendants, for the purpose of these motions these allegations will be assumed to be true. None, however, raises issues of material fact required to be resolved for disposition of this action.

I. Ripeness and Related Doctrines Due Process

Plaintiff has two appeals still pending one in the Michigan Court of Appeals, and the other an appeal from the MDPH Director's denial of Capital Expenditure Review (indefinitely adjourned by plaintiff). Hence considerations of exhaustion of administrative remedies, ripeness, abstention and federal-state comity preclude entertaining the merits of plaintiff's claims. *HN6*[] **[**13]** Where plaintiff has failed to exhaust administrative remedies (where such is explicitly provided or implicitly assumed to exist), judicial review is inappropriate. *Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974)*; *Sampson v. Murray, 415 U.S. 61, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)*; *McGee v. United States, 402 U.S. 479, 91 S. Ct. 1565, 29 L. Ed. 2d 47 (1971)*; *McKart v. United States, 395 U.S. 185, 23 L. Ed. 2d 194, 89 S. Ct. 1657* ***[*1308]*** *(1969)*. The rationale for this rule is based on "the absence of any "lawful function' on the part of the courts "to anticipate the administrative decision with their own,' " *Renegotiation Board, supra, 415 U.S. at 21, 94 S. Ct. at 1039*, Quoting *Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947)*. To the extent that plaintiff has filed appeals in accordance with 42 C.F.R. § 100.106(c), M.C.L.A. § 331.453(2) (M.S.A. § 14.1179(53)(2)) and M.C.L.A. § 331.458 (M.S.A. § 14.1179(58)) and filed an action in the Oakland County Circuit Court, further claims challenging the same actions of defendant would be superfluous and contrary to sound **[**14]** judicial policy. *Schaefer v. First National Bank of Lincolnwood, 509 F.2d 1287, 1299-1300 (7th Cir. 1975)*, Cert. denied, *425 U.S. 943, 96 S. Ct. 1682, 48 L. Ed. 2d 186 (1976)*. ("By electing to make their claim for relief under the securities acts, the plaintiffs have rendered their antitrust claims superfluous." *Id. at 1300*.)

The ripeness doctrine is especially relevant given the appeals pending in both the administrative and state tribunals. In a leading case, the Supreme Court stated that the purpose of the ripeness doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967)*. While initial decisions were handed down by both the administrative and state tribunals, the full course of review on both tracks has not yet been run, so that judicial review is precluded at this premature stage. "Since the record now before (the court) demonstrates that these processes of adjustment are presently proceeding exactly as, and where the statute contemplated, and that no **[**15]** final resolution as to them has been arrived at, this case is not presently ripe for judicial review." *Buckeye Power, Inc. v. E. P. A., 525 F.2d 80, 84 (6th Cir. 1975)*, Citing *Abbott Laboratories, supra*, and *Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967)*.

Federal-state comity and abstention doctrines also militate against judicial review, since the state appeal and administrative review are still pending. *Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S. Ct. 573, 34 L. Ed. 2d 525 (1973)*; *Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972)*; *Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941)*. The applicable policy considerations governing abstention were articulated for this *Circuit in Gay v. Board of Registration Commissioners, 466 F.2d 879, 883 (6th Cir. 1972)*:

> The first of these is the avoidance of a premature constitutional decision by a possible narrowing construction of the state law by a state court. *Lake Carriers' Association v. MacMullan, 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972)*; *Harman v. Forssenius, 380 U.S. 528, 85 S. Ct. 1177,* ***[**16]*** *14 L. Ed. 2d 50 (1965)*; Cf. *Zwickler v. Koota, 389 U.S. 241, 255, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967)* (Harlan, J., concurring). A second policy reason underpinning the principle is the avoidance of needless conflict in the federal-state relationship. *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*; *Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)*. A third consideration is the desirability of avoiding the necessity of a federal court making tentative decisions on issues of state law. *Reetz v. Bozanich, 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970)*; *Meredith v. Winter Haven, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943)*. A fourth basic reason justifying abstention is the avoidance of unnecessary interference with state functions or regulatory schemes. *Lake Carriers' Association v. MacMullan, supra*; *Younger v. Harris, supra.*

Most if not all of the same considerations exist here. The Michigan courts' decisions will permit the state to define the perimeters of state action in the procedures about which plaintiff complains. Nothing could be more disruptive of state regulatory procedures than for a litigant to have a suit **[**17]** **[*1309]** pending against the state regulatory body while that body is concluding its hearings on that litigant's claims.

Plaintiff urges that the defendants' conspiracy has prevented it from receiving a fair consideration of its application for a Certificate of Need. However, it does not claim that defendants' acts have prevented it from presenting anything to the Administrative Law Judge now hearing its appeal. The state procedures provide plaintiff with a full opportunity to assert and to have corrected all violations of state law. Thus *M.C.L.A. § 24.306*, M.S.A. § 3.560(206) (the Michigan Administrative Procedures Act) provides:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of any agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
> (a) In violation of the constitution or a statute.
> (b) In excess of the statutory authority or jurisdiction of the agency.
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, **[**18]** material and substantial evidence on the whole record.
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
> (f) Affected by other substantial and material error of law.

Review is also provided for in the Certificate of Need Act, M.C.L.A. § 331.458, M.S.A. § 14.1179(58), as follows:

> If when the person who applies for a certificate of need is aggrieved by the decision of the director or if the recommendation of the local planning council is not accepted then he or the local planning council may request a hearing to be conducted by the commission in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended. If the certificate of need is not granted by the commission or the person who applies for the certificate of need is aggrieved by the decision of the commission, then he or the local planning council may appeal to the circuit court of the county in which the appealing health facility is located requesting an order reversing the decision of the commission in the same manner as is provided for a civil suit.

Plaintiff has yet to pursue any proceedings to become eligible for medicare and medicaid **[**19]** payments under *42 U.S.C. § 1320a-1*, since it is yet to be licensed as a hospital. Claims relating to procedures for that eligibility are therefore premature. Given the inconclusive status of the state proceedings, abstention precludes present review of plaintiff's claim by this court. Thus defendants are entitled at least to a stay of all proceedings.

The problem is close to that in *Ricci, supra*, and is, as the United States Supreme Court stated,

> recurring. It arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress. Often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations.

Ricci, supra, 409 U.S. at 299-300, 93 S. Ct. at 579 (footnote omitted). Plaintiff in Ricci had purchased a membership in the Chicago Mercantile Exchange, using funds borrowed from the Siegel Trading Company, a member of the Exchange. Subsequently the Exchange, at the behest of the **[**20]** Trading Company, transferred the membership without notice or hearing, utilizing a blank transfer authorization that had previously been revoked. Plaintiff charged that this conduct violated both the rules of the Exchange and the Commodity Exchange Act as well as *§ 1* of the Sherman Act. The Court held that the antitrust proceedings should be stayed until the Commodity Exchange Commission could assess the validity **[*1310]** of the defendants' conduct under the Commodity Exchange Act. The opinion recognized "that the courts, while retaining the final authority to expound the statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498, 78 S. Ct. 851, 861, 2 L. Ed. 2d 926 (1958)*, Quoted in Ricci, supra, 409 U.S. at 305-06, 93 S. Ct. 573.

Plaintiff's application was reviewed and denied by MDPH a number of months before defendant Pontiac's application was submitted and approved. Under well-settled law, plaintiff has no *Fourteenth Amendment* due process right either to have participated in the Pontiac hearing since its **[**21]** own interest (if any) was by that time extinct and could not have been affected or to have its application approved. ***HN7***[] To have a cognizable property interest in a government benefit, the Supreme Court stated in *Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*, there must be more than an abstract need or desire for it. A person "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *408*

U.S. at 577, 92 S. Ct. at 2709. Accord, *Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)*. Since plaintiff had at best a unilateral expectation, and not a protected property interest, which in any event was eliminated before the Pontiac hearing, there has been no deprivation of a protected interest outside the standards of due process, nor has plaintiff alleged any circumstances which would place the nature of the hearings themselves (where the proceedings were matters of public record and conflicts of interest scrupulously disclosed) outside the bounds of due process. *Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)* (conclusory charges of bias insufficient to **[**22]** impugn due process fairness of state administrative hearing).

The State of Michigan may deny the plaintiff a Certificate of Need. If it does so, the plaintiff, never having been eligible to enter the market of supplying hospital services, can claim no deprivation of any due process right. In *New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978)*, a California statute required an automobile manufacturer to obtain the approval of the California New Motor Vehicle Board before opening or relocating a retail dealership within the market area of an existing franchise if the latter protested, and the statute also directed the California Board to notify the manufacturer of this requirement upon the existing franchisee's filing of a protest. The Board was not required to hold a hearing on the merits of the protest before sending the notice to the manufacturer. The Supreme Court held that the absence of a prior hearing requirement and the possibility of delaying the consummation of the business plans of the potential franchisees did not constitute a denial of *Fourteenth Amendment* procedural due process.

> Even if the right to franchise had constituted **[**23]** a protected interest when California enacted the (statute), California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right. . . .
> In particular, the California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices. . . .
>
> Further, the California Legislature had the authority to protect the conflicting rights of the motor vehicle franchisees through customary and reasonable procedural safeguards; I. e., by providing existing dealers with notice and an opportunity to be heard by an impartial tribunal the New Motor Vehicle Board before their franchisor is permitted to inflict upon them grievous loss. Such procedural safeguards cannot be said to deprive the franchisor of due process. States may, as California has done here, **[*1311]** require businesses to secure regulatory approval Before engaging in specified practices. See, E.g. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S.* ***[**24]*** *156, (94 S. Ct. 407, 38 L. Ed. 2d 379) (1973)* (Pharmacy operating permit), *St. Louis Poster Adv. Co. v. St. Louis, 249 U.S. 269, (39 S. Ct. 274, 63 L. Ed. 599) (1919)* (billboard permits), *Hall v. Geiger-Jones Co., 242 U.S. 539, (37 S. Ct. 217, 61 L. Ed. 480) (1917)* (securities registration), *Adams v. Milwaukee, 228 U.S. 572, (33 S. Ct. 610, 57 L. Ed. 971) (1913)* (milk inspection), *Gundling v. Chicago, 177 U.S. 183, (20 S. Ct. 633, 44 L. Ed. 725) (1900)* (cigarette sales license).

At 99 S. Ct. at 410-11. (emphasis in original). That situation is made no less pertinent to this by the fact that the California Board may ultimately approve some of the franchise candidates; the Board may just as easily, as the MDPH has done here, reject the applicant.

Even assuming arguendo the activities in question come under the antitrust laws, an established line of cases holds that mere negotiations toward contracts (as opposed to finished, binding contracts) are not "business or property" deserving of antitrust protection. *Hecht v. Pro Football, Inc., 187 U.S.App.D.C. 73, 86, 570 F.2d 982, 995 (1977)*, Cert. denied, *436 U.S. 956, 98 S. Ct. 3069, 57 L. Ed. 2d 1121 (1978)*. Accord, *Peller v.* ***[**25]*** *Int'l Boxing Club, Inc., 227 F.2d 593 (7th Cir. 1955)*. Analogously to the Supreme Court's constitutional due process doctrine, ***HN8***[] "(a) mere subjective intent to establish a new enterprise or to expand an already existing business is not enough on which to base standing to sue; there must be overt and objective preparations." *N. W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493, 507 (D.Del.1971)*; Accord, *Martin v. Phillips Petroleum Co., 365 F.2d 629 (5th Cir.)*, Cert. denied, *385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451 (1966)*; *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395-96 (6th Cir. 1962)*, Cert. denied, *372 U.S. 907, 83 S. Ct. 721, 9 L. Ed. 2d 717 (1963)*. Here, as in Volasco,

> There was only a stated intention to enter into this additional production with no overt act performed in connection therewith and no expenditure of money to provide the required facilities. Preparedness and capacity to engage in a business mean more than an intention so to do and an ability to buy the necessary facilities.

308 F.2d at 395-96 (authorities omitted). Hence under the standards of due process and antitrust standing, plaintiff fails to state a claim on **[**26]** which relief can be granted.

II. Exemption from the Antitrust Laws

The actions of which plaintiff complains, moreover, fall into well-defined exceptions to the antitrust laws. The regulatory actions of MDPH and CHPC-SEM alleged in the complaint are within the ambit of valid federal and state legislation, and as such are exempted from the antitrust laws under the "state action" defense of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*; Accord, *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*. ***HN9***[] Legislation is not invalid merely because it may have an anticompetitive effect; otherwise, "the States' power to engage in economic regulation would be effectively destroyed." *Exxon v. Governor of Maryland, 437 U.S. 117, 133, 98 S. Ct. 2207, 2218, 57 L. Ed. 2d 91 (1978)*. "Legislative bodies have broad scope to experiment with economic problems . . . ." *Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963)*. Moreover, "the right to conduct a business, or to pursue a calling, may be conditioned. . . . (Statutes) prescribing the terms upon which those conducting certain businesses may contract, **[**27]** or imposing terms if they enter into agreements, are within the state's competency." *Nebbia v. New York, 291 U.S. 502, 528, 54 S. Ct. 505, 512, 78 L. Ed. 940 (1934)* (footnotes omitted); Accord, *New Motor Vehicle Board, supra, 439 U.S. at 96, 99 S. Ct. 403, 58 L. Ed. 2d 361*.

Plaintiff has vigorously attacked the state Certificate of Need process because it excludes new entrants into the **[*1312]** hospital field for the benefit of existing hospitals. Yet this is exactly what the state regulatory scheme demands. Defendants are not relieved of liability because of their status as public bodies but rather because they are acting pursuant to the state's mandate in restricting entry of new health care providers. The legislative history of the Congressional enactments at issue unequivocally supports defendants' contention that state regulation of health care facilities is explicitly exempted from the reach of the antitrust laws. The express policy of one of the relevant statutory provisions, the National Health Planning and Resources Development Act of 1974, Pub.L. No. 93-641, *42 U.S.C. § 300k Et seq.*, is to effect "equal access to quality health care at a reasonable cost" as a priority **[**28]** of the federal government. *42 U.S.C. § 300k(a)(1)*. Specifically, the Senate Committee Report on the bill stated, as a reason for instituting the legislation,

> The need for strengthened and coordinated planning for personal health services is growing more apparent each day. In the view of the Committee the health care industry does not respond to classic marketplace forces. The highly technical nature of medical services together with the growth of third party reimbursement mechanisms act to attenuate the usual forces influencing the behavior of consumers with respect to personal health services. For the most part, the doctor makes purchasing decisions on behalf of the patient and the services are frequently reimbursed under health insurance programs, thus reducing the patient's immediate incentive to contain expenditures.

S.Rep. No. 93-1285, 93d Cong., 2d Sess., Reprinted in (1974) U.S.Code Cong. & Admin.News, pp. 7842, 7878 (emphasis added). See generally *American Medicorp, Inc. v. Humana, Inc., 445 F. Supp. 589, 592-93 (E.D.Pa.1977)* (history of the legislation as response to the spiralling cost of health care delivery). The activities covered by the 1974 Act were **[**29]** thus recognized as being outside the rationale and scope of the antitrust laws. One of the sponsors of the Act explained:

> Although Public Law 93-641 contains no specific exemption from the antitrust laws, an analysis of the activities required of HSA's (Health Systems Agencies, regional state boards established under *42 U.S.C. § 300L* -1 Et seq., such as CHPC-SEM) and providers indicates that Congress sanctioned actions which might otherwise be in violation of our antitrust laws. The intent of Congress was that HSA's and providers who voluntarily work with them in carrying out the HSA's statutory mandate should not be subject to the antitrust laws. If they were, Public Law 93-641 simply could not be implemented.

124 Cong.Rec. Hll, 963 (daily ed. Oct. 10, 1978) (remarks of Rep. Rogers) (emphasis added). Thus the Congress in authorizing state hospital planning agencies intended a partial repeal of the antitrust laws. In requiring the inclusion of current providers as members of planning agencies, and directing the planning agencies to restrict the building of unnecessary beds so that existing hospital beds would be more fully utilized, the inevitable effect is to restrict **[**30]** or restrain competition. It is, in fact, precisely the competition of the free market which the Congressional purpose seeks to check. Plaintiff admitted in oral argument that Congress intended some implied repeal of the antitrust laws in this respect but urges that it was only to permit a restriction on the total number of beds allowed in a geographic area, so that there should be free competition to supply those beds. Plaintiff fails, however, to suggest how this is to be done.

Further, the alleged conspiracy falls within ***HN10***[] the Noerr-Pennington doctrine, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, which protects attempts to influence governmental units and instrumentalities in order to obtain legislation, redress, or action favorable to particular interests. *Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506* ***[*1313]*** *(6th Cir.)*, Cert. denied, *409 U.S. 1001, 93 S. Ct. 325, 34 L. Ed. 2d 262 (1972)*. The doctrine does not protect affirmative attempts to block access to adjudicatory tribunals, I. e. "sham **[**31]** protests." *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. Bribery of a public purchasing agent may constitute a violation of *§ 2(c)* of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(c)*. *Id. at 513, 92 S. Ct. 609*. No such affirmative act is alleged by plaintiff. All of defendants' challenged actions were expressly designed to secure favorable administrative or judicial action. "Nothing could be clearer from the (Supreme) Court's opinion (in Noerr) than that anticompetitive purpose did not illegalize the conduct there involved." *Pennington, supra, 381 U.S. at 669, 85 S. Ct. at 1593*. Defendants' motive or intent in the alleged publicity is irrelevant for Sherman Act purposes, since "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington, supra, 381 U.S. at 670, 85 S. Ct. at 1593*. Hence both the Parker v. Brown state action defense and the Noerr-Pennington defense are called into play and dovetail where, as here, defendants sought only to secure favorable administrative action from a duly authorized agency of the state acting **[**32]** pursuant to valid federal and state economic regulation. In *New Motor Vehicle Board, supra*, it was contended that the state statute conflicted with the Sherman Act since by delaying the establishment of dealerships whenever competing franchisees protest, the scheme gives effect to privately initiated restraints on trade, and hence was invalid under *Schwegmann Bros. v. Calvert Distillers, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951)*. The Court answered

> that the (statute's) regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption.

-- - U.S. at -- , *99 S. Ct. at 412*, Citing *Parker v. Brown, supra*; *Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*; *City of Lafayette v. Louisiana Power & Light Co., supra.* Moreover, the Court held that Noerr-Pennington protects "(protesting) dealers who invoke in good faith their statutory right to governmental action in the form of **[**33]** a Board determination that there is good cause for not permitting a proposed dealership." -- - U.S. at -- , *99 S. Ct. at 412*. By contrast, *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*, relied on by plaintiff to bring its claim under the Sherman Act, is inapplicable on its facts and leaves the Parker v. Brown and Noerr-Pennington defenses intact for the instant defendants. In Hospital Building, a 49-bed community hospital owned by an out-of-state proprietary chain alleged that a second hospital and its administrators had conspired with a local health planning official and others in violation of the Sherman Act to delay and prevent the issuance of a state Certificate of Need in order to keep the plaintiff from relocating and expanding its facilities. The Court held that "since in this case the allegations fairly claim that the alleged conspiracy . . . (would) place "unreasonable burdens on the free and uninterrupted flow' of interstate commerce, they are wholly adequate to state a claim." *425 U.S. at 746, 96 S. Ct. at 1853*, Quoting *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189, 74 S. Ct. 452, 98 L.* ***[**34]*** *Ed. 618 (1954)*. However, the plaintiff in Hospital Building accused respondents and their co-conspirators of having "employed a series of bad-faith tactics, including the bringing of frivolous litigation, to block the implementation of the expansion." *425 U.S. at 741, 96 S. Ct. at 1850*. The reason why those allegations fairly claim an unlawful conspiracy, and the present ones do not, is in significant part because the former charge activities falling squarely within the "mere sham" exception to the Noerr-Pennington rule. Noerr, supra, 365 U.S. at 144, 81 S. Ct. **[*1314]** 523. The exception applies to the use of administrative or judicial processes where the purpose to suppress competition, by depriving competition of meaningful access to the agencies and courts, is evidenced by repetitive lawsuits bearing the hallmark of insubstantial claims. Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973); Trucking Unlimited, supra, 404 U.S. at 512-13, 92 S. Ct. 609. Such was the complaint in Hospital Building; instant plaintiffs, however, do not impute "mere sham" proceedings to defendants and plaintiff has in fact been able to pursue its claims **[**35]** in every tribunal available under the appropriate statutes.

Plaintiff, both in its Brief in Opposition to Defendants' Motion to Dismiss and in oral argument, relies on Duke & Co., Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975), for the proposition that joint conduct (favoring defendants) is not immunized under the Noerr-Pennington doctrine where members of the alleged conspiracy include public officials. Plaintiff cites Duke as follows:

> Both Noerr and Pennington involved suits against Private parties who had allegedly conspired to influence governmental action. In neither case was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anti-competitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the Noerr-Pennington doctrine is inapplicable.

521 F.2d at 1282, Quoted in Plaintiff's Opposition Brief at 36 (emphasis added by plaintiff). However, on the developed facts Duke is distinguishable because the acts taken by members of CHPC-SEM and MDPH were within the bounds of the state's enacting legislation; Noerr-Pennington **[**36]** would be inapplicable if, pursuant to a conspiracy, the relevant members took action inconsistent with their roles in the state's health care regulatory scheme, hence outside Parker v. Brown immunity as well. (The Noerr-Pennington rule was extended to attempts to influence administrative agencies and judicial proceedings in Trucking Unlimited, supra.) This is the distinction of Duke made by Kurek v. Pleasure Driveway and Park District of Peoria, 557 F.2d 580, 593 (7th Cir. 1977):

> Nor is the fact that GSM combined or conspired with governmental officials dispositive, for both of Noerr's premises with respect to that point are undercut by the factual setting of this case. Our determination that the Park District and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of Noerr to the degree it is based on the need of governmental units for citizen input in making decisions that Parker holds to be outside the scope of the Sherman Act. See Duke & Company, Inc., supra, 521 F.2d at 1282.

GSM were defendant concessionaires who outbid plaintiffs, former concessionaires, for the right **[**37]** to sell golf equipment and services on municipal golf courses; defendant Park District allegedly demanded 5% Of gross sales as concession fee and required, as a condition of concession renewal, that plaintiffs raise and fix their prices. Defendant Park District also allegedly used the threat of an award of a monopolistic license to GSM. The court held that Park District lacked a state mandate for state-action exemption purposes since it had substantially less than statewide jurisdiction and "(w)e simply see little sense in automatically treating as state mandates the activities of local governmental units when these activities may vary substantially from unit to unit and may be wholly lacking in any express or implied state authorization or command." 557 F.2d at 590. GSM in its role of successful bidder for the concessions could not be found liable under the antitrust laws, since "successful bidding does not violate the antitrust laws substantively," 557 F.2d at 592. Thus in Duke, in the paragraph just preceding that cited by plaintiff, the court stated:

> Defendants contend that Noerr-Pennington immunity covers a state governmental entity which "listens to anti-competitive pleas." **[**38]** Doubtlessly this proposition **[*1315]** is correct so long as the public body acts within its legal discretion and in what it considers the public interest. . . .

521 F.2d at 1282. Similarly, in Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975), defendant obtained the first granted cable television license in a city and successfully induced the city council not to license a

potential competitor. The Seventh Circuit Court of Appeals found that Noerr foreclosed antitrust liability. At 516 F.2d at 230, the court said:

> In the case at bar, the allegations on the basis of which the defendant mayor and alderman are said to have been co-conspirators are that they were persuaded by two members of the public, who are also defendants, to support the CATV application and to oppose plaintiff's application, and that they were given campaign contributions "in exchange," for this undertaking. These allegations do not take the case outside the protection of the Noerr doctrine. Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a "conspiracy," and that if some of the "conspirators" persuade a member of the legislative **[**39]** body to agree to support their cause, he becomes a "co-conspirator" and a Sherman Act violation results. Such a role would in practice abrogate the Noerr doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became such "co-conspirators." . . . Nothing in the Noerr opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Even a valid governmental decision made at least partially on the basis of personal or political considerations (Cf. instant plaintiff's allegations of personal animosity toward Dr. Trepel) is immune from antitrust liability:

> local government units such as city councils and county boards are seldom completely free from personal interest and outside influences, but the Sherman Act was not intended to regulate this type of activity. There is support for this view in that Noerr . . . holds that so long as the official's action is itself **[**40]** lawful, the action is without the scope of the federal antitrust laws, even if the motive for the action was a personal one.

Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342 (9th Cir. 1969).

It will be seen that Noerr-Pennington immunity presupposes Parker v. Brown immunity: ***HN11***[↑] if the governmental or agency action is valid as under state authority (despite anticompetitive effects), then seeking to influence the action and a successful outcome are also exempt. Conversely, for a Noerr defense to be valid, the parties induced must be public, as opposed to private, entities and legitimately acting as such. To the extent that Noerr immunity is based on the *First Amendment* right to petition, *Noerr, supra, 365 U.S. at 137-38, 81 S. Ct. 523*, *Trucking Unlimited, supra, 404 U.S. at 510-11, 92 S. Ct. 609*, it is the right to petition the Government that is involved.

> Since the governmental actions of the city council and its committees were not themselves subject to the Sherman Act, the same was true under Noerr of concerted efforts to induce those governmental actions, even though those efforts had the anticompetitive purpose and effect alleged by plaintiff, **[**41]** if those efforts were genuinely aimed at inducing the governmental actions and were not a pretext for inflicting on plaintiff an injury not caused by any governmental action.

Metro Cable, supra, 516 F.2d at 229.

III. Violation of State Law vis-a-vis violation of Federal ***Antitrust Law***

Plaintiff's argument in open court that by violating the state regulatory scheme the defendants have thereby violated as well the federal antitrust laws is likewise faulty. ***HN12***[↑] A violation of a state law **[*1316]** (assumed here arguendo), albeit a regulatory scheme affecting commercial activity, is not by that fact alone a violation of the federal antitrust statutes, Cf. *Sun Valley, supra, 420 F.2d at 343*:

> A plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case. This conclusion finds support in the general reluctance of the federal courts to act before state remedies have been exhausted where there is adequate state review.

As the Supreme Court stated in *Apex Hosiery Co. v. Leader, 310 U.S. 469, 512, 60 S. Ct. 982, 1002, 84 L. Ed. 1311 (1940)* (labor violence during a strike):

> the Sherman Act was not enacted **[**42]** to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers." (Quotation from *United Leather Workers v. Herkert Co., 265 U.S. 457, 471, 44 S. Ct. 623, 68 L. Ed. 1104 (1924)*.)

Similarly, in *Hunt v. Crumboch, 325 U.S. 821, 826, 65 S. Ct. 1545, 1548, 89 L. Ed. 1954 (1945)* (union refusal to deal with a certain trucker, forcing him out of business) the Supreme Court said of the Sherman Act:

> That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

Accord, *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 272 (5th Cir. 1979)*. In the leading Sixth Circuit case, *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir.)*, Cert. denied, *375 U.S. 922, 84 S. Ct. 267, 11 L. Ed. 2d 166 (1963)*, the Court of Appeals affirmed the dismissal of a Sherman Act complaint charging that plaintiff's competitor had **[**43]** maliciously persuaded plaintiff's supplier to terminate plaintiff as a distributor in order to obtain the business for himself, I. e., the common law tort of malicious interference with contract. At 318 F.2d at 286 the Court of Appeals said:

> Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the antitrust laws is the sole issue in this case. In that connection it is well settled that ***HN13***[] tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act.

Perhaps the clearest explanation of the distinction between federal antitrust and state common law violations is offered by *Judge Talbot Smith in B & B Oil & Chemical Co. v. Franklin Oil Corp., 293 F. Supp. 1313, 1317 (E.D.Mich.1968)*:

> The attempt is frequently made, with respect to the cases involving termination of dealerships (partially the allegation here, in effect), to employ the antitrust acts as a policing measure. . . . Usually the acts are such as to conceivably come within the ambit of state laws **[**44]** relating to what we may term generically unfair competition (lack of proper notice of termination, pirating of employees, taking over favored accounts, and similar activities). But the antitrust acts do not purport to formulate a code of business morality. They are not tablets of stone for the conduct of business generally. They are directed at one aspect of business life and one only: the preservation of free competition.

Here, of course, even the rationale of free competition is undercut since the state-action (Parker) and petition (Noerr) defenses operate on the instant facts to remove possible violation of free competition as a relevant legal consideration. Hence the alleged conspiracy is not violative of federal antitrust legislation, and it is not here appropriate to decide whether a state or common law rule has been violated.

Accordingly, defendants' motions for summary judgment will be GRANTED.

IT IS SO ORDERED.

Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.

United States District Court for the Northern District of California

March 6, 1979

No. C-74-0189-WWS

Reporter

467 F. Supp. 841 *; 1979 U.S. Dist. LEXIS 13970 **; 1979-1 Trade Cas. (CCH) P62,527

MURPHY TUGBOAT COMPANY, Plaintiff, v. SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD. et al., Defendants. SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD. et al., Counter-Claimants, v. MURPHY TUGBOAT COMPANY, Counter-Defendant

Core Terms

tugs, vessel, defendants', pilots, ship, conspiracy, damages, charges, competitors, percent, profits, monopolization, masters, antitrust, customers, anti trust law, docking, rates, common ownership, undocking, tugboat, speculative, pilotage, flowing, package, tariff, no evidence, employees, segment, cases

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Criminal Law & Procedure > Trials > Motions for Acquittal

HN1[] **Trials, Judgment as Matter of Law**

Defendants' motion for judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict. The court is bound to view the evidence in the light most favorable to the non-movant, drawing all permissible inferences in its favor. If, by that standard, there is substantial evidence to support a finding by a reasonable jury, the motion must be denied.

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

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

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

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

HN2[] **Relevant Market, Geographic Market Definition**

To establish the offense of monopolization, plaintiff must prove (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. The relevant geographic market is the area of effective competition defined in terms of where buyers can turn for alternative sources of supply. The relevant product market consists of commodities or services reasonably interchangeable by consumers for the same purpose.

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

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

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

An attempt to monopolize is established by proof that defendants, even if they failed to monopolize the market, nevertheless had a specific intent to monopolize and engaged in predatory conduct directed to accomplishing their unlawful purpose. Proof of specific intent can be supplied by inference drawn from proof of predatory or anticompetitive conduct which constitutes a restraint of trade.

Business & Corporate Law > ... > Establishment > Elements > Application of Agency Law Principles

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

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

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

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

Business & Corporate Law > Agency Relationships > Types > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Negligent Acts of Directors & Officers

Torts > Vicarious Liability > Agency Relationships > General Overview

HN4[] **Elements, Application of Agency Law Principles**

An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal. Applied to corporations, this rule of agency law means that an officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf. Courts have, however, consistently stated that a corporate executive will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation. The few antitrust decisions considering this issue have also underscored the need for participation in the tort by the executive. Participation may be found not solely on the basis of direct action but may also consist of knowing approval or ratification of unlawful acts.

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

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Negligent Acts of Directors & Officers

HN5[] Duties & Liabilities, Unlawful Acts of Agents

Approval or ratification must be of acts or conduct which are inherently unlawful. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation.

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

HN6[] Duties & Liabilities, Unlawful Acts of Agents

See *Cal. Civ. Code § 2343*.

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > Undercapitalization

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

Torts > Vicarious Liability > Corporations > General Overview

HN7[] Initial Capitalization & Stock Subscriptions, Undercapitalization

A parent corporation is not liable for its subsidiaries' acts simply because the parent owns all the stock of the subsidiaries and shares common officers and directors. The evidence would have to show that the subsidiary was a mere instrumentality of the parent, indicated by such facts as inadequate capitalization, absence of independent activity, action in the interest of the parent rather than the subsidiary, and failure to observe the legal requirements of separate corporate existence.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN8[] Antitrust & Trade Law, Sherman Act

Antitrust law is concerned with the concerted action of distinct economic entities. Agreements must be judged in the light of the purpose of the antitrust laws to prevent restraints on competitive economic behavior. Because an agreement between a corporation and its employees does not restrain competition, it cannot form the basis for a conspiracy claim under the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Labor & Employment Law > Wage & Hour Laws > Statutory Application > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Scope, Exemptions**

The Supreme Court held that the labor exemption of the Sherman Act, *15 U.S.C.S. § 17* applies to agreements and restrictions which like wages, and unlike prices, are intimately related to wages, hours and working conditions.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

The Supreme Court has repeatedly stated that common ownership and control of corporations will not insulate them against antitrust liability. On the other hand, the mere fact that commonly owned and controlled companies follow common policies does not give rise to antitrust liability. ***Antitrust law*** is concerned with the concerted action of distinct economic entities. It is when commonly owned and controlled corporations conduct themselves as distinct economic entities in the market that they become subject to antitrust constraints against concerted action which inhibits that conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Commonly owned or controlled corporations may be held to be guilty of conspiracy under *15 U.S.C.S. § 1* only if the evidence shows their agreement or common action to lack a legitimate business purpose and to have an anticompetitive effect. An agreement or common action arising out of or inherently connected with the common ownership or control of the corporations normally would serve a legitimate business purpose. On the other hand, extraneous restraints producing anticompetitive effects imposed upon commonly owned or controlled corporations holding themselves out to be competitors in the market are evidence from which a jury may find a *§ 1* violation.

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

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

HN12[] **Practices Governed by Per Se Rule, Boycotts**

The policy of refusing to work with competitors did not amount to a boycott because there was no refusal to deal, concerted or otherwise. Nor is that policy equivalent to a tying arrangement because separate products or services were not involved.

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

HN13[] **Private Actions, Remedies**

Once it established with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue the jury will be permitted to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

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

HN14[] **Private Actions, Remedies**

While a plaintiff need not negative all possible alternative explanations for his decline in profits, there must be proof of some damage flowing from the unlawful conspiracy.

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

HN15[] **Private Actions, Remedies**

To meet the minimum requirement of proof in a market exclusion case in which lost profits are sought, plaintiff must normally produce evidence falling into one of the following categories: (1) Comparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions; (2) Comparison of performance in restrained and unrestrained markets which are otherwise comparable; or (3) Loss of specific business or customers.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN16[] **Trials, Judgment as Matter of Law**

The court may grant defendants' motion for a new trial conditionally, even if the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence or results in a miscarriage of justice.

Counsel: [1]** Ronald Lovitt, Lovitt & Hannan Inc., San Francisco, Cal., Robert L. Palmer, Martori, Meyer, Henricks & Victor, Phoenix, Ariz., Thomas Elke, Tucson, Ariz., for plaintiff and counter-defendant.

Richard J. Archer, Kristina M. Hanson, Sullivan, Jones & Archer, San Francisco, Cal., for defendants and counter-claimants.

Opinion by: SCHWARZER

Opinion

[*846] MEMORANDUM OPINION AND ORDER ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL

Plaintiff charges defendants with having violated *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1*, *2*) and *Section 17045 of the California Business and Professions Code*. [1] After 28 days of trial and 5 days of deliberation,

[1] *Section 17045* prohibits the making of secret payments to the injury of competitors where such payments tend to destroy competition. Both plaintiff in its complaint and defendants in their counterclaim complained of violations. The jury declined to

the jury returned a verdict awarding plaintiff damages aggregating $ 700,000. Defendants have moved for judgment notwithstanding the verdict or alternatively for a new trial.

[2]** I. The Factual Background

The relevant facts established at the trial may be summarized as follows. Defendants Shipowners & Merchants Towboat Co., Ltd. ("Red Stack") and Bay Cities Transportation Company ("Bay Cities") have for many years been engaged in ship assisting and ship towing on San Francisco Bay and its tributaries. Although until recently a small percentage of Red Stack's capital stock was held by outsiders, both companies have at all material times been substantially owned and controlled, directly or indirectly, by the Crowley family. Major decisions by the management of either company have required the approval of defendant Thomas B. Crowley, who was the principal officer of each of the companies. Beginning about 1973, Crowley Maritime Corporation ("Crowley Maritime") became the holding corporation of these companies and gradually **[*847]** undertook to provide various administrative services. So far as the record shows, however, it engaged in no operations and performed no acts relevant to the matters at issue.

Plaintiff Murphy Tugboat Company ("Murphy") entered the ship assist business on San Francisco Bay about October 1971 with a single tug. It remained in business, **[**3]** acquiring additional tugs, until September 1975 when ship assist operations were discontinued.

Ship assist work consists of providing tugs to aid vessels in docking or undocking. Vessels are docked or undocked in a variety of ways, depending on their size and configuration, tide and weather conditions, the qualifications of the master or pilot, and other circumstances. They may or may not employ an inland pilot to assist in docking or undocking, and they may choose to dock or undock without tugs or with the aid of one or more tugs.

In addition to assisting vessels in docking or undocking, tugs from time to time perform so-called flat tows, i. e., shifting vessels not under power between locations on the Bay.

Murphy entered the ship assist business about 18 months following the end of a six-months tug strike which had idled Red Stack and Bay Cities. During that strike, other companies had entered the ship assist business in the area, including Murphy-Pacific Marine Salvage Corporation, which had acquired the use of some seven tugs. Roger Murphy, who subsequently organized and largely owned plaintiff Murphy Tugboat Company, headed the ship assist operations for Murphy-Pacific, which **[**4]** was also engaged in the construction and salvage business. After defendants resumed their operations, Murphy-Pacific began to suffer substantial losses in its ship assist operations and ultimately agreed to sell its tugs to the Crowley interests in June 1971. There is evidence which, although disputed by defendants, would have permitted the jury to find that as a part of that transaction Murphy-Pacific agreed to stay out of the ship assist business.

For some years prior to Murphy's entry into the ship assist business, Red Stack and Bay Cities had a policy of refusing, except in emergencies, to provide service to a vessel which was also being assisted by tugs of another company. Thus, if a vessel had arranged for ship assist services with another tugboat company, and more tugs were required for the job than that company could furnish, Red Stack and Bay Cities would decline to furnish the additional tugs to work with the tug of the other company. Defendants gave as a reason for the policy the hazards of divided responsibility in ship handling. Other Crowley controlled companies operating in Los Angeles harbor and Puget Sound, and other tugboat companies operating in New York harbor, **[**5]** did not adhere to such a policy.

During the period at issue, Red Stack and Bay Cities performed not less than 70 percent of the tug-assisted docking and undocking on San Francisco Bay (excluding military and other proprietary operations). The services of these companies were offered under two different tariffs. Bay Cities, operating smaller tugs, served primarily smaller vessels (i. e., less than 14,000 net tons). It charged a flat rate per tug, plus overtime. Red Stack, operating

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award damages to either party. Inasmuch as no party has taken exception to this part of the verdict, the Court will not consider this phase of the case.

larger, more powerful tugs, generally served the larger vessels. Its charges were computed under a grid tariff which took into account the size of the vessel and the length of the ship assist move and generally produced higher charges.

The thrust of Murphy's case at trial was that defendants' policy of refusing to work with competitors effectively excluded it from the large vessel segment of the ship assist market, where most of the demand for multi-tug jobs arose. There was evidence from which the jury could find that potential customers were deterred from hiring a Murphy tug by the knowledge that if the need for additional tugs arose during the operation, defendants would not provide them.

Murphy contended **[**6]** that but for defendants' exclusionary practice, its share of the large vessel market would have been equal **[*848]** to the 28 per cent share it held of the small vessel market. In that event, it would have been able either to raise its rates or increase its volume substantially, resulting in additional revenue which it claimed would have eliminated the operating losses plaintiff incurred between 1972 and 1976.

Murphy also charged that Red Stack had entered into an unlawful conspiracy with the Red Stack pilots' association to fix the fees collected by Red Stack masters for pilotage services rendered by them on Red Stack jobs. Red Stack had for many years offered pilot services along with ship assist services; it was able to do so because the masters of its tugs were licensed inland pilots, and its tugs had five men crews. When Red Stack tugs assisted a vessel, the master of one of the tugs would, at the vessel's request, go on the bridge and serve as pilot. While Red Stack made no extra charge for this service, the master/pilot collected a fee from the vessel. The amount of that fee was set by agreement between Red Stack and the association. During the relevant time, the fee varied, **[**7]** depending on the specific job, but it was always considerably less than the fees charged by independent pilots. Murphy contended that the Red Stack pilots' agreement, by holding down the pilotage component of the package cost of using Red Stack's service, made it necessary for Murphy to hold down its tug charges so that the combined charge for the Murphy Tug-independent pilot package would remain competitive. As a result, Murphy claimed, it lost revenue which it would have realized had it been able either to raise its charges or to attract more jobs by reason of a greater price differential.

Murphy's damage proof consisted of evidence of its operating losses (reflected on its federal income tax returns) for the four fiscal years ended August 31, 1972, 1973, 1974 and 1975, as well as the loss suffered during fiscal 1976 following the shutdown of its operations. These losses totaled $ 490,936. In addition, Murphy computed its lost profits for the five succeeding years by applying to its average annual gross revenue of $ 435,928 the lowest net profit ratio experienced by Bay Cities during this period 8.2 percent. This resulted in a hypothetical annual profit of $ 35,756, or $ 178,730 **[**8]** for the five-year period. The total amount of damages claimed was $ 669,666. The jury awarded damages for violation of *Section 2* aggregating $ 700,000, assessed as follows:

$ 160,000 against Red Stack,
80,000 against Bay Cities,
180,000 against Crowley Maritime Corp., and
180,000 against Thomas B. Crowley.

In addition, the jury awarded $ 100,000 against Red Stack for violation of *Section 1* by reason of the Red Stack pilots' agreement. No verdict was reached on the remaining conspiracy claims. (See Exhibit A, attached.)

II. The Standard of Review

HN1[] Defendants' motion for judgment n. o. v. is governed by the same standards as a motion for directed verdict. The Court is bound to view the evidence in the light most favorable to the non-movant, drawing all permissible inferences in its favor. If, by that standard, there is substantial evidence to support a finding by a reasonable jury, the motion must be denied. *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; *Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 909* (9th Cir.), Cert. denied, *436 U.S. 946, 98 S. Ct. 2848, 56 L. Ed.* ***[**9]*** *2d 787 (1978)*.

The foregoing standard is applicable to the issues on which the jury returned a verdict for plaintiff (monopolization, attempt to monopolize, the Red Stack pilots' agreement as a violation of *Section 1*, and damages). With respect to those issues on which the jury failed to reach agreement (other violations of *Section 1* and conspiracy to monopolize), defendants' motion will be treated as one for a directed verdict governed by the same standard.

III. Monopolization and Attempt to Monopolize

A. Liability of Bay Cities and Red Stack

1. Monopolization

HN2[] To establish the offense of monopolization, plaintiff must prove (1) possession **[*849]** of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The relevant geographic market is the area of effective competition defined in terms of where buyers can turn for alternative sources of supply. *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977)*. The relevant product market consists of commodities or services reasonably interchangeable by consumers for the same purpose. **[**10]** *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

There is no serious dispute that the relevant geographic market must be confined to San Francisco Bay, and the record would permit no different finding. To bring tugboats into the Bay to perform particular jobs would be prohibitive in terms of both money and time. The boundaries of the Bay for this purpose may not be clearly established i. e., it may or may not be feasible, in view of the running time, to perform San Francisco-Oakland jobs with tugs based as far away as Benicia but in view of defendants' overwhelming share of the ship assist business on the Bay, regardless how delineated, further refinement is unnecessary.

Defendants argue that the product (or service) market must include doing without commercial tug service, i. e., docking or undocking without tugs or with the use of inhouse tugs. The alternative of doing without is present in the market for virtually every product or service, except perhaps air or water. The readiness with which consumers will resort to the alternative is a function of the relationship of demand to supply, an element of every market. Thus, **[**11]** demand for a product or service may be more or less elastic, depending on circumstances. The degree of elasticity, however, does not aid in defining the limits of the product or service market in terms of reasonable alternatives; it is more properly taken into account in determining the degree of monopoly power possessed by the supplier once the market has been defined.

Defendants also seek to include jobs performed by tugs operated by the Navy and by the Standard Oil Company. Inasmuch as these tugs during the relevant period served only vessels operated by the Navy and Standard Oil, respectively, and were not available to serve the public, they did not offer an alternative source of ship assist services. The market must therefore be limited to commercial ship assist jobs. See *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3rd Cir. 1978)*.

There was evidence from which the jury could find that defendants' share of the market based on revenue exceeded 80 percent. In addition, according to defendants' own contemporary records, between 1971 and 1975 Bay Cities and Red Stack together performed over 70 percent of the commercial ship assist jobs, even if so-called no tug jobs **[**12]** are included. No competing firm ever performed more than 15 percent of the jobs. Given the size of defendants' market share, there was substantial evidence to sustain a finding that defendants together possessed the power to exclude competition or control prices, [2] and hence monopoly power in the relevant market. [3] See United States v. du *Pont & Co., supra, 351 U.S. at 391, 76 S. Ct. 994*; *Greyhound Computer Corp., Inc. v.*

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[2] There was, in addition, evidence that the rates charged by defendants were treated as the going rate and were followed by others performing ship assist services on the Bay.

[3] Inasmuch as Bay Cities and Red Stack were commonly owned and controlled, their market shares may reasonably be aggregated for purposes of determining whether they possessed monopoly power. The fact that they chose to behave as

International Business Machines Corp., 559 F.2d 488, 496 (9th Cir. 1977), Cert. denied, *434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2nd Cir. 1945)*.

[13] [*850]** Defendants presented evidence from which it could be found that the demand for their services was relatively elastic. Thus, during the 1969-1970 strike, many vessels were docked and undocked without the use of tugs. After the strike, however, the use of tugs was resumed; the decline in the number of tug jobs in the post-strike period may have been attributable as much to the decline in shipping accompanying the wind-down of the Vietnam war as to vessels doing without tugs. Defendants also showed that bow thrusters, which improve vessel maneuverability and control, are being installed in increasing numbers, reducing the demand for tugs. All of this evidence could be considered by the jury but did not preclude a finding that defendants possessed the requisite monopoly power.

There remains the question whether defendants were guilty of willful acquisition or maintenance of that power. Defendants presented evidence reflecting the quality of their service and equipment and the large amount of goodwill gained by them over the years in support of the claim that, if defendants had monopoly power, it was the result of their superior service or business acumen. See *United States **[**14]** v. Grinnell Corp., supra, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778*.

There was, however, abundant evidence to warrant the jury's rejection of that contention. Among other things, that evidence showed that the Crowley companies acquired the tugs of Murphy-Pacific Marine Salvage Corporation and a surplus tug put up for sale by Standard Oil Company although they considered this equipment inferior and had little if any use for it. There was evidence, albeit hotly disputed, that the purchase from Murphy-Pacific may have been accompanied by an agreement not to compete; certainly, the vigorous reaction of Crowley management to the appearance on the Bay of the Captain William, a 48-year-old, low-power tug which Roger Murphy had purchased shortly after the Murphy-Pacific sale, tends to confirm their expectation that no competition would appear from that quarter. [4]

[15]** The principal support for the jury's verdict is found in defendants' policy of refusing to work on ship assist jobs with the tugs of competitors except in emergencies. Defendants contended that this policy was a reasonable measure to assure that jobs would be performed safely and competently and to minimize their exposure to claims and litigation. The jury was entitled to weigh against that justification the evidence that neither the Crowley-controlled tugboat operations in Los Angeles harbor and Puget Sound nor other tugboat companies in New York harbor followed such a policy. There was, moreover, evidence that the tendency of the policy was to deter vessel owners, agents, and pilots from using plaintiff's tugs. In this connection, the evidence showed that shipowners and agents, knowing that defendants would not work on a job with Murphy tugs, were deterred from hiring Murphy, particularly for larger vessels requiring more tugs or where, because of tide or wind conditions, the possibility existed that additional tugs might have to be called in to assist. Since Murphy never had more than two large tugs in service, it lacked the capability to assure customers that its own equipment **[**16]** could meet whatever needs might arise in the course of the job. [5]

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separate firms competing with each other in the market (See Part V. A. infra) does not eliminate the existence of Power derived from their combined market share by the person controlling their operations, regardless of whether it was exercised.

[4] Lester Bedient, then president of Bay Cities, cabled Thomas Crowley, who was on vacation in Switzerland, to report this event and advise that he would contact the union about it.

[5] From August 1971 to May 1972, Murphy Tugboat had only one small tugboat on the Bay. From May 1972 to June 1973, it had one large tug, one small tug, and another small tug for several months. From June 1973 to September-October 1974, it had in service on the Bay two large tugs, a small tug, and another small tug for three months. From October 1974 to April 1975, it had only one large tug on the Bay. From April 1975 to September 1975, when operations ceased, the company had one large tug and one small tug.

Thus, for the four years of its operation, Murphy Tugboat had two large tugboats for only one and one-half years. For approximately two years, it had only one large tug. For one-half year, it had only a small tug. Murphy had four vessels on the Bay (two large tugs and two small tugs) for only three months in 1973.

[*851] Defendants are, of course, under no legal duty to supply equipment to remedy plaintiff's deficiencies or to help **[**17]** it get jobs. Cf. *Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918, 920-21* (9th Cir.), Cert. denied, *391 U.S. 916, 88 S. Ct. 1810, 20 L. Ed. 2d 654 (1968)*. Nor are they precluded from adopting reasonable practices to protect themselves against liability for the acts of others. But the policy pursued by defendants, whatever its business justification, also had anti-competitive effects. As already noted, prospective customers were deterred from employing Murphy by the knowledge that defendants would not supply tugs to assist on a Murphy job if needed. It is one thing for defendants to attract the business of customers by reason of their superior capacity to supply whatever tugs may be needed for a job. It is quite another, however, to reinforce their dominant market position by a restrictive rule against working on jobs on which competitors are employed. Given their market position, defendants were "precluded from employing otherwise lawful practices that unnecessarily excluded competition." *Greyhound Computer Corp. v. International Business Machines, supra, 559 F.2d at 498*.

This record amply supports the jury's verdict for plaintiff on the monopolization issue.

2. Attempt to Monopolize

[18]** ***HN3***[] An attempt to monopolize is established by proof that defendants, even if they failed to monopolize the market, nevertheless had a specific intent to monopolize and engaged in predatory conduct directed to accomplishing their unlawful purpose. *Moore v. Jas. H. Matthews & Co., supra, 550 F.2d at 1219*. Proof of specific intent can be supplied by inference drawn from proof of predatory or anticompetitive conduct which constitutes a restraint of trade. *Gough v. Rossmoor Corp., 585 F.2d 381, 389-90 (9th Cir. 1978)*; *Knutson v. Daily Review, Inc., 548 F.2d 795, 814-815 (9th Cir. 1976)*, Cert. denied, *433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)*.

The evidence of defendants' practice of refusing to work on vessels with competitors, which the Court has found sufficient to support a finding of monopolization, coupled with the other evidence previously discussed raising an inference of intent to exclude competitors, is sufficient to support the verdict here. See *Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 854 n. 4 (9th Cir. 1977)*, Cert. denied, *439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122 (1978)*.

B. Liability of Thomas B. Crowley and Crowley Maritime Corporation

[19]** 1. Thomas B. Crowley

It is undisputed that Thomas B. Crowley was at all material times defendants' chief executive officer with authority to exercise control over their operations. The Ninth Circuit has said that "(t)he individuals through whom a corporation acts and who shape its intentions can be held liable on a charge of attempted monopolization." *Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association, 358 F.2d 115, 118 (9th Cir. 1966)*. But neither the facts of that case nor the decisions cited in support of this proposition disclose Under what circumstances an officer or a director may be held liable under the antitrust laws for his corporation's *Section 2* violation. [6]

[20]** **[*852]** Basic principles of tort and agency law provide the starting point for defining those circumstances. ***HN4***[] An agent "who does an act otherwise a tort is not relieved from liability by the fact that he acted at the

[6] Plaintiff's brief is of little assistance here. It relies primarily on *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, and *Hartford-Empire Co. v. United States, 323 U.S. 386, 65 S. Ct. 373, 89 L. Ed. 322 (1945)*, both of which were government suits for injunctive relief and do not address the issue of liability for damages for past conduct. Plaintiff's contention that a treble damage judgment was subsequently rendered against both the corporate and individual defendants in the Lorain Journal litigation is apparently in error. See *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356, 357 (6th Cir. 1961)* ("plaintiff radio station had begun a civil action for treble damages against the newspaper . . ."). In any event, there is no discussion whatever in the cited decisions of liability of officers or directors. Hartford-Empire, to the extent it has any bearing on the present issue, simply confirms the necessity of proof of participation by the individuals in acts constituting steps in the progress of the wrongful conduct. *323 U.S. 386 at 407, 65 S. Ct. 373, 89 L. Ed. 322*.

command of the principal or on account of the principal." *Restatement (Second) of Agency § 343* (1957). Applied to corporations, this rule of agency law means that "an officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." Ballantine, Corporations § 112 (rev. ed. 1946). Courts have, however, consistently stated that a corporate executive will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation. *Tillman v. Wheaton-Haven Recreation Association, 517 F.2d 1141, 1144 (4th Cir. 1975)*; *Martin v. Wood, 400 F.2d 310, 313 (3d Cir. 1968)*; *Armour & Co. v. Celic, 294 F.2d 432, 439 (2d Cir. 1961)*. Personal liability must be founded upon specific acts by the individual director or officer. *Tillman v. Wheaton-Haven Recreation Association, supra, 517 F.2d at 1144*; *Davis H. Elliot* ***[**21]*** *Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1182 (6th Cir. 1975)*. The few antitrust decisions considering this issue have also underscored the need for participation in the tort by the executive. *Higbie v. Kopy-Kat, Inc., 391 F. Supp. 808, 810 (E.D.Pa.1975)*; *Deaktor v. Fox Grocery Co., 332 F. Supp. 536, 542 (W.D.Pa.1971)*, *Aff'd, 475 F.2d 1112* (3d Cir.), Cert. denied, *414 U.S. 867, 94 S. Ct. 65, 38 L. Ed. 2d 86 (1973)*; *Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 482 (E.D.Mo.1965)*, *Aff'd, 368 F.2d 679 (8th Cir. 1966)*.

Participation may be found not solely on the basis of direct action but may also consist of knowing approval or ratification of unlawful acts. E.g., *Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3rd Cir. 1978)* (corporate officer arranged for the use and copying of materials constituting unfair competition); *Tillman v. Wheaton-Haven Recreation Association, supra, 517 F.2d 1141* (directors of the association promulgated and enforced a white-only membership policy); *Solo Cup Co. v. Paper Machinery Corp., 359 F.2d 754 (7th Cir. 1966)* (president of corporation, who arranged for the employment of plaintiff's former engineer and negotiated for the sale **[**22]** of machines in anticipation of the engineer's ability to duplicate plaintiff's machine, was liable to plaintiff for damages based on unfair competition); *Barry v. Legler, 39 F.2d 297 (8th Cir. 1930)* (officer had knowledge of misrepresentations made by agents under his control in connection with the sale of stock yet failed to act); *McCrea v. McClenahan, 131 App.Div. 247, 115 N.Y.S. 720 (Sup.Ct.1909)* (president of corporation personally converted plaintiff's chattels).

Such ***HN5***[] approval or ratification must, however, be of acts or conduct which are inherently unlawful. See, e.g., *Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 409 (10th Cir. 1958)* (emphasis added), where the court stated:

> "Specific direction or sanction of, or active participation or cooperation in, a Positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation."

The principle is reflected in ***HN6***[] *Section 2343 of the California Civil Code*, which provides:

> "AGENT'S RESPONSIBILITY TO THIRD PERSONS. One who assumes to act as an agent **[**23]** is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:
> "1. When, with his consent, credit is given to him personally in a transaction;
> "2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or
> "3. When his acts are wrongful in their nature." (emphasis added)

[*853] The application of this principle to cases in which Sherman Act liability is sought to be imposed for past conduct is supported by sound reasons, most recently explicated by the Supreme Court in *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*. Although that case involved the imposition of criminal liability under the antitrust laws, the underlying policy considerations have a bearing as well on the civil liability of officers for corporate violations. After noting that "judicial elaboration of the Act (has not) always yielded the clear and definitive rules of conduct which the statute omits" and that "the behavior proscribed by the Act is often difficult to distinguish from **[**24]** the gray zone of socially acceptable and economically justifiable business conduct," *Id. at 438, 440, 98 S. Ct. at 2874, 2875*, the Court stated:

> "(W)here the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessary (Sic, necessarily) redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of the producers is entirely consistent with the legislative purpose." *Id. at 442, 98 S. Ct. at 2876 n. 17*.

The generality of the Act's prohibition, the often uncertain line between proper and improper conduct, and the social interest in not deterring economically useful conduct by the imposition of excessive risks all of which the Supreme Court recognized in United States Gypsum make it appropriate to limit personal liability to cases of participation in inherently wrongful conduct. [7] The only reported cases involving the imposition of personal liability appear to be consistent. **[**25]** See *Bergjans Farm Dairy Co. v. Sanitary Milk Producers, supra, 241 F. Supp. 476* (individual corporate officers of the dominant dairy firm in the market held liable for violation of *Sections 1* and *2* where they knowingly participated in or approved a course of conduct which included predatory price reductions, payment and false reporting of secret rebates, pressuring customers to accept exclusive supply contracts and buying out those who would not cooperate); Kentucky-Tennessee *Light & Power Co. v. Nashville Coal Co., 37 F. Supp. 728 (W.D.Ky.1941)*, *Aff'd, 136 F.2d 12 (6th Cir. 1943)* (affirming denial of motion to dismiss charges of violation of Robinson-Patman Act against officer who accepted bribes from coal company to induce him to cause his corporation to make coal purchases).

[26]** The evidence of Thomas Crowley's conduct does not sustain a finding of participation in inherently wrongful conduct. His direct participation was limited to the purchase of the Murphy Pacific tugs which, even if coupled with a non-competition covenant, was not inherently wrongful. Cf. *California Business & Professions Code § 16601*; *Monogram Industries, Inc. v. Sar Industries, Inc., 64 Cal.App.3d 692, 134 Cal.Rptr. 714 (1976)*. While he must be assumed, as chief executive officer, knowingly to have approved or ratified the policy of refusing to work vessels with competitors, that policy also cannot be said to be inherently wrongful. It violates no per se prohibition (See p. 861 Infra), is supported by legitimate business considerations, and is simply evidence of monopolization or an attempt to monopolize when viewed in the light of all the surrounding facts and circumstances. In the absence of evidence of knowing approval of inherently wrongful acts, Thomas Crowley cannot be held personally liable for the corporate defendants' **[*854]** violation of *Section 2*. He is therefore entitled to judgment.

2. Crowley Maritime Corporation

Crowley Maritime became the holding company of Bay **[**27]** Cities and Red Stack sometime after 1973. It owned substantially all of their stock and shared common officers and directors with them. Its activities were substantially limited to providing computer and other corporate support services having no bearing on the matters in issue. There is no evidence that it engaged in any operations, let alone that it participated in any possibly unlawful practice or conduct.

Crowley Maritime can therefore not be held liable for having participated directly in the antitrust violations. If liability is to be imposed, it would have to be on the theory that Crowley Maritime is responsible for the acts of its subsidiaries. But ***HN7***[] a parent corporation is not liable for its subsidiaries' acts simply because the parent owns all the stock of the subsidiaries and shares common officers and directors. *Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 161 (7th Cir. 1963)*; *Spears v. Transcontinental Bus System, 226 F.2d 94, 98 (9th Cir. 1955)*, Cert. denied, *350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956)*; Annot., 7 A.L.R.3d 1343, 1350-51 (1966). The evidence would have to show that the subsidiary was a mere instrumentality of the parent, indicated by **[**28]** such facts as inadequate capitalization, absence of independent activity, action in the interest of the parent rather than

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[7] That statement is not intended to suggest that proof of unlawful intent is necessary to impose civil liability on officers. Although that argument has been advanced by some commentators, See Whiting, Antitrust and the Corporate Executive (pt. I), 47 Va.L.Rev. 1938 (1965), Note, The Antitrust Laws and the Corporate Executive's Civil Damage Liability, 18 Vand.L.Rev. 1938 (1965), there is no warrant in the authorities previously discussed to impose a requirement which would in effect equate the standard of proof for civil and criminal liability.

the subsidiary, and failure to observe the legal requirements of separate corporate existence. *Steven v. Roscoe Turner Aeronautical Corp., supra, 324 F.2d at 161*; Annot., 7 A.L.R.3d 1343, *Supra, at 1354-55*. None of those factors is present here. On the contrary, Bay Cities and Red Stack were held out to be and acted as separate and independent operational and economic entities. (See Part V. A. Infra.)

Crowley Maritime is therefore entitled to judgment.

IV. The Red Stack Pilots' Agreement

A. Capacity to Conspire

The jury found the agreement between Red Stack and the pilots' association to be an agreement in unreasonable restraint of trade, presumably on the theory that it operated to fix the fees charged by Red Stack masters for performing pilot services. Assuming plaintiff to have standing under Section 4 of the Clayton Act, [8] the threshold question is whether the agreement falls within the ambit of *Section 1*.

[29]** The undisputed evidence establishes that an informal association of Red Stack masters was formed in 1946. The masters had been performing pilotage services for Red Stack customers for many years but had not received extra compensation for this service. About 1946, the Masters, Mates and Pilots Union, representing these masters, asked that they be permitted to charge a fee for providing this service. Red Stack agreed to a then pilotage fee of $ 5 or $ 10, **[*855]** depending on the move, to be paid by the vessel requesting the service, and it was in conjunction with this agreement that the association was formed.

The association collects the fees and disburses the proceeds. There is no evidence that it performs any significant additional functions other than to negotiate with Red Stack concerning the level of the fee to be charged.

HN8[] "***Antitrust law*** is concerned with the concerted action of distinct economic entities." *Knutson v. Daily Review, Inc., supra, 548 F.2d at 802*. Agreements must be judged in the light of the purpose of the antitrust laws to prevent restraints on competitive economic behavior. Because an agreement between a corporation and its employees does not restrain **[**30]** competition, it cannot form the basis for a conspiracy claim under *Section 1* of the *Sherman Act. Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 n. 9 (9th Cir. 1969)*; *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 917 (8th Cir. 1976)*; *Nelson Radio & Supply Co., Inc. 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)*. The agreement at issue here which is the raison d'etre of the association is one between a group of employees and their common employer concerning the amount of extra compensation they may collect from their employer's customers for rendering extra service to them during their regular working hours. It imposes no restraint on competitive or other independent economic activity of the association (which has no such purpose or function) [9] **[**31]** or its members. It must therefore be considered as being outside the ambit of *Section 1*. [10]

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[8] Whether plaintiff, as a competitor of defendant Red Stack, has standing under the antitrust laws to attack an agreement between Red Stack and an association of its employees which has a tendency to place a ceiling on the price charged by Red Stack for the package of services it offers in competition with plaintiff is a matter not free from doubt. While plaintiff and defendants were engaged in the same "area of the economy," it does not follow that injury caused plaintiff by reason of a competitive advantage gained by defendants through an agreement controlling a component of the total price of their service is injury "by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*; *In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d 122, 125-29* (9th Cir.), Cert. denied, ***414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973)***; See also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-89, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Plaintiff has cited no cases supporting recovery under Section 4 of the Clayton Act based on conduct by a competitor enabling him to price below plaintiff, and a court should be loath to entertain attacks on arrangements (not shown to have exclusionary effects) between persons who are not competitors the purpose of which is to lower the cost of goods or services to consumers. See generally *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N.D.Cal.1978)*. In view of the disposition of this branch of the case, however, it is unnecessary to untangle this particular web; the court will therefore assume without deciding that plaintiff has standing.

[9] While plaintiff has at times contended that the Red Stack pilots' agreement somehow ran afoul of the prohibition against tying, there is no evidence whatever to support such an argument. Nothing in the record suggests that Red Stack required or even

B. Application of the Labor Exemption

The jury found that the agreement between Red Stack and the Red Stack pilots was not intimately related to the wages or working conditions of the members of the association as Red Stack employees and therefore not exempt.

The members of the association, all of whom were masters on Red Stack tugs, were employees of Red Stack. Their services as pilots were **[**32]** performed during the time when they were employed by Red Stack and the Red Stack tugs on which they worked were performing ship assist services on behalf of Red Stack for Red Stack customers. None of the services subject to the agreement was performed by the masters independently of their employment by Red Stack.

In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689, 85 S. Ct. 1596, 1602, 14 L. Ed. 2d 640 (1965)*, ***HN9***[] the Supreme Court held that the labor exemption of the Sherman Act (*15 U.S.C. § 17*) applies to agreements and restrictions which "like wages, and unlike prices, (are) . . . intimately related to wages, hours and working conditions." In that case, the question involved a union demand that sales of meat by all markets be restricted to the hours of 9 a.m. to 6 p.m. The Court held that "the particular hours of the day . . . during which employees shall be required to **[*856]** work are subjects well within the realm of "wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *381 U.S. at 691, 85 S. Ct. at 1602*. It then went on to say:

> "And, although the effect on competition is apparent and real, perhaps **[**33]** more so than in the case of the wage agreement, the concern of union members is immediate and direct." Id.

Given that test, it is immaterial that, as plaintiff contends, the services performed by the masters as pilots may technically have been outside the scope of their employment. [11] The level of pilotage fees (whatever their effect on competition between Red Stack and independent pilots and tugs) being received in connection with the masters' employment clearly had an effect on their total compensation and hence was a matter of "immediate and direct" concern for them. That concern is borne out by the genesis of the agreement, which was the demand of the masters for permission to charge fees. Given such a demand upon their employer Red Stack, some agreement on the subject between the employer and a representative of the masters was virtually inevitable. That the employee

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requested that its customers also use Red Stack masters as pilots; vessels were entirely free to use the (more expensive) services of independent pilots. Nor were Red Stack pilots precluded from rendering services outside working hours on whatever terms they might negotiate.

[10] Suppose the Red Stack pilots' agreement had simply prohibited the Red Stack pilots from charging for pilotage service performed while engaged in their duties as Red Stack employees. The result would have been to increase the price differential between the two packages to plaintiff's disadvantage. But could plaintiff complain of a rule imposed by an employer prohibiting his employees from collecting fees for themselves from his customers? Such an apparently reasonable restriction on one's employees would not seem to be an antitrust violation. If that is true, it is difficult to see how a more limited understanding with one's employees having a lesser impact on competitors could be found to be unlawful.

[11] Plaintiff points to a clause in the agreement stating that Red Stack shall not be liable for the acts of its employees when they are serving as pilots. But this clause is merely an attempt by Red Stack to relieve itself from liability; it does not change the essential fact that the pilotage services are furnished in connection with and as a result of the masters' employment by Red Stack. Moreover, the cases cited by plaintiff, even if relevant, do not support its contention that the masters are not acting within the scope of their employment when they perform pilotage services. *Bisso v. Inland Waterways Corp., 349 U.S. 85, 92-95, 75 S. Ct. 629, 99 L. Ed. 911 (1955)*; *Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 294-95, 53 S. Ct. 135, 77 L. Ed. 311 (1932)*; *United States v. SS President Van Buren, 490 F.2d 504-07 (9th Cir. 1973)*; and *California v. S/T Norfolk, 435 F. Supp. 1039, 1046-47 (N.D.Cal.1977)*, state no more than that for purposes of determining a vessel's liability, a pilot is considered the employee of the vessel he is navigating, not of the tug. That conclusion does not imply that the pilot cannot at the same time be viewed as acting within the general scope of his employment for purposes of applying the labor exemption especially where, as here, his pilotage is a direct result of his employment by the tug. Finally, plaintiff argues that the pilots' fees are not included in the W-2 statements issued by Red Stack and that the union's collective bargaining agreement does not discuss the pilotage work. But this contention, like plaintiff's other theories, ignores the totality of the circumstances of the Red Stack pilots' working conditions which give rise to the piloting services.

representative for this purpose is someone other than the regular collective bargaining representative and that the subject of the agreement is compensation collected from a third party does not diminish the immediate and direct concern of these employees in this aspect of their compensation. See *NLRB v. Harrah's **[**34]** Club, 403 F.2d 865, 873-75 (9th Cir. 1968)*; *Mitchell v. Gibbons, 172 F.2d 970 (8th Cir. 1949)*. Nor is the labor exemption rendered inapplicable by reason of any impact of the agreement on price. *American Federation of Musicians v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*.

[35]** There is in this case the additional factor of the employer's legitimate concern that the activities of its employees while on the job, particularly the level of compensation collected by them from the employer's customers during the employees' working hours, should be regulated.

Under these circumstances, it must be concluded that the agreement is exempt as a matter of law.

C. Damages

The jury awarded plaintiff damages of $ 100,000 for injury caused by the Red Stack pilots' agreement.

The only damage evidence offered by plaintiff pertaining to this agreement consisted of Exhibit 608 and testimony by plaintiff's expert, Professor McFadden. Exhibit 608 showed that on ships over 14,000 tons, the average Red Stack package cost (i. e., the tug charge plus the pilotage fee as fixed by the agreement) was at all times twice as high or higher than the average package cost of using plaintiff plus the more expensive independent pilot. **[*857]** Even on the smaller vessels, the average Red Stack package cost substantially exceeded the average Murphy package cost at all times.

Inasmuch as plaintiff could therefore not argue that the relative magnitude of pilotage fees placed it under a **[**36]** competitive disadvantage, its theory, as articulated by Professor McFadden, was that had Red Stack permitted its pilots to charge more, Murphy could have increased its Tug charges by a similar amount, thus retaining the competitive price relationship while increasing its revenue. Alternatively, plaintiff could have maintained its charge and benefitted from the additional business attracted by the greater price differential. (R.T. 2405-06, 2410-11)

The logic of that theory, such as it is, rests on the assumption that whatever disadvantage was suffered by plaintiff flowed from the relatively higher pilotage fee of the independent pilots, i. e., Murphy's percentage share of the total package charge was reduced in proportion to the higher share represented by the pilots' fee. The cause of any loss, therefore, would be the differential between the total cost of using Red Stack and the total cost of using plaintiff. But if the independent pilots chose to maintain a level of fees that compelled plaintiff to maintain lower rates to be competitive, the resulting loss of revenue is not attributable to the Red Stack pilots' agreement. Thus, plaintiff has failed to prove "injury of the type the **[**37]** antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*. See also *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790* (10th Cir.), Cert. denied, *434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977)*; *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N.D.Cal.1978)*.

Moreover, plaintiff has failed to offer any evidence from which the jury could have made a reasonable estimate of the amount of profit lost as a result of the agreement. Plaintiff's damage claim here was based on the theory that had the Red Stack pilot fees been increased, resulting in a relative increase in the Red Stack package cost over the cost of using plaintiff's tugs, plaintiff would have increased its revenue through higher rates or more jobs. That theory rests on a number of assumptions, none of which is supported by facts in the record, including the following: that in the absence of the agreement, the Red Stack pilots' fees would have been significantly increased; that had they increased, the independent pilots would not have increased **[**38]** their fees and plaintiff would have been able to increase its ship assist charges above the level of Bay Cities' competitive charges without loss of business; and that if plaintiff had instead maintained its charges unchanged and diverted substantial business, defendants would not have lowered their charges to meet the competition.

In a nutshell, plaintiff's damage theory is premised on a general increase in the price level for ship assist services as a result of which it would have increased its net revenue, either by charging more or by handling a greater volume. It is purely hypothetical, based on assumptions regarding competitive behavior which are wholly unrealistic and without any evidentiary support. Cf. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 85-88 (9th Cir. 1969)*, Cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*; See also *Gray v. Shell Oil Co., 469 F.2d 742, 749 (9th Cir. 1972)*, Cert. denied, *412 U.S. 943, 93 S. Ct. 2773, 37 L. Ed. 2d 403 (1973)* (" "By its own terms, Clayton Act recovery is available only where actual injury has been suffered.' ").

But even if all of these objections were overcome, there is no evidence **[**39]** at all from which the jury could have derived the amount of $ 100,000 as a reasonable estimate of the resultant revenue loss. From all that appears in the record, that figure was simply picked out of the air. [12]

[40]** **[*858]** For each of the foregoing separate and independent reasons, defendants are entitled to judgment on this claim.

V. The Conspiracy Charges Under *Sections 1* and *2*

A. Capacity to Conspire

The form of verdict submitted to the jury required it to find specifically whether defendants Red Stack, Bay Cities and Crowley Maritime, who had been charged with conspiracy in violation of both *Sections 1* and *2*, were legally capable of entering into such a conspiracy. The jury failed to reach a verdict on that issue and defendants have moved for judgment. [13]

Bay Cities and Red Stack are corporations which for many years have been substantially owned and controlled by the Crowley family. At some time after **[**41]** 1973, Crowley Maritime, a corporation wholly owned and controlled by the Crowley family, became the holding company for Bay Cities and Red Stack. Thomas Crowley succeeded his father sometime in the 1940's as chief executive officer of the Crowley companies and acted in that capacity during the period in issue. Each of the companies had its own management, but Mr. Crowley had the final authority in decisions affecting rates, equipment purchases, labor matters and operations.

At all material times, Red Stack and Bay Cities followed a common policy of refusing, except in emergencies, to work a vessel together with a competitor's tug. There is sufficient evidence to establish that the policy was discussed among the Crowley companies and was implemented by each in awareness of the fact that the other was doing the same.

Passing for the moment the question whether the Crowley policy constituted an unreasonable restraint of trade, the facts present a classic case of combination and conspiracy, unless the common ownership and control of the companies immunizes them against conspiracy liability.

HN10[] The Supreme Court has repeatedly stated that common ownership and control of corporations will **[**42]** not insulate them against antitrust liability. E.g., *United States v. Citizens & Southern National Bank, 422 U.S. 86, 116-17, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*; *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134,*

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[12] Although plaintiff in its brief claims that "the damage calculation for the customer boycott policy and the RSPA Agreement are entirely separate and cumulative," that is not the way in which plaintiff's case was presented to the jury. In his summation, counsel for plaintiff did not ask the jury to award damages discretely caused by that agreement. Instead, he treated that agreement as a part of defendants' exclusionary practices which caused plaintiff to lose jobs and revenue, for which loss he asked for aggregate damages of $ 669,666. (R.T. 4079-86, 4089-96) Inasmuch as the jury also awarded plaintiff damages for loss caused by defendants' exclusionary practices under *Section 2*, the instant award of $ 100,000 would in any case have to be struck as duplicative, requiring a new trial. Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

[13] The conspiracy claim against Thomas Crowley was previously dismissed on the ground that an officer is legally incapable of conspiring with the corporation by which he is employed. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 82-83*. See also Part IV. A. Supra.

141-42, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 71 S. Ct. 259, 95 L. Ed. 219 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947). On the other hand, the mere fact that commonly owned and controlled companies follow common policies does not give rise to antitrust liability. As previously noted, "***antitrust law*** is concerned with the concerted action of distinct economic entities." *Knutson v. Daily Review, Inc., supra, 548 F.2d at 802*. It is when commonly owned and controlled corporations conduct themselves as distinct economic entities in the market that they become subject to antitrust constraints against concerted action which inhibits that conduct. *Id. at 802, n. 5* and cases cited. Cf. *Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d **[**43]** 451 (9th Cir. 1979)* (intra-corporate **[*859]** conspiracy held not to exist where the decision not to deal with plaintiff was made by a single person, who was the stockholder, president, and chairman of the Board of the affiliated corporations, without participation of any other members of management of the corporations).

The evidence established that Bay Cities and Red Stack historically had separate managements, operated out of separate locations, conducted separate solicitation, used separate and different equipment, negotiated separate and different labor agreements, and charged under separate and different tariffs. As separate corporations, they had the benefits flowing from separate incorporation. They competed for the San Francisco Bay ship assist business, each offering services which differed somewhat in their cost and nature from those offered by the other. [14]

[44]** The question presented is whether corporations which are legally separate and conduct themselves as economically distinct entities in the market may escape antitrust liability for concerted action because authority for that action flows from the person exercising common control over both corporations. The Supreme Court's prior expressions seem to reject the existence of an across-the-board defense on that basis. (See cases cited at p. 858 Supra.)

The "distinct economic entity" analysis leads to the conclusion that *Section 1* reaches commonly owned firms to the extent that they act as ostensibly separate enterprises in the market. Where, as here, commonly-owned enterprises, enjoying the benefits of separate incorporation, compete for business in the market by offering distinct and independent services, a combination or agreement between them to impose a restraining practice on the market will affect not only their competitive behavior but, in all likelihood, the competitive behavior of other firms. Thus, market behavior will be adversely affected, and the effect on the market is not diminished by reason of the firms' common ownership.

> "The fact that these restraints occur in a **[**45]** 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 integrated under common ownership as from a conspiracy among 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." *United States v. Yellow Cab Co., supra, 332 U.S. at 227, 67 S. Ct. at 1565*.

On the present record, therefore, it cannot be concluded that defendants as a matter of law lacked capacity to conspire. [15]

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[14] Although there is evidence reflecting public awareness that both Bay Cities and Red Stack were "Crowley companies," it is clear that customers dealt with each company separately and that, when it came to doing business with them, they were not regarded as being either unitary or interchangeable.

[15] The capacity issue was submitted by the Court to the jury, which apparently encountered great difficulty in dealing with it. On reflection, it seems to the Court to be more of a legal than factual issue (at least where, as here, none of the relevant facts are disputed) and hence more properly resolved by the Court, but there appear to be no reported decisions on this question.

[46]** B. Sufficiency of the Evidence

The existence of legal capacity to conspire does not, however, resolve the question whether a particular combination or agreement of commonly owned or controlled corporations subjects them to *Section 1* liability. The Supreme Court has not yet defined the parameters of the so-called intra-corporate conspiracy doctrine. What the cases so far decided establish is that **[*860]** common ownership or control of corporations does not immunize conduct which would otherwise violate *Section 1*. But common ownership or control of corporations will inevitably bring about communications, understandings, and common actions among them in areas reached by *Section 1* such as production, distribution, and price. Indiscriminate application of *Section 1* to commonly owned or controlled corporations could therefore have absurd and counterproductive results, subjecting them to liability for "an automatically self-proving conspiracy" on account of activity necessarily arising out of or inherently connected with common ownership or control. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 83-84*; Willis and Pitofsky, Antitrust Consequences **[**47]** of Using Corporate Subsidiaries, 43 N.Y.U.L.Rev., 20, 29-30 (1968). The result would be the imposition of unreasonable and unwarranted risks and burdens on the routine and legitimate use of the corporate form, and "reduced economic efficiency and a less fluid market for transfer or financing of capital assets." Willis and Pitofsky, Antitrust Consequences, supra, 43 N.Y.U.L.Rev. at 28; see also Report of the Attorney General's National Committee to Study the Antitrust Laws 34 (1955).

Thus, ***HN11***[] commonly owned or controlled corporations may be held to be guilty of conspiracy under *Section 1* only if the evidence shows their agreement or common action to lack a legitimate business purpose and to have an anticompetitive effect. See *DuPont Glore Forgan Inc. v. American Telephone & Telegraph Co., 437 F. Supp. 1104, 1115-16 (S.D.N.Y.1977)*, *Aff'd, 578 F.2d 1367 (2d Cir. 1978)*; *Chastain v. American Telephone & Telegraph Co., 401 F. Supp. 151, 160 (D.D.C.1975)*. An agreement or common action arising out of or inherently connected with the common ownership or control of the corporations normally would serve a legitimate business purpose. See, e.g., *Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d **[**48]** 683, 687 (2d Cir. 1963)* (internal redistribution of corporate profits). On the other hand, extraneous restraints producing anticompetitive effects imposed upon commonly owned or controlled corporations holding themselves out to be competitors in the market are evidence from which a jury may find a *Section 1* violation.

Defendants' policy of refusing to work with competitors falls into the latter category. Such a policy was not an integral aspect or necessary concomitant of common ownership or control. And, as heretofore discussed, the evidence showed that the policy was discussed among members of management of the companies and approved by Mr. Crowley, and was sufficient to permit the jury to infer that each company pursued it with knowledge that it was a common policy of the Crowley companies and for the purpose of implementing it as such. Thus the evidence was sufficient to sustain a *Section 1* verdict. Cf. *Theatre Enterprises Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*.

Defendants' rates are a different matter. The evidence showed **[**49]** that the rates and tariffs of each company were subject to Mr. Crowley's approval. Crowley consulted with subordinates, and management discussed rates from time to time. Pricing of course is an integral part of the operation of any enterprise and is a legitimate concern of those who own and control it. Nothing is added to the picture by the evidence offered by plaintiff of a single instance in which one of the companies, Bay Cities, circulated a preliminary tariff to Red Stack prior to its implementation. There was no evidence that Bay Cities and Red Stack combined to employ pricing in any anticompetitive fashion. [16]

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[16] Before the trial began, plaintiff pursued the theory that defendants conspired to depress the prices they charged for their services, presumably for the purpose of preventing plaintiff from operating profitably. The Court rejected this theory as a basis for computing damages, reserving for the trial the question whether defendants' pricing might be evidence of conduct violating *Section 1* or *2*. *Murphy Tugboat Co. v. Crowley, supra, 454 F. Supp. at 850*. Plaintiff produced no evidence at the trial, however,

[50] [*861]** C. Unreasonable Restraint of Trade

At the trial the Court rejected plaintiff's contention that defendants' conduct amounted to a per se violation. ***HN12***[] The policy of refusing to work with competitors did not amount to a boycott because there was no refusal to deal, concerted or otherwise. Cf. *Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Nor is that policy equivalent to a tying arrangement because separate products or services were not involved. Cf. *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; L. Sullivan, Antitrust 434-40 (1977).

Finally, the price fixing charge was rejected for the reasons stated in the preceding section.

Defendants' joint conduct may, however, (for the reasons stated in Part III. A. 1, Supra) be found to constitute a misuse of their dominant position in the market, tending to inhibit the free choice of customers seeking tugboat services. The effect of that conduct in tending to foreclose access of competitors to the market is somewhat analogous to that of exclusive dealing contracts imposed by the dominant firm in the market. Cf. *Tampa Electric **[**51]** Co. v. Nashville Coal Co., 365 U.S. 320, 329, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. And from the point of view of economic efficiency, defendants' refusal to work policy artificially reenforces demand for their tugboat services, tending to lead to underutilization of the facilities of competitors.

These considerations, coupled with the fact that the Crowley companies followed a refusal to work policy only in the market where they held a dominant position, would have permitted the jury to find a combination in unreasonable restraint of trade.

Defendants, therefore, are not entitled to judgment as a matter of law on the *Section 1* claim. Inasmuch as the same conduct has heretofore been held to be sufficient to permit the jury to find a violation of *Section 2*, defendants are not entitled to judgment as a matter of law on the conspiracy to monopolize issue.

VI. Damages [17]

[52]** We come then to the question whether the jury's award of damages aggregating $ 600,000 for violations of *Section 2* can stand. [18]

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from which a jury could find that defendants acted jointly to depress prices. The only evidence offered in this respect reflecting a relative increase in the labor to revenue ratio maintained by Bay Cities and Red Stack from time to time raised no inference of joint action to maintain depressed prices. Moreover, the substantive evidence disclosed that the prices charged by both Red Stack and Bay Cities, which differed from each other, exceeded average variable costs, exceeded the prices charged by plaintiff, and generally even produced a net profit. The Court therefore instructed the jury that these prices were lawful and could not be considered in arriving at a verdict for plaintiff under *Section 1* or *2*. The Court adheres to that view and further discussion of pricing under either *Section 1* or *2* is therefore unnecessary. See *Janich Bros. Inc. v. American Distilling Co., supra, 570 F.2d 848*.

[17] As stated in note 16 Supra, plaintiff's original theory of damages was premised on the existence of a conspiracy among defendants to depress the charges for ship assist services. Damages consisting of lost profits were sought on the theory that, but for defendants' conspiracy, their charges would have been higher, allowing plaintiff to increase its charges and thereby increase its revenue without additional expense. In a prior ruling, the Court rejected plaintiff's offer of proof based on this theory. *Murphy Tugboat Co. v. Crowley, supra, 454 F. Supp. 847*.

[18] For purposes of deciding the damage issue on the motion for judgment n. o. v., the Court will adopt plaintiff's interpretation of the verdict (Exh. A, attached) that the jury assessed $ 600,000 against defendants jointly and severally, and that the assessment of particular amounts to specific defendants was surplusage.

In the event the judgment were overturned on that issue, however, the verdict must properly be treated as imposing on each defendant liability for a specified amount of damages. The form of verdict specifically asked the jury to find and state separately the amount of damage caused by each defendant found to be liable. The terms of the verdict form cannot be ignored. Cf. *Fed.R.Civ.P. 49(b)* (in case of inconsistency between a general verdict and the jury's answers to special interrogatories, the latter control). The assessments of $ 180,000 each against Thomas Crowley and Crowley Maritime must then be set aside for

[53]** **[*862]** The Court has heretofore determined that, on the record before it, the jury was entitled to find that defendants' policy of refusing to work with competitors was unlawful and had an adverse impact on plaintiff. (See Part III. A. 1, Supra.) Plaintiff correctly points out that ***HN13***[] once it established "with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue . . . the jury will be permitted to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' *Bigelow v. RKO Radio Pictures, Inc., (327 U.S. 251, 264, 66 S. Ct. 574, 580, 90 L. Ed. 652 (1946))*." *Flintkote Co. v. Lysfjord, 246 F.2d 368, 392* (9th Cir.), Cert. denied, *355 U.S. 835, 78 S. Ct. 54, 2 L. Ed. 2d 46 (1957)*. Accord, *Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978)*; *Greyhound Computer Corp. v. International Business Machines, supra, 559 F.2d at 506*; *Knutson v. Daily Review, Inc., supra, 548 F.2d at 811-12*. Defendants' argument that any resulting injury suffered by plaintiff was not cognizable under the antitrust laws must therefore be rejected.

The issue before the Court **[**54]** is whether plaintiff offered evidence sufficient to enable the jury to make such a just and reasonable estimate. That mathematical certainty is not required for proof of damages is of course well settled, *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-66, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*, but that is not the issue here. As the Court observed in Story Parchment:

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages Which are definitely attributable to the wrong and only uncertain in respect of their amount." *Id. at 562, 51 S. Ct. at 250* (emphasis added).

And in *Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. at 264, 66 S. Ct. at 579-80*, the Court said that:

> "In the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, And from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. . . . (T)he jury **[**55]** could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible. . . . In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not Render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data . . . ." (Emphasis added) See also *Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

HN14[] While a "plaintiff need not negative all possible alternative explanations for his decline in profits," *Knutson v. Daily Review, Inc., supra, 548 F.2d at 811*, there **[*863]** must be proof of some damage "flowing from the unlawful conspiracy." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. at 114 n. 9, 89 S. Ct. 1562*. Causation, while relevant in the first instance to proof of the fact of damages, has a bearing as well on the sufficiency of the proof of the amount of damage. Unless the amount sought to be recovered is shown to be

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the reasons stated in Part III. B., Supra. There would remain assessments of $ 160,000 and $ 80,000 against Red Stack and Bay Cities, respectively. Inasmuch as each may be separately liable for monopolization and attempt to monopolize, the jury could properly find each to be responsible for a different amount of damage.

This holding does not conflict with the common law principle that a jury has no right to apportion damages among joint tortfeasors, and that if it does, the total damage award will control and the attempted apportionment will be treated as surplusage. See *Gates v. L. G. DeWitt, Inc., 528 F.2d 405, 413 (5th Cir. 1976)* (applying state common law); *Dauenhauer v. Sullivan, 215 Cal.App.2d 231, 30 Cal.Rptr. 71, 74 (1963)*; Annot., 46 A.L.R.3d 801, 830-35 (1972). In those cases, the jury acted on its own in deciding to apportion damages after first determining a lump sum damage award. Here, however, the jury acted in accordance with the Court's instruction that it first assess the damage caused by Each defendant and then total these amounts. Plaintiff did not object to this form of verdict at the time of trial. It cannot now contend that the jury actually meant to award $ 600,000 jointly and severally against defendants.

"definitely attributable" to defendant's wrongful conduct, there is no basis for making a "just **[**56]** and reasonable estimate." [19]

[57]** ***HN15***[]

To meet the minimum requirement of proof in a market exclusion case in which lost profits are sought, plaintiff must normally produce evidence falling into one of the following categories:

(1) Comparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions; *Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652*; *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 376-78, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*; *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1206-07 (9th Cir. 1975)*, Cert. denied, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*;

(2) Comparison of performance in restrained and unrestrained markets which are otherwise comparable; *Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129*; *Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652*; *Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 714-15 (9th Cir. 1959)*, Cert. denied, *361 U.S. 961, 80 S. Ct. 590, 4 L. Ed. 2d 543 (1960)*; or

(3) Loss of specific business or customers; *Herman Schwabe, Inc. v. United* ***[**58]*** *Shoe Machinery Corp., 297 F.2d 906, 913* (2nd Cir.), Cert. denied, *369 U.S. 865, 82 S. Ct. 1031, 8 L. Ed. 2d 85 (1962)*.

Plaintiff offered no "before and after" evidence, nor did it offer evidence of loss of particular sales. Instead, it relied on damage theories which are discussed in the following sections. [20]

[59]** **[*864]** A. Lost Past Profits

Plaintiff contends that had it not been for defendants' refusal to work policy it would have had the same share of jobs on vessels over 14,000 tons as it had of jobs on vessels of less than 14,000 tons. It handled 28 percent of the

[19] The cases cited by plaintiff confirm the necessity of proof sufficient to permit a reasonable inference that the loss or damage was attributable to acts of defendants. In *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*, where plaintiff, a distributor, complained of having been illegally cut off by defendant, its supplier, plaintiff's damage proof was based on a comparison with revenue it had received during the period prior to the cutoff. In *Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544*, where plaintiff complained of predatory price cuts, the proof was based on comparison of the prices previously charged with the unlawfully cut prices, allowing the jury to compute damages based on the differential. In *Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652*, where plaintiff complained of having been deprived of first run motion pictures, the proof was based on comparison with the profits received by defendants' comparable theatre and also with the earnings of plaintiff's theatre during a prior period when it had received some first runs. And in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129*, where plaintiff complained of having been excluded from the Canadian market for television sets and radios by an illegal patent pool, plaintiff's damage proof was based on its share in the comparable United States market and its ability to obtain the same share in Canada had its marketing not been impeded by defendant's conspiracy to deny it patent licenses. *Id. at 116 n. 11, 123-25, 89 S. Ct. 1562*. These decisions do not support plaintiff's contention that its operating losses constitute proof of the amount of damage attributable to defendants' wrongful conduct simply because that conduct precluded it from obtaining substantial additional business which it could have handled profitably.

[20] Plaintiff's damage theories have undergone several metamorphoses and no useful purpose would be served by recapitulating their evolution. At oral argument on these motions, the Court expressed its concerns on the damage issue and invited counsel to submit further memoranda setting out the theory and the substance of the supporting evidence. The following discussion then addresses plaintiff's position as most recently taken in its post-argument memorandum.

Regrettably, plaintiff chose not to respond to the Court's specific request at oral argument to address in its memorandum its theory of damages under the Red Stack pilots' agreement. The Court in this opinion has therefore had to rely on the arguments and theories previously urged by plaintiff on this aspect of the case.

small vessel jobs but only 2 percent of the large vessel jobs. (Exh. 606) Thus, its volume of work on large vessels would have substantially increased.

Next plaintiff contends that it would have adopted a Red Stack-type grid tariff under which charges would have increased with the size of the vessel, but at a level of approximately 80 percent of the corresponding Red Stack charge.

Finally, relying on testimony of its economist Professor McFadden, plaintiff contends that given the additional volume at the higher rates, it would have realized net profits on the business which would have eliminated its operating losses and caused it to break even. [21]

[60]** The threshold problem with this damage theory is the assumption that plaintiff's operating losses incurred in serving the small vessel segment of the market represent the amount of damage attributable to exclusion from the large vessel segment. Even assuming that plaintiff would have realized a net profit from working large vessels, the amount of that profit is not a function of the amount of loss suffered working small vessels. That loss logically cannot be said to be attributable to anything other than the small vessel operation. The fact that plaintiff might have realized from large vessel jobs profits to compensate for the losses incurred on small vessel jobs does not make the latter a measure of the former.

The mere fact that defendants' conduct had an adverse impact on plaintiff's business and that this business showed a loss does not provide a basis for equating that loss with the amount of damage caused by defendants. Plaintiff must prove albeit not with mathematical certainty "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., supra, 429 U.S. at 489, 97* ***[**61]*** *S. Ct. at 697*. Professor McFadden's opinion, unsupported by facts, that but for defendants' conduct plaintiff would not have suffered losses does not convert the evidence of operating losses into evidence of damage flowing from defendants' antitrust violations. See *Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 566 (2nd Cir. 1970)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 420-21 (S.D.N.Y.1978)*. [22]

[62] [*865]** Even if we were to put aside this fatal defect, there are other flaws in the damage theory which are so obvious and substantial as to render it pure speculation.

First, the assumption that plaintiff would have acquired something on the order of a 28 percent share of the large vessel segment of the market, when all it ever had was a two percent share, is totally without evidentiary support.

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[21] In his closing argument to the jury, plaintiff's counsel put it as follows:

"Now what kind of losses did we have? These losses on this chart are the losses from all operations for four years. And this is from Mr. Murphy's testimony, when he referred to his income tax returns, and this is the figure: $ 306,217. Those were our actual losses. And those are the losses that Professor McFadden testified that had we been operating in a competitive market where we had not been excluded, where we had free access to the big ships and the flat tows, those are the losses we would not have had." (R.T. 4093).

[22] Such evidence as there was refuted, rather than supported, the claim that plaintiff's tax losses provided a basis for a just and reasonable estimate of its antitrust losses. The evidence showed, for example, that plaintiff operated at a profit during its first year, when defendants' practices were the same as later, but that this profit was converted to a loss in subsequent years when plaintiff (1) increased officers' salaries substantially, e.g., Murphy's own salary went from $ 11,000 in 1971 to a high of $ 61,000 in 1975, at a time when operating results were the lowest (R.T. 640-42, 3451, 3511-12); (2) paid $ 9700 for a speedboat which produced only $ 600 of revenue and was used mainly for Mr. Murphy's pleasure (R.T. 770-73); (3) acquired an underpowered tug, the San Clemente, which, according to an application for a Small Business Administration loan, was "a terrific drain on the company," (R.T. 786, Exh. G3); and (4) paid $ 1000 for a coffee table which Mr. Murphy used in his home (R.T. 775-76; Exh. V). Finally, defendants' accountant showed that plaintiff incurred a two-year loss of $ 28,100 in its ship assist operations in Sacramento, where defendants did not operate and their practices therefore had no effect (R.T. 3440, 3460). Mr. Murphy's less detailed calculations showed that the Sacramento operation earned $ 4100 during these two years (R.T. 3869), but his testimony suggested that it suffered a loss instead. While these would normally of course be matters for the jury to weigh, they are relevant to the legal issue whether the proof offered of operating losses could qualify as the basis for a just and reasonable estimate of damages by the jury.

The evidence showed that there are substantial differences between docking and undocking small and large vessels. Docking large vessels is more hazardous and difficult, involves greater risks, and generally requires more, and more powerful, tugs. (R.T. 514, 523, 567, 893-94, 1348, 2222.) Moreover, plaintiff's participation in this work was necessarily premised on its working jointly with Red Stack on particular vessels. Although a number of witnesses testified in favor of having the option of calling on both Murphy and Red Stack, the evidence also indicated that some pilots and vessel operators prefer to avoid the risks of divided responsibility and liability. Thus, plaintiff's straight extrapolation from its share of small vessel jobs to project its share of large vessel jobs is too **[**63]** speculative to be accepted. Moreover, the possibility that plaintiff, operating most of the time with only one large tug, [23] could with Red Stack's help have captured more than one-fourth of the large vessel market from Red Stack, operating eight large tugs, is too remote and speculative to permit the jury to consider it as a basis for damages. [24]

[64]** Second, the assumption that plaintiff would have published a grid tariff with a different and substantially higher rate structure is purely hypothetical. There is no evidence that plaintiff was precluded from publishing such a tariff while it was in business. And certainly the assumption that plaintiff could have maintained a level of rates 20 percent below Red Stack's while taking away, on the strength of Red Stack's cooperation, a large share of Red Stack's business defies reason.

Third, plaintiff's conclusion that with 28 percent of the large vessel segment serviced at 80 percent of the Red Stack rates it would have generated a profit equal to the amount it lost while servicing the small vessel segment is pure speculation. Even **[*866]** accepting the contention that plaintiff could have performed additional jobs on which its revenue would have exceeded its costs, there are no computations in the record to support the particular numbers which plaintiff placed before the jury and the jury accepted.

It may well be that defendants' policy caused plaintiff to lose some jobs which it otherwise might have handled. But from all the record discloses, plaintiff made no effort to offer **[**65]** evidence reflecting the impact of defendants' policy on its business. Presumably, that approach would have generated figures far more modest than those placed before the jury. That fact, however, does not justify permitting the jury to base a verdict on theories and assertions that are wholly speculative and without evidentiary support.

B. Lost Future Profits

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[23] See note 5 Supra.

[24] A further difficulty with extrapolation from plaintiff's 28 percent share of the small vessel jobs is that this share resulted in part from plaintiff's exclusion from the large vessel jobs. Defendants' practice inevitably forced plaintiff to concentrate on small vessels, leading to a penetration of that market segment greater than it would have been had plaintiff spread its limited resources over both small and large vessel jobs. Thus, plaintiff, by relying on the 28 percent figure, is in a sense seeking to profit from defendants' wrong, something it should not be permitted to do. See *Eastman Kodak Co. v. Southern Photo Materials Co., supra, 273 U.S. at 378, 47 S. Ct. 400*.

A related difficulty concerns the effect on plaintiff's share of small vessel jobs had it acquired the 28 percent share of large vessel jobs. Plaintiff's position on this question has vacillated. This of course is not a case where plaintiff had a proven capacity to handle additional volumes of business. Nor is this a case where plaintiff proposed to acquire additional equipment, intending instead to rely on the availability of defendants' equipment to augment its own capacity.

Professor McFadden's prediction in this regard that plaintiff could have greatly expanded its volume with its existing fleet of tugs (See note 5 Supra) depended on his assumption that each of plaintiff's tugs had a capacity of 2.9 jobs per day, and that plaintiff had not been working at its full capacity. (R.T. 2257-62) However, this capacity figure is speculative and is based only on Mr. Murphy's observation that during a five-month period, one of his tugs, the Go Getter, averaged 2.9 jobs per day. (R.T. 2104-05) There are serious problems with plaintiff's approach of taking the total number of jobs done, dividing by the number of workdays, and then assuming that this is the capacity of each tug for purposes of calculating damages: Red Stack did not operate at this 2.9 figure, although there is no reason to assume it was less efficient than Murphy; the 2.9 figure does not take into account the need to have standby capacity to handle periods of peak demand; and it is speculative to assume that each Murphy tug, no matter what size or in what condition, would have the same capacity as the Go Getter, a large tug which alone operated continuously for 3 1/2 years. (R.T. 2467-85, 2509-14)

Plaintiff also sought damages for the loss of future profits based on its prior years' revenues. In closing argument, plaintiff's counsel stated the theory of recovery to the jury as follows:

> "Now how do we figure out what would have happened to us in the future? I think it is a pretty simple matter. We would stay in business. We would continue to operate, and operate profitably. The only question is: how profitably?
>
> "We think that it is reasonable for you to conclude that we would have operated on about the same, at least as well as Bay Cities did in its worst year of this three-year period, the least of the Bay Cities and Red Stack performance for the entire three-year period, and that is that we would have earned something in the vicinity of 82% (sic, 8.2%) of our revenue as profit. That is what they earned. **[**66]** That is what can be earned in this business. There is no reason why we could not earn it.
>
> "So the calculation is thus: The first thing that you have to do is you have to figure what would our revenue have been. We have assumed for the purpose of this future analysis that our revenue would have been our same annual revenue that we had for the four years that we operated. And our annual revenue at that time was $ 435,000; $ 435,928. And if you take 8.2 percent of that, you get $ 35,746. That's annually.
>
> "We think that it is reasonable for you to conclude that if we had been in business five years beyond the date that we got driven out, and to give us credit after this year, after we had this going-out-of-business loss, beyond that year, for the years "77, "78, "79, "80, and "81, a five-year period, that's $ 178,730.
>
> "So I submit to you that our total losses are $ 178,730 for the future profits, and for the lost profits, $ 490,936, or total losses in this amount: $ 669,666." (R.T. 4095-96)

There is no evidence to support the assertion that plaintiff could have earned a profit of 8.2 percent of gross revenue or that this would have been its profit rate in **[**67]** the absence of defendants' conduct. Even assuming that Bay Cities' operation was in certain respects comparable, the fact that Bay Cities was able to operate profitably in the small vessel segment of the market and plaintiff (after the first year) was not, renders any reference to Bay Cities' profit rate entirely inappropriate. [25] Plaintiff's claim for future profits must be rejected as wholly speculative. See *Lessig v. Tidewater Oil Co., 327 F.2d 459, 473-74* (9th Cir.), Cert. denied, *377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1964)*.

[68]** The Court is therefore compelled to conclude that the damage verdict is too speculative to stand. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* ***[*867]*** *supra, 416 F.2d at 88*; *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 390-93 (6th Cir. 1962)*, Cert. denied, *372 U.S. 907, 83 S. Ct. 721, 9 L. Ed. 2d 717 (1963)*. The words of the Ninth Circuit are appropriate here:

> "The verdict of a jury should not lightly be set aside certainly not for the mere reason that a court may disagree with it. However, in this case we are convinced that this verdict for the plaintiff, if allowed to stand, would be a legally unjustified windfall to the plaintiff and a miscarriage of justice." *Autohaus Brugger, Inc. v. Saab Motors, Inc., supra, 567 F.2d at 915*. [26]

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[25] Bay Cities' financial statements, from which plaintiff derived the 8.2 percent figure, were received into the record in connection with plaintiff's sales below cost claim. There was no suggestion when they were offered that they would be used as a basis for making a comparison to support the claim for future profits, advanced for the first time in closing argument. This use, without adequate foundation that Bay Cities' business was comparable to plaintiff's, would in any event require granting a new trial on damages.

[26] The confusion engendered in the jury's mind by plaintiff's "damage proof" is confirmed by the verdict. In the closing argument counsel for plaintiff stated that "our total losses are . . . in this amount, $ 669,666," and went on:

"And that is what we firmly feel that these defendants damaged Murphy Tug, in that amount. And that is what we ask you to award as your verdict." (R.T. 4096)

With no other relevant evidence before it, the jury awarded an aggregate of $ 700,000, assessing different amounts for which there is no apparent basis against Bay Cities, Red Stack, Crowley Maritime and Thomas B. Crowley on the *Section 2* claim and Red Stack on the Red Stack pilots' agreement claim.

[69]**

VII. Motion For New Trial

HN16[] The Court may grant defendants' motion for a new trial conditionally, even if the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence or results in a miscarriage of justice. *Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976)*, Cert. denied, *429 U.S. 1074, 97 S. Ct. 813, 50 L. Ed. 2d 792 (1977)*. In this case, defendants' motion for a new trial must be granted, conditioned on reversal of the judgment, in the following respects:

A. Damages Under *Section 2*

For the reasons discussed in Parts IV. C. and VI, Supra, the damage award is not supported by substantial evidence and is in any event excessive and against the clear weight of the evidence. A new trial, limited to the issue of damages, must therefore be granted. *Hanson v. Shell Oil Co., supra, 541 F.2d at 1360*; *Minthorne v. Seeburg Corp., 397 F.2d 237, 244 (9th Cir. 1968)*.

B. Liability of Thomas B. Crowley and Crowley Maritime Corporation

For the reasons discussed in Parts III. B. 1 and 2, Supra, the verdicts against Thomas Crowley and Crowley Maritime must be set aside as being against the clear weight of the evidence. There was no evidence **[**70]** permitting the jury to find either a sufficient degree of active participation or wrongful conduct or a sufficient causal connection with damage suffered by plaintiff.

C. Liability of Red Stack on Account of the Red Stack Pilots' Agreement

For the reasons discussed in *Part IV, supra*, the verdict against Red Stack based on the pilots' agreement is against the clear weight of the evidence, and the damage award is excessive. A new trial must be granted on that issue.

D. Liability for Conspiracy (other than the Red Stack Pilots' Agreement).

Because plaintiff presented no separate damage claim under *Section 1*, the Court's disposition of the *Section 2* claim on damage grounds disposes of this claim as well. In the event the judgment is reversed, however, and a new trial is ordered, plaintiff will be entitled to a new trial on the conspiracy issue. (See Part V, Supra)

In all other respects, defendants' motion for a new trial is denied.

CONCLUSION

For the reasons stated, defendants' motion for judgment notwithstanding the verdict is granted. In the alternative, defendants' motion for a new trial is granted to the extent stated above, conditional on reversal of the judgment. Each party **[**71]** shall bear its own costs.

IT IS SO ORDERED.

TABLE

Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.

United States District Court for the Eastern District of Virginia, Norfolk Division.

March 6, 1979, Filed; Affirmed in Part, Vacated in Part and Remanded Ocotober 3, 1980

Civil Action No. 77-637-N.

Reporter

1979 U.S. Dist. LEXIS 14003 *; 1979-2 Trade Cas. (CCH) P62,886

Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., American International Pictures, Inc., Avco Embassy Pictures Corp., Buena Vista Distribution Co., Inc., Columbia Pictures Industries, Inc., Paramount Pictures Corp., Twentieth Century Fox Film Corp., United Artists Corp., Universal Film Exchanges, Inc., Warner Brothers Distributing Corp., ABC Southeastern Theaters, Inc., General Cinema Corp. of Virginia, Inc., and American Multi-Cinema, Inc.

Core Terms

films, distributor, exhibitor, split, bid, licensed, damages, no evidence, terms, theatre, pictures, conspiracy, futility, speculation, prima facie case, antitrust, negotiate, non-split, contends, sales, self-interest, prerequisite, twenty-three, first-run, inferior

Counsel: **[*1]** For plaintiff: Stanley E. Sacks and Girard C. Larkin, Jr., Norfolk Va. For defendants: Thomas J. Harlan, Jr., and William M. Secton, Norfolk, Va., for American Multi-Cinema, Inc.; Norman G. Knopf and Warren L. Lewis, Richmond, Va., for ABC Southeastern Theaters, Inc.; Daniel R. Murdock, New York, N.Y., Robert M. Hughes, III, Norfolk, Va., for Buena Vista Distributing Co., Inc.; Richard B. Spindle, III, Thomas G. Johnson, Jr., and Guy R. Friddell, III, Norfolk, Va., for General Cinema Corp.; Lewis T. Booker, William F. Young, and L. Neal Ellis, Jr., Richmond, Va., for Allied Artists Pictures Corp., et al.

Opinion by: CLARKE

Opinion

Memorandum Opinion

CLARKE, D.J.: This matter came to trial before the Court and a jury. At the conclusion of plaintiff's evidence, all defendants moved for a directed verdict. Due to the number of attorneys involved in the case and the considerable additional expense that would be incurred by all parties in waiting for any action by the Court, the Court rendered an oral decision from the Bench granting each defendant's motion for a directed verdict. According to our comments from the Bench, this Memorandum Opinion is entered to elaborate more fully the Court's **[*2]** decision.

At the outset, it should be noted that plaintiff has had an ample opportunity to prepare its case. The period of discovery has exceeded one year. Some eleven months after initiation of the suit plaintiff first moved for production of documents and the Court, over defendants' objections, extended plaintiff's time for discovery. At the trial, plaintiff's evidence spread over six days and hundreds of documents. [1] However, notwithstanding the bulk of

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[1] At trial the parties presented several stipulations, some of which were marked as "Court Exhibits." There was an additional stipulation which was not given a number. The Court informed the parties that the Court would hear arguments as to the

evidence before the Court, the Court holds as a matter of law that plaintiff has failed to make out a prima facie case which would justify submitting the case to the jury.

The general background surrounding this dispute can be stated quite simply. Plaintiff, owner and operator of two motion **[*3]** picture theatres which are now closed, instituted this action on October 12, 1977, under sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. The defendants are three chains of motion picture exhibitors in the Norfolk-Virginia Beach area and eleven motion picture distributors. [2]

Plaintiff asserts that the distributor defendants engaged in a conspiracy with the exhibitor defendants. In 1966, defendant exhibitor General Cinema opened the Janaf theatre adjacent to the Janaf Shopping Center. By the early 1970's, defendant exhibitors ABC Southeastern and American Multi-Cinema had opened their respective theatres at the Pembroke and Military Circle shopping malls. Janaf, Military Circle and Pembroke malls are all large, modern shopping centers which attract substantial numbers of shoppers, a favorable factor in theatre attendance. It is at this time plaintiff contends that the unlawful conspiracy began. Under the alleged conspiracy, the plaintiff contends, that the distributor defendants agreed to license first-run motion pictures only to the exhibitor defendants to the **[*4]** exclusion of plaintiff and the other independent exhibitors in the Norfolk-Virginia Beach area. Plaintiff further contends that this conspiracy caused its two theatres to lose business and ultimately to go out of business in December 1975.

There is little dispute concerning the substantive ***antitrust law*** which controls this action. Under section 1 of the Sherman Act, the plaintiff has the burden of proving three essential elements to establish its prima facie case:

(1) That there was an agreement, conspiracy, or combination among the defendants in restraint of trade;

(2) That as a direct and proximate result thereof plaintiff has been injured in its business and property; and

(3) That the damages which the plaintiff sustained are capable of reasonable ascertainment and are not speculative or conjectural.

Admiral Theatre Corporation v. Douglas Theatre Company , 585 F.2d 877 (8th Cir. 1978).

Initially, it should be noted that the exhibitor defendants admit the existence and operation of a split agreement during the time relevant to this case. However, the law in this Circuit is clear that a split system is neither per se illegal nor, standing alone, evidence of a conspiracy **[*5]** to violate the antitrust laws. *Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627 (E.D. N.C. 1966)*, aff'd, *388 F.2d 987 (4th Cir. 1967)*, cert. denied, *390 U.S. 959 (1968)*; accord *Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971)*; *Viking Theatre Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285 (3d Cir. 1963)*, aff'd by an equally divided court, *378 U.S. 123 (1964)*; Royster Drive-In *Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246* (2d Cir.), cert. denied, *361 U.S. 885 (1959)*.

Apart from the admitted operation of the split, plaintiff produced no evidence from which a reasonable inference could be drawn that a conspiracy existed or operated among exhibitor defendants as to restrict unreasonably the competitive market. There was no evidence that the split had the purpose or effect to foreclose the plaintiff from being allowed to license films or compete in the bidding and negotiation for films. Indeed, the evidence showed that non-split members, including the plaintiff, continually received letters soliciting bids on films, did bid and negotiate for pictures, and were licensed films when they offered the superior terms. Even the split member **[*6]** exhibitors were not required by their agreement to attempt to license films split to them. The only agreement was that other members of the split would not bid or attempt to negotiate films split to the other split exhibitors. The evidence showed the sole purpose and effect of the split was to curtail competitive bidding by split members so as hopefully

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admissibility of the unnumbered exhibit at the time of arguments for a directed verdict. For purposes of this opinion, the Court considered all stipulations as part of plaintiff's case.

[2] One of the distributor defendants, MetroGoldwyn Mayer, subsequently was dismissed.

to lower prices of film licenses. Neither plaintiff nor any other exhibitor was ever prohibited from competitively bidding or negotiating for films. Such a situation does not harm a non-participating exhibitor and is not evidence of a conspiracy. See *Dahl, 448 F.2d at 20*; *Viking, 320 F.2d at 292-93*; *Seago, 42 F.R.D. at 638*.

Thus, in order for plaintiff to establish the first element of its prima facie case, the plaintiff had to show that the distributor defendants knowingly participated in implementing or promoting the split with the intent to deprive plaintiff of his "fair share" of high quality first-run films. *Admiral, 585 F.2d at 884*. Of course, the plaintiff is not required to prove directly the fact of an agreement among the distributor defendants or between the distributor defendants and the exhibitor defendants. Evidence **[*7]** from which an agreement could be inferred is sufficient. American Tobacco C3. v. *United States, 328 U.S. 781, 809-10 (1946)*; *Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86* (10th Cir.), cert. denied, *347 U.S. 976 (1954)*. However, to avoid a directed verdict "the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion." *Admiral, 585 F.2d at 884*, quoting *Johnson v. J. H. Yost Lumber Co., 117 F.2d 53, 61 (8th Cir. 1941)*; see *Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036* (2d Cir.), cert. denied, *429 U.S. 885 (1976)*; *Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309 (3d Cir. 1975)*. Furthermore, an inference which a jury is entitled to draw must be based upon proven facts and not on other inferences. *Admiral, 585 F.2d at 884*.

Plaintiff points to practices of competing distributors to support an inference of conspiratorial agreement. Plaintiff contends that the distributors acted uniformly in certain aspects of licensing of films. While evidence of conscious parallelism will sometimes support an inference of an agreement, an inference of a conspiracy is not warranted where such **[*8]** conduct is at least as consistent with legitimate business decisions by distributors as with the planned exclusion of the plaintiff. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954)*; *Admiral, 585 F.2d at 884*; *Dahl, 448 F.2d at 19-20*; Brown v. Western Mass. *Theatres, Inc., 288 F.2d 302, 305-06 (1st Cir. 1961)*. As the court noted in the Admiral case:

Section 1 of the Sherman Act does not prohibit independent business actions and decisions. Only where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, were they acting alone, may an agreement be inferred solely from parallel actions. *First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968)*.

Admiral, 585 F.2d at 884.

Plaintiff asserts that defendant distributors joined in the implementation of the split by (1) providing advance information to exhibitor defendants, (2) requiring unreasonably high advances and guarantees of plaintiff and other non-split exhibitors but not of split members, and (3) rejecting superior bids of non-split exhibitors and accepting inferior bids of split members.

Plaintiff's contention regarding advance information **[*9]** is nearly identical to the claim rejected in the Admiral case where the court wrote:

It is not surprising that a distributor would provide information concerning forthcoming films to any interested exhibitor. It is certainly not inconsistent with the distributor's self-interest to attempt to generate interest in its films.

Id. at 885. Furthermore, as in that case, even assuming that this advance information was unavailable to Wilder through the various trade journals, it is clear that the plaintiff neither requested nor was designedly refused the information that its competitors had acquired.

Plaintiff suggests distributor defendants all eventually adopted a practice requiring guarantees and that they discriminatorily made this demand only of non-split members. It is true that most all distributor defendants began to require guarantees of exhibitors. As to the date when the first distributor required this and when the other distributors adopted this practice, however, plaintiff's evidence ranged from a few weeks, to several months to over six years.Notwithstanding the date of inception differential, the evidence was overwhelming that from the mid-1960's through 1975 there **[*10]** have been consistently fewer films being released and more theatres competing for those pictures. That development could do nothing but put distributors in a stronger competitive position vis-a-vis exhibitors wherein distributors could demand such guarantees which were unquestionably in their business self-interests. Such parallel conduct cannot support an inference of an agreement.

Plaintiff's only evidence that defendant distributors required advances and guarantees of plaintiff and other non-split exhibitors while not requiring these terms on films licensed to exhibitor defendants was the silence of distributor representatives when plaintiff's representative said he suspected this was the case. Accepting this as true, the best inference that can be drawn from this evidence is that the split exhibitors were not putting up such funds. However, plaintiff's own evidence showed this was not the case. Contrary to what the plaintiff's representative "suspected," the evidence showed that split members were required to and did put up guarantees. Plaintiff is not entitled to an inference that is negated by other express evidence in its case. Moreover, evidence of a distributor remaining **[*11]** silent and refusing to disclose to one exhibitor the terms of a license granted to a competing exhibitor in a situation of secret bidding would seem highly consistent with good business judgment.

Plaintiff's evidence did show that at least on four occasions a split member was called by a distributor and told the terms on which an upcoming film would be licensed, and on one occasion that "you've got" a certain picture prior to bid solicitation letters being sent out. There are, however, two difficulties in drawing an inference of distributor participation in the split from this evidence. First, as also discussed below, there was no evidence that those films were not licensed to an exhibitor other than the exhibitor who made the best bid or offered the most lucrative terms to the distributor. Second, the same witness who testified to such contacts by distributors testified that: (a) he would only be licensed that film if he met the distributor's minimum terms; (b) that, indeed, he was not licensed one of these pictures when he could not pay the guarantee demanded by the distributor, and (c) regardless of the split selections, split exhibitors ran the risk that non-split exhibitors **[*12]** would offer superior terms and be licensed the film. The witness characterized the dealings with distributors on movies split to him as "[fighting] it out with the distributor over [the] terms." There was no evidence that exhibitors dictated the terms of licenses to distributors or that exhibitors were anything but free to select any bid or offer. See *Syufy Enterprises v. National General Theatres, Inc., 575 F.2d 233 (9th Cir. 1978)*; *Admiral, 585 F.2d at 887*.

Taking this evidence in the light most favorable to plaintiff, the best inference that can be drawn is that distributors were selecting split members to play their films prior to soliciting bids. The same witness, however, testified that he had no knowledge of any agreement by any distributor to boycott, discriminate or exclude any exhibitor in licensing films, no knowledge of any agreement to conduct sham bidding, and no knowledge of any agreement as to the selection of theatres for licensing. Again, there was no evidence that any film went to any exhibitor except the exhibitor offering the most lucrative proposal for the film.Since such a practice is consistent only with the business self-interests of each distributor, **[*13]** each distributor was free to license its films in any manner it determined in its own judgment was in its best interests. See, e.g., *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068 (7th Cir. 1978)*.

Most significant is the fact that plaintiff failed to prove that a single film went to any exhibitor other than the exhibitor (member of the split or not) which made the best bid or offered the most favorable terms to the distributor. This was overwhelmingly apparent even ignoring the fact (which would argue against plaintiff's case) that the evaluation of competing bids is "necessarily somewhat subjective" normally involving considerations of grossing potential including "location, quality of furnishings, demonstrated ability to attract patrons and the type of films previously shown." *Admiral, 585 F.2d at 885*. Accordingly, plaintiff's evidence that the great majority of films split by exhibitor defendants were eventually licensed to split members can raise no inference of distributor participation in the split.

In pretrial discovery and at trial, plaintiff failed to prove any other incidents of preferential treatment to split members by distributors such **[*14]** as shortened runs, pre-release screenings, move overs or adjustments of bids and film rentals. Even if this evidence were presented, there can be no conclusion drawn unless plaintiff can show it requested and was denied similar treatment. *Admiral Theatre Corp. v. Douglas Theater Corp., 437 F. Supp. 1268, 1290-91 (D. Neb. 1977)*, aff'd, *585 F.2d 877 (8th Cir. 1978)*.

Despite plaintiff's broad allegations, there is neither any evidence nor reasonable inference considered alone or in combination to prove a conspiracy among distributor defendants or between distributor and exhibitor defendants. To the contrary, plaintiff presented no evidence that any distributor acted alone or in concert in any manner except in his own selfinterest.

With regard to section 2 of the Sherman Act, plaintiff has not actively pursued this claim. Plaintiff offered no evidence as to who was attempting to monopolize or even what product was alleged to be the subject of the monopoly. Plaintiff's only evidence as to the fixing of prices was that plaintiff and all other exhibitors were free to establish and maintain their own price levels. Moreover, there was absolutely no showing of the requisite intent **[*15]** to monopolize or dangerous probability that an actual monopoly will be achieved. *White Bag Company v. International Paper Company, 579 F.2d 1384 (4th Cir. 1974)*.

Plaintiff has failed to meet its burden of establishing this first element of its prima facie case.

Even assuming plaintiff had proved the first element of its case, in order to establish a private cause of action under the Clayton Act, plaintiff must prove an injury. The mere fact of a violation, even if proven, does not automatically produce damages. *Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978)*. Moreover, there must be a causal relationship between the illegality and the injury if proved. The only damages recoverable in an antitrust suit are those which occur by reason of that which made the defendant's actions unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)*. The Supreme Court has held:

Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive **[*16]** acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations… would be likely to cause." Zenith Radio Corp. v. Hazeltine Research, 395 U.S. [100, 125].

Brunswick, 429 U.S. at 489. This is the case regardless of whether the violation is thought to be unreasonable or per se illegal. *Admiral, 585 F.2d at 893*.

Plaintiff relied upon two theories to prove the fact of injury: (1) demand prerequisite theory and (2) comparative theatre or futility theory. Under the former theory, plaintiff contends it was injured by failing to receive first-run films. As a prerequisite to this approach, though, plaintiff must show it bid or attempted to negotiate to get each film it claims it did not receive due to defendants' unlawful action, and that it was unjustifiably denied those films.

One cannot show "fact of injury," by alleging he did not receive something when he initially never tried to obtain it. Thus, the "demand prerequisite" is also inherently necessary in showing damages, plus the causal connection of those damages to the split activities. If plaintiffs never attempted to obtain the film, ipso facto, exhibitor-defendants could **[*17]** not have prevented them from obtaining it, and thus could not have caused damages."We know of no principle of law which authorizes a person aggrieved by the deprivation of a right either statutory or constitutional to recover for such deprivation in the absence of a demand or request for its exercise." *Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 568 (7th Cir. 1951)* [footnote omitted].

Admiral, 585 F.2d at 893-94.

Plaintiff identified twenty-three films on which it said it bid or attempted to negotiate but did not receive due to defendants ' illegal activities. There is, however, no evidence that plaintiff bid or offered specific terms for any of these films or that such terms were rejected in favor of inferior bids or offers of defendant exhibitors. Even beyond the twenty-three films there is no evidence distributors unjustifiably denied any bid or offer for any film. Thus, plaintiff has prove no damages. Plaintiff failed to establish any factual basis on which the jury could determine that a conspiracy prevented him from obtaining any of these films.

Alternatively, plaintiff attempted to rely upon the comparative theatre or futility method of proving damages. **[*18]** Before relying upon this theory instead of the demand prerequisite theory, plaintiff must show that it would have been futile to make bids on all first-run films it wanted. As stated by the court in Admiral:

Only by this foundational route could plaintiffs appropriately use the comparative theatre method for showing causation. For if plaintiffs could not show futility of demand, there remained no justification for not using the demand prerequisite theory.

Admiral, 585 F.2d at 894. As discussed above, plaintiffs have not shown futility by means of evidence of irregular or preferential treatment afforded exhibitor defendants.

Plaintiff states it determined it was futile to bid on first-run films sometime in 1970 or 1971. The records show, however, that during the critical years when plaintiff was developing a feeling of futility, a large percentage of the films it played was licensed from distributor defendants.

Plaintiff presented no evidence that the films it was licensed from defendant distributors were of inferior quality, although plaintiff claims this was the case. There is no evidence on which the jury could make a determination of inferiority or superiority other **[*19]** than by pure speculation.

In addition, to rely on the futility theory, plaintiff must show it made superior bids or offered superior terms for films which were rejected and licensed pursuant to inferior bids. Rather than that showing, the evidence was clear that whenever the plaintiff or any other exhibitor offered the best terms, it licensed that film. Thus, plaintiff has utterly failed to present any evidence on which the jury could make a determination that the plaintiff failed to bid or bid with less vigor because of a feeling of futility.

The final element of an antitrust plaintiff's prima facie case is the proof of the amount of damages. In addition to the fact of injury and requisite causal relation, the damages accruing from the injury must be capable of reasonable ascertainment and must not be speculative or conjectural. *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)*. A jury may not render a verdict based upon speculation or guesswork. Id. Damages must be "susceptible of expression in figures" and there must be a "reasonable basis of computation" so that damages are proven by facts "from which they were logically and legally inferable." *Eastman Kodak Co.* ***[*20]*** *v. Southern Photo Materials Co., 273 U.S. 359 (1927)*.

Plaintiff has presented no evidence from which damages could be computed. Assuming the plaintiff was "frozen out" of the market on the twenty-three films discussed above, the only evidence on which the jury conceivably could make a determination of damages is by comparing the successful bidder's gross receipts with plaintiff's house expenses. However, when that was done, it was established that plaintiff would have lost money by playing those films. Plaintiff's evidence consisted of statements by its chief operating officer to the effect that on a few of the twenty-three films it "may have made a few bucks" or "a little bit of money." Moreover, plaintiff never established what his offsetting income was from films it did show during the weeks when plaintiff contends it could not get the pictures. Regardless of the evidence plaintiff might have presented regarding the revenue it may have received from pictures it did not play, plaintiff must offset that figure with the receipts it did earn during those times. Similarly, plaintiff's evidence regarding concession sales simply amounted to a statement of the average ratio of ticket **[*21]** sales to concession sales. However, without the evidence of the amount plaintiff actually made on films shown and without evidence of the amount of revenues from concession sales, that ratio does not provide sufficient information on which the jury could assess damages. Furthermore, plaintiff's evidence regarding the concession sales-ticket sales ratio did even indicate whether that figure was a gross or net figure.

With regard to plaintiff's alleged damages to its real property, plaintiff admitted that it was not injured in its real property valuation by the failure to obtain the twenty-three pictures. In addition, plaintiff presented no evidence of a diminution of value of its real estate by virtue of its being sold without an ongoing theatre business as opposed to its being sold as an ongoing enterprise. The jury cannot be allowed to speculate on such matters without benefit of any underlying evidence.

Furthermore, the only evidence of the value of the property was its tax assessment value, and when that is applied to the sales price, plaintiff made a profit rather than a loss on the sales.In addition, part of that property was leased commercially to unrelated businesses. **[*22]** Plaintiff's evidence made no allocation as to the respective valuations of the theatre and rental properties.

The plaintiff was unable to show damages resulting from the loss of a profitable business. The evidence clearly showed that in applying any reasonable figure for management and overhead to the gross profits or losses realized from the exhibition of pictures from 1965 until the theatres were closed, the plaintiff consistently lost money.

In sum, plaintiff's evidence regarding damages was such that any computation by the jury would amount to pure speculation or guesswork.

Plaintiff has failed to prove not one but each and every element of its prima facie case. There is no evidence upon which a jury could render a verdict without resorting to speculation or guesswork. For these reasons, the Court ordered that all defendants' motions for directed verdict be granted and that judgment be entered for defendants.

Mullins v. Kaiser Steel Corp.

United States District Court for the District of Columbia

March 9, 1979

Civ. A. No. 78-0650

Reporter
466 F. Supp. 911 *; 1979 U.S. Dist. LEXIS 13873 **; 105 L.R.R.M. 2575; 85 Lab. Cas. (CCH) P11,237; 1979-1 Trade Cas. (CCH) P62,587

Julius MULLINS et al., Plaintiffs, v. KAISER STEEL CORPORATION, Defendant

Core Terms

coal, antitrust, purchase-of-coal, contributions, illegality, unfair labor practice, onions, signatories, summary judgment, employees, purchases, courts

Counsel: **[**1]** Stephen J. Pollak, Washington, D. C., for plaintiffs.

A. Douglas Melamed, Washington, D. C., for defendant.

Opinion by: GREEN

Opinion

[*912] MEMORANDUM OPINION

The difficult questions before the Court concern the legality and enforceability of a clause of the National Bituminous Coal Wage Agreement of 1974 (hereinafter the "1974 Agreement") [1.] providing for a royalty payment to the United Mine Workers of **[*913]** America Health and Retirement Funds (hereinafter the "Funds") on all bituminous coal procured or acquired by a signatory employer for use or for sale on which contributions to the Funds had not been made (hereinafter the "purchase-of-coal clause"). [2.] **[**3]** The purchase-of-coal clause is only one component of the 1974 Agreement which establishes the terms and conditions of employment for Kaiser Steel Corporation (hereinafter "Kaiser") coal mining employees. The 1974 Agreement also requires Kaiser to make payments to the Funds based on the hours worked and coal produced by its employees. [3.] Kaiser, a member of the

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[1.] The National Bituminous Coal Wage Agreement of 1974 is a collective bargaining agreement executed by the United Mine Workers of America International Union, various multi-employer bargaining entities, the largest of which is the Bituminous Coal Operators Association (hereinafter "BCOA"), and certain individual coal operators. The 1974 Agreement was in force and effect between December 6, 1974 and December 6, 1977.

[2.] Article XX(d)(1)(v) provides in part:

. . . during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made . . . .

Complaint, Exhibit A, p. 28.

BCOA and therefore a signatory to the 1974 Agreement, made contributions on the coal produced by its own 400 UMWA employees but failed to make any contributions **[**2]** pursuant to the purchase-of-coal clause. Kaiser never acknowledged any coal purchases voluntarily despite the fact that the terms of the 1974 Agreement were apparently based on the parties' understanding that the Trustees of the Funds would rely upon signatory operators to furnish information concerning the amount of coal produced and purchased (Complaint, Exhibit A, p. 29). The signatories reported under separate entries the tonnage of coal purchased and produced and also calculated the amount of contributions payable to the Funds on "remittance advice forms" supplied by the Trustees.

Kaiser also failed to inform the Trustees voluntarily of its decision to withhold Fund contributions required by the purchase-of-coal clause. Had Kaiser elected to test the purchase-of-coal clause during the term of the 1974 Agreement, a contract provision calling for renegotiation in the event of a successful challenge could have been invoked by the Union in order to remedy the resulting deficiency in pension benefit contributions from signatories. [4.] The Trustees contend that Kaiser effectively foreclosed the intended application of the renegotiation provision by failing to disclose coal purchases and deprived covered employees of part of their bargained-for wages which the Trustees now seek to recover.

[4]** On April 11, 1978, the Trustees of the Funds brought this suit under Section 301 of the Labor-Management Relations Act (LMRA), *29 U.S.C. § 185* and *Section 502* of the Employee Retirement Income Security Act of 1974, *29 U.S.C. § 1132* seeking to recover from Kaiser contributions alleged to be due and owing to the Funds pursuant to the purchase-of-coal clause. [5.]

Plaintiffs have moved for summary judgment arguing that the principles announced in *Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)* require judicial intervention and enforcement of payments pursuant to the purchase-of-coal provisions regardless of Kaiser's claims of illegality.

[*914] In opposition to the Trustees' motion and in support of its own motion for summary judgment, Kaiser contends that its agreement with the United Mine Workers union to contribute to the Funds **[**5]** pursuant to the coal purchase royalty clause is illegal, unenforceable and void as a "hot cargo" provision under Section 8(e) of the Labor-Management Relations Act, *29 U.S.C. § 158(e)*; that is, an implied agreement to cease doing business with non-signatory employees and signatories which are delinquent in Fund contributions. Kaiser also urges that the Kelly v. Kosuga decision permits the interposition of the defense of antitrust illegality under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2* because the contract provision relied upon by the Trustees is itself unlawful. [6.]

[3.] The plaintiff Trustees have not claimed that Kaiser is delinquent in making contributions to the Funds based on the number of "hours worked" and coal produced by Kaiser employees covered by the 1974 Agreement.

[4.] Article XX(d)(1)(v)(v) provides in part:

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in the paragraph just preceding (purchase-of-coal clause) is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

Complaint, Exhibit A, p. 28.

[5.] Memoranda submitted by the parties discuss recovery by the Trustees on a restitution theory but the complaint seeks recovery on the contract only.

[6.] The antitrust defense has been briefed by the parties only with reference to the decision in *Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)* and the availability of an antitrust defense to an action to recover pension contributions on an expired contract. Motion of Kaiser Steel Corporation for Summary Judgment at 2 n.2. Several other defenses raised by way of answer have not been argued by Kaiser. The Court finds the defenses of standing and failure to join an indispensable party to be without merit. See *Lewis v. Quality Coal Corp., 243 F.2d 769, 772-73 (7th Cir. 1957)*; *Paul v. Lindgren, 375 F. Supp. 843, 849 (N.D.Ill.1974)*.

[6]** Finally, the Trustees argue that the Court is without jurisdiction to hear a Section 8(e) defense and failing this, that several disputed issues of material fact preclude summary judgment in favor of Kaiser.

Antitrust Defense

The decision in *Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)* restated the position of the United States Supreme Court regarding recognition of a defense of antitrust illegality to an action brought on a contract. In Kelly, as in prior decisions, the Court attempted to accommodate the competing interests involved: enforcement of a contract provision which may in itself be unlawful or in furtherance of illegal ends and thereby frustrating public policy, or denial of recovery which may result in unjust enrichment at the plaintiff's expense or otherwise impose a penalty unrelated to the character of plaintiff's illegal acts and thereby give defendant a windfall.

The contract sued upon in Kelly [7.] provided for the sale of fifty carloads of onions at market price to an onion grower and included an agreement by the vendor not to deliver onions on the futures market in order to maintain artificially high prices. This contract was one aspect **[**7]** of a larger price maintenance scheme in which other onion growers purchased additional onions from the vendor and then agreed among themselves not to market the onions. The vendee accepted delivery of thirteen carloads but only made partial payment before refusing delivery of the remaining thirty-seven carloads. After repudiation by the vendee, the vendor sold the rapidly deteriorating onions at a reduced price in mitigation of damages and brought suit on the contract for the unpaid purchase price. The vendee argued that the sale was made pursuant to and as an indivisible part of an agreement restraining trade in violation of the Sherman Act. Plaintiff's motion to strike this affirmative defense was granted by the trial court which rendered summary judgment for the plaintiff.

The Supreme Court upheld a judgment for the contract price in favor **[**8]** of the vendor and stated:

> As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold.

358 U.S. at 518, 79 S. Ct. at 431. The Court noted its extreme reluctance to supplement the express remedies provided by the antitrust laws with an additional remedy of **[*915]** contract avoidance and also restated the limits of the defense of antitrust illegality:

> Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the (Sherman) Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." . . . Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, is avoided by treating the defense as so confined (citations omitted).

358 U.S. at 520-21, 79 S. Ct. at 432.

The general rule emerging from Kelly is **[**9]** that a contract should be enforced whether or not it fosters illegal ends, unless the alleged illegality is of such a character that enforcement of the contract would "make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *358 U.S. at 520, 79 S. Ct. at 432*. The extreme difficulty confronting Kaiser in attempting to demonstrate that the purchase-of-coal clause falls within the narrow exception noted in Kelly is underscored by the fact that the Supreme Court has sustained the defense of antitrust illegality on only one occasion. The unique factors present in *Continental Wall Paper Co. v. Louis Voight & Sons Company, 212 U.S. 227, 256, 29 S. Ct. 280, 290, 53 L. Ed. 486 (1909)* which led the Court to condemn a monopolization and price-fixing scheme characterized as "certain in results . . . widespread in its operation, and . . . evil in its purposes" and to sustain an antitrust defense to a contract action are not present in this case. See *D. R. Wilder Manufacturing Company v. Corn Products Refining Company, 236 U.S. 165, 177, 35 S. Ct. 398, 59 L. Ed. 520 (1915)*.

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7. The opinion of the Seventh Circuit Court of Appeals in Kosuga v. Kelly, published at ***257 F.2d 48***, amplifies the factual background giving rise to the litigation.

In similar decisions preceding Kelly v. Kosuga, the Supreme Court sought **[**10]** to reconcile conflicting policies underlying ***antitrust law*** and contract principles by adhering to a difficult formula distinguishing between enforceable "collateral" agreements not illegal in themselves and "inherently" illegal agreements. Compare *Continental Wall Paper Co., supra*, with *Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S. Ct. 431, 46 L. Ed. 679 (1902)*. The Kelly decision signals abandonment of this troublesome test and in its place the Supreme Court has invited attention to the nature of the remedy sought as the touchstone for determining whether or not an alleged antitrust illegality should counsel a court to refuse assistance to a party presenting a contractual claim. [8.] See *Kelly v. Kosuga, 358 U.S. at 516, 79 S. Ct. 429, 3 L. Ed. 2d 475* .

[11]** The Trustees are seeking to recover one component of agreed compensation pursuant to the terms of a contract which has expired. The amounts claimed are based on purchases actually made. The contract is at an end decisions to purchase or not to purchase have been made and acted upon. Whether or not an express or implied agreement not to make Future purchases of coal, like the nondelivery agreement referred to in Kelly at 521, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 would warrant a different result, the Court concludes that requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade within the meaning of Kelly v. Kosuga. [9.]

[*916] The "Hot Cargo" Defense

The Court disagrees with the arguments **[**12]** advanced by Kaiser concerning the proper application of Section 8(e) and concludes that Section 8(e) is not a bar to recovery by the Trustees under the facts and circumstances of this case.

In deciding whether or not to allow the interposition of a Section 8(e) defense, the Court is guided by *San Diego Building Trades Council et al. v. Garmon et al., 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*. Thus, when an activity is arguably subject to Section 8 of the National Labor Relations Act, federal courts must defer to the exclusive competence of the NLRB. This is true, where as here, an aggrieved party declines to bring allegedly illegal Section 8 activity to the attention of the NLRB or, as noted in Garmon, where the NLRB failed to determine the status of the allegedly unlawful conduct. *Id. at 245-46, 79 S. Ct. 773*.

Congress enacted Section 8(e) in order to plug a "loophole" in the law of "secondary boycotts" recognized by the Supreme Court in *Local 1976, United Brotherhood of Carpenters v. NLRB (Sand Door), 357 U.S. 93, 78 S. Ct. 1011, 2 L. Ed. 2d 1186 (1958)* in its interpretation of Section 8(b)(4)(B) of the Taft-Hartley Act of 1947, *29 U.S.C. § 158(b)(4)(B)*. See *National **[**13]** Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967)*. The inclusion of "hot cargo" prohibitions within Section 8(e) along with the express introductory phrase "it shall be an unfair labor practice" suffice to create a presumption that, in enacting Section 8(e), Congress intended simply to expand the list of unfair labor practices subject to exclusive NLRB jurisdiction.

The addition of the "unenforceable and void" language without more cannot change the character of the "hot cargo" legislation so as to create a separate federal remedy not available in the enforcement of other unfair labor practices. As the Trustees point out in their Reply Memorandum at 11-12, the purpose of the "unenforceable and void"

[8.] In so holding the Court relied on Corbin on Contracts which explains:

There are cases in which the making of a bargain may be prohibited, even though the performances agreed upon are all perfectly lawful . . . . (For example), problems arise with respect to a bargain in unreasonable restraint of trade, the bargain being illegal although the performances promised are not; also with respect to the transaction of business without a license. It will be found that the determination of divisibility may depend as much upon the remedy that is sought (specific performance, injunction, damages, restitution, etc.) as upon the nature and extent of the illegality. 6A Corbin on Contracts § 1520 at 755-56 (1962).

[9.] The Court notes that Kaiser has failed to seek affirmative relief by availing itself of the powerful treble damage remedy provided for claimants who can demonstrate injury resulting from a restraint of trade such as that alleged here by way of defense.

language "was to ensure that the 8(e) prohibitions would reach all contracts even those in effect at the time of the enactment of the legislation."

Examination of the relevant legislative history supports rather than detracts from this Court's tentative construction of Section 8(e) and its proper application to the case at bar. Kaiser's reference to Senator Goldwater's remarks on the impact of Section 8(e) fully comports with the Court's **[**14]** view that the Trustees are not seeking damages but are attempting to recover agreed upon compensation which is in part measured by the amount of coal purchased by Kaiser. See Kaiser Memorandum at 18, n.22 Quoting II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1857 (hereinafter "II Legislative History"). In addition, remarks made by Senator Kennedy, one of the sponsors of the bill, indicate his belief that Section 8(e) was intended simply to create a new unfair labor practice enforceable by the NLRB:

> Tomorrow, after thinking about it overnight, we might decide whether we should consider giving priority to the handling of unfair practices arriving under this provision. We should consider whether we ought to give priority to any unfair labor practice charges which might come to the attention of the Board in this particular category.

II Legislative History at 1163.

Cases cited by Kaiser do not undercut the Court's conclusion that it cannot entertain a Section 8(e) defense. Decisions such as *Smith v. Evening News Association, 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962)* only hold that "(t)he authority of the Board to deal with **[**15]** an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Id. at 197, 83 S. Ct. at 269*. Thus, federal courts are not precluded from deciding contract claims under the express grant of jurisdiction under Section 301 of the Labor-Management Relations Act, *29 U.S.C. § 185*, simply because the breach of contract might also be an unfair labor practice.

[*917] In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*, the Court was not confronted with an agreement claimed to constitute an unfair labor practice involving complex questions of intent and effect. Rather the Court was presented a task for which it is ideally suited; that is, balancing the labor and antitrust policy while determining whether the construction industry proviso of Section 8(e) removed certain activity from the reach of the antitrust laws. The Court agrees with plaintiffs' observation that the "collateral" labor law issue involved in Connell is very different from the question Kaiser is asking **[**16]** this Court to resolve, a question well beyond " "the conventional experience of judges' " which raises issues " "within the special competence' " of the NLRB. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. Hardeman, 401 U.S. 233, 238-39, 91 S. Ct. 609, 28 L. Ed. 2d 10 (1971)*. [10] See *Huge et al. v. Long's Hauling Co., Inc., 580 F.2d 457 (3d Cir. 1978)*.

The Court concludes that the record in this case does not raise any genuine issue of material fact and that the Trustees are entitled to summary judgment. An order reflecting the judgment of the Court and awarding appropriate relief, including the award of reasonable **[**17]** attorneys' fees, has been entered previously.

End of Document

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[10] The memoranda submitted by the parties demonstrate that the issues raised by the attempt to enforce the purchase-of-coal clause are of central importance to the national labor policy and that the NLRB has consistently exercised its jurisdiction to resolve Section 8(e) issues raised throughout the evolution of the purchase-of-coal clause.

[Cernuto, Inc. v. United Cabinet Corp.]

United States Court of Appeals for the Third Circuit

January 16, 1979, Argued ; March 16, 1979, Decided

No. 78-1872

Reporter
595 F.2d 164 *; 1979 U.S. App. LEXIS 16162 **; 1979-1 Trade Cas. (CCH) P62,509

CERNUTO, INCORPORATED, a corporation t/d/b/a C & C BUILDERS SUPPLY COMPANY, Appellant, v. UNITED CABINET CORPORATION, a corporation, FAMOUS FURNACE & SUPPLY COMPANY, a corporation and ROBERT L. LAPPIN COMPANY, INC., a corporation, Appellees.

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (D.C. Civil No. 74-1088)

Core Terms

manufacturer, dealer, terminate, cabinets, customer, prices, Sherman Act, unilateral, rule of reason, competitor, price competition, kitchen cabinet, anti trust law, per se rule, horizontal, antitrust, franchise, redeeming, selling

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

A non-moving party entitled to have record viewed in the light most favorable to it.

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

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

Summary judgment is to be used sparingly in complex antitrust litigation.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN3[] **Reviewability of Lower Court Decisions, Adverse Determinations**

Under *Fed. R. Civ. P. 54(b)* the district court is empowered to enter a final judgment as to some claims without deciding others. The appellate court has jurisdiction to consider appeals from such judgments under *28 U.S.C.S. § 1291*.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN4[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act has been construed for the most part to proscribe only those combinations that unduly restrain trade. In the classical § 1 controversy, therefore, a rule of reason is applied, and the plaintiff must prove that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5[] **Sherman Act, Claims**

The per se violations of the Sherman Act, those requiring no proof of an actually harmful impact, are specific exceptions to the general rule of reason.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Per se violations of the Sherman Act are agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Practices Governed by Per Se Rule, Boycotts**

Among those business practices that have been treated as per se violations are price fixing, resale price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing.

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**

Interbrand competition between manufacturers of different brands of the same commodity has been labelled the primary concern of ***antitrust law***. Nonetheless, intra-brand competition between sellers of the same product produced by a single manufacturer has not been of so little importance as never to merit the protection of a per se rule.

Antitrust & Trade Law > Sherman Act > General Overview

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

Business & Corporate Law > Distributorships & Franchises > General Overview

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

It does not follow from the fact that a manufacturer may, when franchising a dealer, commit itself not to franchise another in a territory defined by the manufacturer, that it may, having earlier franchised two or more dealers, agree at the request of one to terminate the others.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN10[] **Antitrust & Trade Law, Sherman Act**

When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be. The court recently observed in a different context that particularly where the refusal to deal is not unilateral but rather is prompted by an understanding with other parties, an antitrust violation may be found, either by application of a per se rule or through a rule of reason analysis.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN11[] **Antitrust & Trade Law, Sherman Act**

When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN12[] **Antitrust & Trade Law, Sherman Act**

Price is the central nervous system of the economy, and an agreement that interferes with the setting of price by free market forces is illegal on its face.

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN13[] **Price Fixing & Restraints of Trade, Vertical Restraints**

If the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, it is then illegal per se violation of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN14[] **Antitrust & Trade Law, Sherman Act**

Any combination, which tampers with price structures, is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they stabilized prices they would be directly interfering with the free play of market forces.

Torts > ... > Commercial Interference > Contracts > General Overview

HN15[] **Commercial Interference, Contracts**

One who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another or, (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

Torts > ... > Commercial Interference > Contracts > General Overview

HN16[] **Commercial Interference, Contracts**

One who purposely causes a third person not to enter into or continue a business relation with another in order to influence the other's policy in the conduct of his business is privileged, if (a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and (b) the desired policy does not illegally restrain competition Or otherwise violate a defined public policy and (c) the means employed are not improper.

Counsel: Howard A. Specter, Michael D. Buchwach (argued), Litman, Litman, Harris & Specter, P.A., Pittsburgh, Pa., for appellant.

Donald E. Seymour, Michael R. Plummer (argued), Kirkpatrick, Lockhart, Johnson & Hutchinson, Pittsburgh, Pa., for appellees.

Judges: Before ADAMS and WEIS, Circuit Judges, and WEINER, District Judge. [*]

Opinion by: ADAMS

Opinion

[*165] OPINION OF THE COURT

We are confronted in this appeal with the termination, by a manufacturer of kitchen cabinets, of one of its customers, a discount house, at the urging of another customer, a retailer, allegedly because of price considerations. Although the manufacturer's action was destructive to competition between the two customers, under the circumstances present here the plaintiff may recover only if the challenged conduct is termed a Per se violation of the Sherman Act, because under a "rule of reason" analysis the necessary anti-competitive effects as to a particular **[**2]** commodity in a relevant market cannot be proven. [1] Inasmuch as we believe, based on the allegations set forth by the plaintiff, that a Per se violation of the Act might be found, we reverse the summary judgment entered in favor of the defendants, and remand the case for trial.

I.

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[*] Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] After discovery was completed, plaintiff filed a pretrial narrative statement that did not, and presumably could not, allege the harmful economic effects necessary to make out a § 1 violation under the rule of reason analysis. Under Local Rule 5. II. G. of the Western District of Pennsylvania, such evidence may not be introduced at trial because of the pretrial narrative statement and plaintiff's position at pretrial conference.

Plaintiff, Cernuto, Inc. (Cernuto), is a seller in Western Pennsylvania of supplies and appliances used in the construction or remodeling of buildings. One of these products is kitchen cabinets. Beginning in March, 1974, United Cabinet Corporation (United), through its sales representative, Robert L. **[**3]** Lappin Company (Lappin), agreed to supply Cernuto with United cabinets for at least a two year period. In return Cernuto agreed to promote, display and sell United's cabinets, and undertook to advertise them and alter its display area so as to feature them prominently. Only three months after entering into the contract, however, Lappin informed Cernuto that United would cease supplying the cabinets. Plaintiff alleges that Famous Furnace & Supply Co. (Famous), a retail store selling United cabinets in the same competitive area as Cernuto, complained to United about the discounter's price competition. Because this appeal concerns a grant of summary judgment, we must view the record in the light most favorable to the plaintiff, and consequently must infer that Famous' conduct was the cause of United's decision to terminate Cernuto's supply, and that Famous was motivated by direct price competition between it and Cernuto. [2]

[4]** Cernuto brought the present action against United, Lappin, and Famous, alleging, Inter alia, conduct violative of § 1 of the Sherman Act. After completion of discovery and the filing of pretrial narrative statements, defendants moved for summary judgment on two counts of the complaint, including the Sherman Act claim. The district judge concluded that plaintiff could not recover on these counts and that there was no just reason for delay. He therefore entered a judgment as to both counts, and Cernuto took a timely appeal to this Court. [3]

[5]** **[*166]** II.

Because almost all business agreements may be interpreted as restraining trade to some degree, § 1 of the Sherman Act ***HN4***[] has been construed for the most part to proscribe only those combinations that "unduly" restrain trade. In the classical § 1 controversy, therefore, a "rule of reason" is applied, and the plaintiff must prove "that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets . . .." [4] **[**6]** Thus, to demonstrate an antitrust violation under the "rule of reason" in the present case, Cernuto would have to show an actual anti-competitive impact on the sale of cabinets in Western Pennsylvania. However, Cernuto does not allege, and apparently cannot prove, such harmful effects. Other sources of cabinets were available, and it is clear from its pretrial narrative statement that plaintiff was not prepared to offer any market analyses at trial. Plaintiff's claim, therefore, is grounded entirely on the alleged Per se illegality of the defendants' combination. [5]

HN5[] The Per se violations of the Sherman Act those requiring no proof of an actually harmful impact are specific exceptions to the general rule of reason. They were described by Justice Black in *Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*, as:

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[2] See *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)* ***HN1***[] (non-moving party entitled to have record viewed in the light most favorable to it). We note that ***HN2***[] summary judgment is to be used sparingly in complex antitrust litigation. Id.

[3] The complaint included seven counts: one count charging violation of § 1 of the Sherman Act (count 1), two counts charging breach of contract (counts 2 and 3), a count charging wrongful cancellation of the contract (count 4), a recoupment count (count 5), a count alleging tortious interference with contractual relations (count 6), and a count alleging unfair trade practices (count 7). The district court granted summary judgment as to counts 1 and 6, and retained jurisdiction over the other counts. Only these two counts, then, are before this Court.

HN3[] Under Fed.R.Civ.Proced. 54(b) the district court was empowered to enter a final judgment as to some claims without deciding others. This Court has jurisdiction to consider appeals from such judgments under *28 U.S.C. § 1291*. See Wright & Miller, Federal Practice and Procedure, § 2657.

[4] *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977)*.

[5] *448 F. Supp. 1332, 1334 (W.D.Pa.1978)*. See note 1 Supra.

> . . . ***HN6***[] 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.

HN7[] Among those business practices that have been treated as Per se violations are price fixing, [6] **[**8]** resale price maintenance, [7] group boycotts, **[**7]** [8] tying arrangements, [9] and certain types of reciprocal dealing. [10] The question we must consider is whether the conduct at issue here a manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitors at the request of a competitor should be classified as a Per se violation of the Act. Following Justice Black's formulation, the activity under consideration in this case must be seen to have a pernicious effect on competition without having any redeeming virtue. The pernicious effect is apparent: one competitor has succeeded in excluding another from dealing in United cabinets through a combination with United and its agent, and, in so doing, has eliminated the possibility of price competition by the foreclosed dealer. Although this harm may have its impact solely in the market for United kitchen cabinets, rather than in the general market for kitchen cabinets, it is not for that reason, beyond the reach of the antitrust laws. [11]

[9]** **[*167]** The difficult problem here, as we read the case law, is whether the business decision that has been brought into question has the same redeeming pro-competitive virtues that have been relied upon in rejecting a Per se rule in other arguably similar cases. The conduct at issue, it might be said, is merely a decision by a manufacturer to terminate a customer. It is therefore, the argument goes, comparable to the conduct at issue in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, a case notable for the importance the Supreme Court placed on the pro-competitive aspects of the manufacturer's marketing plan. There, the Court upheld the right of a company to terminate a distributor of its television sets when that distributor began to sell them at an outlet outside of its allotted territory. The Supreme Court reasoned that the manufacturer's exclusive-franchise marketing plan was in fact beneficial to competition among the various television manufacturers and should therefore be governed by a "rule of reason."

For the most part, the Supreme Court has been disinclined to apply harsh or rigorous rules when reviewing **[**10]** unilateral decisions made by a single manufacturer in arranging its distribution structure. The interest of the manufacturer in controlling the marketing of its own product has been thought to justify restrictions on those who distribute it, or those who would like to do so. Thus, a manufacturer may sell its product to whomever it wishes, and a unilateral refusal to deal has not been considered to be a violation of the Act. [12] **[**11]** Moreover, a manufacturer may include in its marketing strategy certain restraints designed to improve its overall competitive position. Nor is it either uncommon or illegal for a manufacturer to enter into contracts that provide particular customers exclusive

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6 *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

7 *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*.

8 *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*.

9 *International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*.

10 *United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*.

11 ***HN8***[] Interbrand competition competition between manufacturers of different brands of the same commodity has been labelled the "primary concern of ***antitrust law***." *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Nonetheless, intrabrand competition competition between sellers of the same product produced by a single manufacturer has not been of so little importance as never to merit the protection of a Per se rule. See, e. g., *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)* (Chevrolet automobiles); *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)* (Parke, Davis pharmaceutical products).

12 See, e. g., *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*.

rights to sell the product in designated geographical areas. [13] And, under certain circumstances, a manufacturer may change its strategy, franchising new dealers or substituting new dealers for less productive old ones. [14] The result in GTE Sylvania, then, is not out of keeping with the law's traditional tolerance of unilateral decisions on the part of a manufacturer.

The ultimate reach of the GTE Sylvania decision is still uncertain, and continues to be a subject of considerable controversy, [15] but we are not persuaded that the **[*168]** law's tolerance of reasonable **[**12]** restraints designed to improve the manufacturer's competitive position may be converted into a blanket allowance of Any marketing decision made by a manufacturer. As Professor Sullivan has suggested in his treatise on the antitrust laws:

[13]**

> HN9[] "It does not follow from the fact that a manufacturer may, when franchising a dealer, commit itself not to franchise another in a territory defined by the manufacturer, that it may, having earlier franchised two or more dealers, agree at the request of one to terminate the others." [16]

HN10[] When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be. This Court recently observed in a different context:

> Particularly where the refusal to deal is not unilateral but rather is prompted by an understanding with other parties, an antitrust violation may be found, Either by application of a per se Rule or through a "rule of reason' analysis. [17]

[14]**

Thus, to the extent that the conduct here differs from the conduct held to be justifiable in other cases involving manufacturer decisionmaking, application of a Per se rule may be warranted.

Two of the most crucial differences between the conduct under consideration here and other accepted manufacturer actions are, upon analysis, readily apparent. HN11[] When a manufacturer acts on its own, in

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[13] (A) manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods . . . .

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967), Overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

[14] " . . . (I)t is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A."

Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972).

[15] It might be argued that GTE Sylvania, if pressed to its logical conclusion, may be read to undermine all Per se Rules applied to primarily vertical restraints. Cf. Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term 1977, 77 Colum.L.Rev. 979, 987 (1977) (questioning continuing validity of a previous decision); Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U.Chi.L.Rev. 1 (1977) (evaluating effect of GTE Sylvania on precedents other than Schwinn). It should be noted however, that the GTE Sylvania Court was careful to preserve the Per se analysis traditionally applied to cases involving price-fixing or resale price maintenance, 433 U.S. at 51 n.18, 97 S. Ct. 2549, and we believe it would be ill advised to presume that so radical a change in existing law as the abolition of Per se rules in all arguably vertical cases was intended, absent an express declaration to that effect. Moreover, although we are confronted here with an apparently vertical conspiracy, the principal impact of that conspiracy, as we note Infra at page 168, is horizontal rather than vertical in nature.

[16] L. Sullivan, Antitrust, § 148 (1977).

[17] Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 142 (3d Cir. 1978) (emphasis added).

pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the GTE Sylvania decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level. **[**15]**

The importance of the horizontal nature of this arrangement is illustrated by *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*. Although General Motors, the manufacturer, was seemingly imposing vertical restraints when it pressured recalcitrant automobile dealers not to deal with discounters, the Supreme Court noted that in fact these restraints were induced by the dealers seeking to choke off aggressive competitors at their level, and found a Per se violation, rejecting the suggestion that only unilateral restraints were at issue. [18] So here, if United and Lappin acted at Famous' direction, both the purpose and effect of the termination was to eliminate competition at the retail level, and not, as in GTE Sylvania, to promote competition at the manufacturer level. Accordingly, the pro-competitive redeeming virtues so critical in GTE Sylvania may not be present here.
[16]**

Equally important, the motivating factor in Famous' efforts and therefore the resulting conspiracy was at least according to Cernuto's theory of the case price. The pre-eminence of price considerations in ***antitrust law*** was summarized recently by Justice Stevens:

> ***HN12***[] "Price is the "central nervous system of the economy,' and an agreement that "interfere(s) with the setting of price by free market forces' is illegal on its face." [19]

It is true that the alleged combination in the case at hand did not set prices at an **[*169]** exact level. But such a traditional conspiracy is not a Sine qua non of a Per se violation of the Act under the price-fixing rubric. ***HN13***[] If the purpose and effect of the challenged conduct is to restrain price movement and the free **[**17]** play of market forces, it is then illegal Per se. As the Supreme Court stated in the celebrated price-fixing case, United States v. Socony-Vacuum Oil Co.:

> ***HN14***[] Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they . . . stabilized prices they would be directly interfering with the free play of market forces. [20]

Cernuto's pretrial narrative statement points to the centrality of price in the combination of Famous, Lappin, and United to cut off plaintiff. The thrust of Famous' communication to United, it is alleged, was "that (Cernuto) was selling United products in Famous' territory and that (Cernuto) was a low price volume dealer." [21] Cernuto is a "discount house", and, it must be presumed, was prepared to sell United cabinets at prices lower than those offered **[**18]** by Famous. Famous' concern, understandably, was that Cernuto's low prices would force Famous' own prices down if it were to compete effectively in selling United cabinets. By prevailing upon United and Lappin to terminate their contract with Cernuto, Famous effectively eliminated the threatened competition and was able to maintain prices at its own preferred levels. It is just this type of conduct that the antitrust laws were designed to reach.

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[18] *384 U.S. at 144-45, 86 S. Ct. 1321*. General Motors, like the present dispute, involved a combination with conspirators at different levels of the distribution chain. Unlike this case, however, there was more than one conspirator at the dealer level.

[19] *United States v. National Society of Professional Engineers, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)*.

[20] *310 U.S. 150, 221, 60 S. Ct. 811, 843, 84 L. Ed. 1129 (1940)*.

[21] 53a.

There are, it must be noted, a scattering of cases suggesting a result contrary to the one we reach today. The best known is the so-called Packard case. [22] **[**20]** There, the most successful car dealer in the Baltimore area threatened to cease selling the manufacturer's automobiles unless the dealer's competitors were terminated and it was granted an exclusive right for the entire region. The manufacturer was not in a strong enough overall competitive position to resist the demand of this dominant dealer, and acquiesced. Notwithstanding the horizontal impact of **[**19]** the dealer's action, the court reversed a jury verdict for plaintiff and refused to find an antitrust violation on the part of the manufacturer. A more recent case is Oreck Corp. v. Whirlpool Corp. [23] There, the Court of Appeals for the Second Circuit, sitting En banc, reversed a jury verdict for a plaintiff that had been deprived of its profitable trade in Whirlpool vacuum cleaners, as a result of an agreement between Whirlpool and Sears & Roebuck Co., the plaintiff's principal competitor. The court found the trial judge's instructions to the jury, which left open the possibility of finding a Per se Violation on such facts, to be erroneous, and remanded for a new trial presumably under a rule of reason analysis.

As a preliminary matter, we are not convinced that this Court would necessarily have decided Packard and Oreck the same way had we been presented with the identical factual configurations. But whatever result we might have reached in such situations, those two cases are distinguishable from this one. Packard, often criticized on its own facts, dealt with a manufacturer that was struggling to maintain a declining competitive position, and is frequently explained as an example of the failing-company doctrine. Moreover, in Packard the dealer was seeking not to fix prices but to secure an exclusive franchise, a form of marketing strategy that is not without certain **[*170]** overall competitive advantages. In contrast, Famous was not the exclusive dealer of United products in Western Pennsylvania and, at least as far as the record shows, was not seeking such a position. Instead it was desirous of eliminating a dealer that was providing price competition. **[**21]**

Similarly, in Oreck there was no proof that Sears, the aggressive dealer, was inspired by price. In fact, Sears was selling Whirlpool vacuum cleaners at prices below those offered by plaintiff Oreck. [24] Price control, then, was not the likely purpose of the Whirlpool-Sears agreement. Furthermore, Whirlpool did no more than refuse to renew a contract with Oreck, whereas here United breached its two year contract with Cernuto after only three months. Whirlpool's decision may be considered to be more an element of its own marketing strategy, in contradistinction to United's decision, which, given the sudden repudiation of a recently made agreement, is alleged to have been predominantly the result of customer pressure.

Thus, despite Packard And Oreck, the situation present in this case may be fairly considered to raise the possibility of a Per se violation of the Sherman Act. Given the alleged anti-competitive and arguably horizontal impact of United's decision, and given the price **[**22]** orientation of the alleged conspiracy, we cannot say that a Per se violation of the Act may not be shown. If Cernuto can prove at trial that United, Lappin and Famous conspired to protect Famous from price competition by Cernuto, and that United and Lappin terminated Cernuto at Famous' request and in pursuit of a price related end, then it can prevail on a price-fixing theory notwithstanding its failure to show any impact on competition involving kitchen cabinet sales in Western Pennsylvania. Of course, at trial the defendants may be able to demonstrate that the evidence does not at all conform to what plaintiff has alleged. If it could be shown, for example, that United's decision to terminate Cernuto was in fact its own the result of its own marketing strategy and judgment then notwithstanding Famous' actions, the alleged conduct would be essentially unilateral in nature and might be found to possess the pro-competitive redeeming virtues that would defeat the application of a Per se rule. [25] Similarly, if defendants can demonstrate that their actions were not motivated solely

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[22] *Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S.App.D.C. 161, 243 F.2d 418*, Cert. denied, *355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 (1957)*. See also *Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899* (D.Md.), *Aff'd, 239 F.2d 176 (4th Cir. 1956)*, Cert. denied, *355 U.S. 823, 78 S. Ct. 30, 2 L. Ed. 2d 38 (1957)*.

[23] *579 F.2d 126* (2d Cir.) (En banc), Cert. denied, ***439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)***.

[24] *Id. 130*.

by considerations of price then the use of a Per se rule might be inappropriate. But at present in reviewing **[**23]** a grant of summary judgment we must assume that the facts are otherwise. Under these circumstances, a Per se application of § 1 of the Sherman Act may well be warranted.

III.

The other count of the complaint ruled upon by the district court alleges tortious interference with a business contract. All parties are agreed that our resolution of this question must turn on whatever decision is reached on the antitrust claim. Pennsylvania has adopted § 766 of the Restatement of Torts [26] which applies only to those who act "without a privilege to do so." Lappin **[**24]** maintains that under § 771 of the Restatement [27] **[**25]** it had such a privilege, **[*171]** but acknowledges that the privilege would be destroyed were its actions found to be violative of the antitrust laws. [28] Because we have concluded that an antitrust violation might be found, we shall reverse the district court's judgment on the sixth count of the complaint as well as on the first.

The judgment of the district court will be reversed, and the case will be remanded for action consistent with this opinion.

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[25] On the other hand, if United acted in pursuit of its own policy, but that policy was itself a form of resale price maintenance, involving other parties in its enforcement, it might constitute a Per se violation of the Act under *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, and an antitrust violation may be made out, albeit under a slightly different rubric than the parties have argued heretofore.

[26] Section 766 of the Restatement of Torts reads:

Except as stated in Section 698, ***HN15***[] one who, Without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another or,

(b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

(emphasis added).

[27] Section 771 of the Restatement of Torts reads:

HN16[] One who purposely causes a third person not to enter into or continue a business relation with another in order to influence the other's policy in the conduct of his business is Privileged, if

(a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and

(b) The desired policy does not illegally restrain competition Or otherwise violate a defined public policy and

(c) the means employed are not improper.

(emphasis added).

[28] Appellee's Brief at 13-14.

Pireno v. New York State Chiropractic Asso.

United States District Court for the Southern District of New York

March 16, 1979

76 Civ. 4309

Reporter

1979 U.S. Dist. LEXIS 13729 *; 1979-2 Trade Cas. (CCH) P62,758

A. ALEXANDER PIRENO, Plaintiff, against NEW YORK STATE CHIROPRACTIC ASSOCIATION, UNION LABOR LIFE INSURANCE COMPANY and INTERNATIONAL CHIROPRACTORS ASSOCIATION, Defendants.

Core Terms

insurer, patients, insurance business, chiropractic, chiropractor, exemption, coverage, boycott, regulation, charges, peer review, Sherman Act, intimidation, licensed, policies, alleges, insurance company, anti trust law, antitrust, practices, coercion, summary judgment motion, conspiracy, reimburse, parties

LexisNexis® Headnotes

Governments > State & Territorial Governments > Licenses

Healthcare Law > Payment Systems > Insurance Coverage > General Overview

HN1[] **State & Territorial Governments, Licenses**

New York requires insurers to reimburse insureds for chiropractic treatment whenever a policy provides for reimbursement for any service which is within the lawful scope of practice of a duly licensed chiropractor. N.Y. Ins. Law § 221(5)(e) (1978-79).

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 > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN2[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Although Congress' primary concern in enacting the McCarran-Ferguson Act (Act), *15 U.S.C.S. §§ 1011-1015*, was to ensure that the states would continue to be empowered to regulate the business of insurance, an additional concern was the applicability of the antitrust laws to the industry. Instead of a total exemption, Congress provided that the federal antitrust laws are applicable to the business of insurance to the extent that such business is not regulated by state law. *15 U.S.C.S. § 1012(b)*. Moreover, the Sherman Act remains applicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion or intimidation. *15 U.S.C.S. § 1013(b)*. Thus, there are three distinct elements to the Act's limited antitrust exemption: 1) the challenged practices must constitute the "business of insurance"; 2) they must be regulated by state law; and 3) they must not take the form of "boycott, coercion or intimidation."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Contract Formation > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN3[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

McCarran-Ferguson does not exempt, the business of insurance companies from the antitrust laws; it exempts only the "business of insurance." In creating the exemption, Congress was concerned with the type of state regulation that centers around the contract of insurance. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the "business of insurance." The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN4[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Determination of the rights of an insured under his policy is the "core of the business of insurance." Peer review, moreover, involves the spreading of risk, an indispensable element of the "business of insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN5[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

A party need not be defined by state law as an insurance company to be engaged in the "business of insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN6[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The second element of the McCarran-Ferguson exemption is that the challenged activity be "regulated by state law." *15 U.S.C.S. § 1012(b)*. The state regulation which Congress provided should operate to displace federal law means regulation by the state in which the challenged activity is practiced and has its impact.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > ... > State Insurance Commissioners & Departments > Hearings & Orders > Hearings

HN7[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

N.Y. Ins. Law art. IX-D prohibits any person from engaging in any unfair method of competition or unfair and deceptive act or practice in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act. N.Y. Ins. Law § 270. Among the prohibited practices is the unfair settlement of claims. N.Y. Ins. Law §§ 40-d, 273. The Superintendent of Insurance is empowered to issue cease and desist orders against such practices, N.Y. Ins. Law § 276, and may investigate, hold hearings and issue reports concerning unfair practices not specified elsewhere in Article IX-D. N.Y. Ins. Law § 278.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN8[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The Donnelly Act (Act) states that every contract, agreement or conspiracy whereby a monopoly is or may be established is illegal. *N.Y. Gen. Bus. Law § 340* (1968). The Act was amended in 1948 and specifically made applicable to licensed insurers and other persons and organizations subject to the provisions of the insurance law. *N.Y. Gen. Bus. Law § 340(2)*.

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Industry Practices > Federal Regulations > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN9[] **Coercion & Harassment, Elements**

Section 3(b) of the McCarran-Ferguson Act provides that the Sherman Act remains applicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation. *15 U.S.C.S. § 1013(b)*. The 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, patronage or services from the target.

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN10[] **Summary Judgment, Opposing Materials**

A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. *Fed. R. Civ. P. 56(e)* provides that a party opposing summary judgment may not rest upon the mere allegations of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. Although summary judgment must be used sparingly in antitrust actions, *Rule 56(e)* remains fully applicable and significant evidence in support of a claim must be produced if a well-supported motion for summary judgment is to be defeated. *Rule 56(e)* should not, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaint, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations.

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

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

Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surerfooted reading of applicable law. 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.

Counsel: [*1] YUDENFRIEND, PATTERSON & WEINSTEIN, 1290 Avenue of Americas, New York, New York 10019

EDWARD S. PATTERSON, ESQ., DONALD WEST, ESQ. For Plaintiff

ROBERT P. BORSODY, ESQ., 45 Rockefeller Plaza, New York, New York 10020, New York State Chiropractice Association For Defendant

CABELL, KENNEDY, HAMMER & FRENCH, 330 Madison Avenue, New York, New York 10017

T. RICHARD KENNEDY, ESQ., AKIN M. FRENCH, ESQ., SPENCER C. WARREN, ESQ. For Union Labor Life Insurance Company

Opinion by: GAGLIARDI

Opinion

GAGLIARDI, D.J.

Plaintiff A. Alexander Pireno, a licensed New York chiropractor, has commenced this action for injunctive and declaratory relief under the federal antitrust laws and for damages under state libel law. No jurisdictional basis is alleged in the complaint, but jurisdiction lies pursuant to *28 U.S.C. § 1337* and principles of pendent jurisdiction. At issue in this case is the defendants' "peer review" system, by which a committee of licensed chiropractors are utilized to review the "reasonableness" of claims submitted by insureds to their insurance company under policies providing for chiropractic coverage. Plaintiff alleges that through the peer review process the defendant Union **[*2]** Labor Life Insurance Company ("ULL") has conspired with the New York State Chiropractic Association ("NYSCA") and the International Chiropractors Association to fix the prices plaintiff charges for his professional services in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. ULL and NYSCA have moved for summary judgment dismissing the complaint pursuant to *Rule 56, Fed. R. Civ. P.* For the reasons stated below, the motion is granted.

Statement of Facts

Defendant NYSCA, a New York not-for-profit corporation, is a professional association whose membership consists solely of licensed New York chiropractors. In the early 1970's the NYSCA became concerned about the reluctance of many health insurance companies to provide coverage for chiropractic services. Moreover, those companies that did provide such coverage disallowed many of the claims submitted to them on the advice of the doctors of medicine whom they employed to evaluate claims and who were skeptical of chiropractic services. In an effort to increase the number of insurance companies providing chiropractic coverage in their health policies and to reduce the number of claims denied by those companies providing coverage, **[*3]** the NYSCA, in 1971, established a Peer Review Committee (the "Committee"). NYSCA thereafter offered the Committee's claims review services to various insurance companies, including defendant ULL. In January, 1973, ULL accepted NYSCA's offer and proceeded to submit claims for chiropractic services submitted by its insureds for the Committee's review. The Committee performs this service without charge.

ULL is a licensed Maryland insurer which does business in New York. ***HN1***[] New York requires insurers like ULL to reimburse insureds for chiropractic treatment whenever a policy "provides for reimbursement for any service which is within the lawful scope of practice of a duly licensed chiropractor." New York Ins. Law § 221(5)(e) (McKinney Cum. Supp. 1978-79). ULL issues several different policies in which the coverage includes chiropractic services. Most of the plaintiff's patients who have submitted claims to ULL have been members of groups who had selected "basic" and "major medical" coverages for non-occupational sickness or accidental bodily injury. These policies provide that coverage is limited, inter alia, to "reasonable charges for necessary medical care and services." Other **[*4]** patients of plaintiff have had "supplemental accident expenses" coverage with ULL, providing reimbursement for charges for treatment of non-occupational, accidental bodily injuries.This coverage is limited to charges "not in excess of the regular and customary charges for the services and treatment furnished." In all instances, coverage is limited to those services lawfully within the scope of a chiropractor's services. [1] When ULL decides not to pay all or part of a claim for chiropractic services because it believes that the charges are not "reasonable" or are "in excess of the regular and customary" amount, it submits the claim to the Committee for its evaluation. [2]

[*5] Upon receipt of a request for review, the Committee sends a questionnaire form to the treating chiropractor. In addition to providing the information asked for in the questionnaire, the chiropractor will often provide additional documentation, including x-rays, to substantiate his patient's claim. The Committee's Procedural Guidelines provide that in formulating its opinions as to the "reasonableness" of a treating chiropractor's charges, the Committee must take into consideration the following factors: the practitioner's experience and specialty degrees; the location of his office; the number of visits and amount of time spent with the patient; the patient's age, occupation, general physical condition and history of prior treatment; and x-ray findings. The Committee, however, does not undertake its own examination of the insured patient. A Committee opinion letter generally contains only information as to whether the number of visits and the fee charged for the services performed is "usual, reasonable and customary." The defendants claim that Committee opinions, once rendered, are disclosed only to the party requesting review, generally the insurer, and the treating chiropractor. **[*6]** Plaintiff, however, contends that insured patients also receive copies of Committee opinions.

The Committee's Procedural Guidelines provide that Committee opinions are not binding upon any of the parties involved unless they so agree and advise the Committee in writing prior to the commencement of review. Thus, after the Committee renders its opinion the insurer remains free to reject it and make its own determination of its liability under its policy. Moreover, absent his consent to a binding determination, the patient remains free to contest the insurer's evaluation of the "reasonableness" of his claim and may bring suit to enforce the terms of his policy. Similarly, if the treating chiropractor accepts an assignment of contractual rights from his patient he may sue the insurer to recover on the policy. If the chiropractor does not accept such an assignment, of course, the patient is obligated to pay the chiropractor's entire fee notwithstanding the refusal of the insurer to pay all or part of the claim. Plaintiff contends, however, that ULL has generally regarded Committee opinions as "binding" even when the parties have not consented to such an arrangement.

Plaintiff **[*7]** has been engaged in the practice of chiropractic medicine in the New York City area since 1960. He claims that over forty of his patients have had their claims reviewed by the Committee; NYSCA contends that only twelve claims submitted by plaintiff's patients have been the subject of peer review of which only four involved defendant ULL. Plaintiff never accepts an assignment from a patient whereby he agrees to accept insurance proceeds as full payment of his bill; on rare instances he has accepted assignments of proceeds as partial payment of his fee while reserving the right to proceed against the patient for the remainder. Rather, plaintiff's usual practice is to request, and receive, payment from the patient at the time services are rendered. Plaintiff has never been involved in a peer review determination to which the parties agreed to be bound as provided in the Committee's Procedural Guidelines. Thus, whatever effect the Committee's opinion may have on ULL's decision to pay an insured's claim, plaintiff has usually received his full fee in advance. While the defendants contend that plaintiff's

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[1] In New York, a license to practice chiropractic is generally limited to the correction "by manual or mechanical means structural balance, distortion, or subluxation in the human body for the purpose of removing nerve interference", Education Law § 6551(1), (McKinney 1972), and a chiropractor may not prescribe or administer drugs or use diagnostic or therapeutic methods involving biological means. Id. § 6551(3).

[2] The request for peer review almost always comes from the insurer although, on occasion, chiropractors and their patients have requested peer review if the insurer has denied or reduced a claim and it is hoped that favorable review from the Committee might convince the insurer that the claim is reasonable. Thus, plaintiff has requested peer review of ULL's denials of his patients' claims on several occasions.

fees for chiropractic services are among the highest in the profession, plaintiff **[*8]** denies that his fees are any higher than other practitioners similarly situated.

Plaintiff alleges that the defendant's actions constitute a conspiracy to fix the prices plaintiff charges for his services in violation of *§ 1* of the Sherman Act. The alleged effects of the conspiracy have been: 1. to deprive plaintiff's patients of both the benefits of free competition in the acquisition of his services and the coverage to which they are entitled from ULL under the terms of their policies; and 2. to restrain plaintiff in his ability to make his chiropractic services available to the public. Plaintiff seeks declaratory and injunctive relief against the practice of peer review. Plaintiff also alleges that opinion letters issued by the Committee to plaintiff's patients have libeled him in the practice of his profession for which he seeks $1,000,000 in punitive damages. [3]

[*9] Discussion

A. The Sherman Act Claim

Defendants NYSCA and ULL have moved for summary judgment dismissing plaintiff's antitrust claim on several grounds. The principal defense raised by these defendants to this claim is the statutory exemption contained in the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*. For the reasons stated below, the court concludes that the defendants are exempt under this statute and plaintiff's Sherman Act claim must be dismissed.

The legislative history of the McCarran-Ferguson Act has been canvassed at length in two recent Supreme Court decisions, Group Life & Health Insurance Co. v. Royal Drug Co., 47 U.S.L.W. 4203 (February 27, 1979) ("Royal Drug") and *St. Paul Fire & Marine Insurance Co. v. Barry, 98 S. Ct. 2923 (1978)*. The law was enacted in 1945 in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944)*, which held, contrary to well-established precedent, that the insurance industry was part of interstate commerce subject to Congressional regulation under the *commerce clause* and, moreover, that Congress did not intend to exempt the business of insurance from the operation of **[*10]** the Sherman Act. Royal Drug, supra, 47 U.S.L.W. at 4206; *Barry, supra, 98 S. Ct. at 2928-29*. ***HN2***[] Although Congress' primary concern in the wake of that decision was to ensure that the States would continue to be empowered to regulate the business of insurance, an additional concern was the applicability of the antitrust laws to the industry. Instead of a total exemption, Congress provided that the federal antitrust laws are applicable "to the business of insurance to the extent that such business is not regulated by State law." *15 U.S.C. § 1012(b)*. Moreover, 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)*. Thus, there are three distinct elements to the Act's limited antitrust exemption: 1.the challenged practices must constitute the "business of insurance"; 2. they must be regulated by state law; and 3. they must not take the form of "boycott, coercion or intimidation." Royal Drug, supra, 47 U.S.L.W. at 4216 (dissenting opinion); 7 Von Kalinkowski, Antitrust Laws & Trade Regulation §§ 47.01-.03 (1978 ed.).

1. The Business of Insurance

HN3[] McCarran-Ferguson does not exempt, **[*11]** the business of insurance companies from the antitrust laws; it exempts only the "business of insurance." Royal Drug, supra, 47 U.S.L.W. at 4207 n. 18. In creating the exemption, "Congress was concerned with the type of state regulation that centers around the contract of insurance… The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the 'business of insurance.'" *SEC v. National Securities Inc., 393 U.S. 453, 460 (1969)*. "The primary elements of an insurance contract are the spreading and underwriting

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[3] *Rule 10(b), Fed. R. Civ. P.*, requires that the contents of each alleged claim be limited as far as practicable to a statement of a single set of circumstances and that each claim founded upon a separate transaction be stated in a separate count whenever separation facilitates the clear presentation of the matters set forth. In apparent disregard of this rule, the complaint amalgamates in a single count the federal antitrust claim and the state law defamation claim. Since the parties have treated the complaint as attempting to state two separate causes of action, the court will do so as well.

of a policyholder's risk." Royal Drug, supra, 47 U.S.L.W. at 4205. Accord, *SEC v. Variable Annuity Life Insurance Co., 359 U.S. 65, 73 (1959)*.

In support of their contention that their actions constitute the "business of insurance", the defendants have relied upon cases from several Courts of Appeals holding that "provider agreements" between insurance companies or health care organizations and the providers of health or other services are part of the "business of insurance" under the Act.See, e.g., Proctor v. State Farm Mutual Automobile Insurance Co., 561 F. d 262 (1977), **[*12]** cert. pending, No. 77-580; *Doctors, Inc. v. Blue Cross of Greater Philadelphia, 557 F.2d 1001 (3d Cir. 1976)*; *Frankford Hospital v. Blue Cross of Greater Philadelphia, 554 F.2d 1253* (3d Cir.), cert. denied, *434 U.S. 860 (1977)*; *Anderson v. Medical Service of the District of Columbia, 551 F.2d 304 (4th Cir. 1977)*; *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80* (3d Cir.), cert. denied, *414 U.S. 1093 (1973)*. These cases hold that the close nexus between the cost of reimbursing insureds on their claims and the rates the insurer must charge necessarily brings agreements reducing the cost of providing covered services within the scope of the exemption. The Supreme Court's recent decision in Royal Drug effectively overrules this substantial body of precedent. The Court reasoned that the contracts that Blue Shield entered into with providers of pharmaceutical services were unrelated to the underwriting or spreading of risk among its insureds and were merely arrangements enabling Blue Shield to purchase goods and services, and thereby fulfill its underwriting obligations, at reduced cost.

The benefit promised to Blue Shield policyholders is that their premiums **[*13]** will cover the cost of prescription drugs except for a $2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies.

47 U.S.L.W. at 4205.

In the instant case, by contrast, ULL's insureds are intimately and directly concerned with the peer review arrangement between ULL and the NYSCA's Committee. Unlike the agreement between Blue Shield and participating pharmacies, the peer review arrangement between ULL and the Committee serves to define the precise extent of ULL's contractual obligations to its insureds under their policies. Peer review may enable ULL to reduce its costs, but it does so through interpretation of the contractual relationship between insurer and insured. ***HN4***[] Determination of the rights of an insured under his policy is the "core of the business of insurance." *SEC v. National Securities, Inc., supra, 393 U.S. at 460*. Peer review, moreover, involves the spreading of risk, an indispensable element of the "business of insurance." Royal Drug, supra, 47 U.S.L.W. at 4206 n.12. The defendants determine the extent to which an individual insured must bear **[*14]** the full cost of chiropractic services, or instead have that cost borne by the insurer (and, through higher premiums, his fellow insureds). The Committee's role in evaluating claims submitted for review is thus akin to that played by the licensed adjuster, long an important figure in the settlement of claims against insurers. [4] See 16 J. Appleman & J. Appleman, Insurance Law & Practice, §§ 8646-50 (1968 ed.). The court thus concludes that ULL and the Committee are engaged in the "business of insurance." [5]

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[4] This court does not read Royal Drug to hold that any contractual arrangement between an insurer and a party other than an insured is outside the scope of the "business of insurance." Thus, the Supreme Court explicitly noted that Congress intended to make cooperative ratemaking efforts -- horizontal agreements among insurers -- exempt from the antitrust laws. 47 U.S.L.W. at 4207. Moreover, the Court stated that transactions between an insurer and its agents may also fall within the scope of the exemption. 47 U.S.L.W. at 4208 n.32. The Court distinguished insurer-agent agreements from the provider agreements at issue in Royal Drug, stating: Transactions between an insurer and an agent, unlike the Pharmacy Agreements, are wholly intra-industry; an insurance agent sells insurance while a pharmacy sells goods and services.

Id. In the case at bar, the Committee's sole function is peer review of submitted claims; it, too, functions solely within the industry of insurance.

[5] ***HN5***[] A party need not be defined by state law as an insurance company to be engaged in the "business of insurance." Thus, in Royal Drug, the Supreme Court noted that at the time of the enactment of the McCarran-Ferguson Act most states did not consider health care organizations like Blue Shield to be engaged in the insurance business. 47 U.S.L.W. at 4208-09. The court stated, however,

[*15] 2. Regulation by the State

HN6[] The second element of the McCarran-Ferguson exemption is that the challenged activity be "regulated by State law." *15 U.S.C. § 1012(b)*. "[The] state regulation which Congress provided should operate to displace… federal law means regulation by the State in which the [challenged activity] is practiced and has its impact." *FTC v. Travelers Health Ass'n., 362 U.S. 293, 299 (1960)*. The parties agree that New York -- the state in which plaintiff's practice is located and most of his patients reside -- is the applicable state jurisdiction.

New York has enacted a pervasive scheme of regulation and supervision of insurance. *HN7*[] Article IX-D of the Insurance Law prohibits any person [6] from engaging in any "unfair method of competition or unfair and deceptive act or practice in the business of insurance in accordance with the intent of Congress as expressed in [the McCarran-Ferguson Act]." Id. § 270. Among the prohibited practices is the unfair settlement of claims. Id. § 40-d, 273. The Superintendent of Insurance is empowered to issue cease and desist orders against such practices, id. § 276, and may investigate, hold hearings and issue reports **[*16]** concerning unfair practices not specified elsewhere in Article IX-D. Id. § 278. The practices complained of by plaintiff are clearly regulated by New York's insurance law. See *Dexter v. Equitable Life Insurance Society, 527 F.2d 233, 236* (2d Cir. 1975(.

Moreover, New York's own ***antitrust law*** proscribes the conduct alleged in the complaint. *HN8*[] The Donnelly Act states that every contract, agreement or conspiracy whereby a monopoly is or may be established is illegal. *New York General Bus. Law § 340* (McKinney 1968). The Act was amended in 1948 and specifically made applicable to "licensed insurers… and other persons and organizations subject to the provisions of the insurance law." Id. *§ 340(2)*. On this basis too, the McCarran-Ferguson exemption operates as a bar to plaintiff's federal antitrust claim. *Steingart v. Equitable Life Assurance Society, 366 F. Supp. 790, 793-94 (S.D.N.Y. 1973)*.

3. Boycott, Coercion or Intimidation

HN9[] Section 3(b) of **[*17]** the McCarran-Ferguson Act provides that 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)*. The complaint does not allege that the defendant's acts constitute "boycott, coercion, or intimidation." Nor do the facts alleged in the complaint fall within the scope of this exception. "The 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, patronage or services from the target." *St. Paul Fire & Marine Ins. Co. v. Barry, supra, 98 S. Ct. at 2930*. Plaintiff does not claim that the defendants have refused to deal with plaintiff's patients. It is not disputed that ULL continues to issue policies to plaintiff's patients and to reimburse them for plaintiff's charges to the extent that they are "reasonable" or "not in excess of the regular and customary charges." Nor does the complaint allege that the defendants have induced plaintiff's patients to refuse to patronize plaintiff. The complaint alleges only a conspiracy to fix prices and "price-fixing, in the absence of any additional enforcement activity, **[*18]** has [not] been treated either as a 'boycott' or 'coercion.'" *Id. at 2932 n.18*. Accord, Proctor v. State Farm Mutual Auto Ins. Co., supra, 561 F.2d at 274. Nor do plaintiff's affidavits in opposition to the motion for summary judgment make any factual showing on the issue of boycott. Rather, plaintiff conclusorily states that:

When a patient is under treatment and submits a claim to his insurance carrier who in turn is told by the committee and repeats to the patient that the treatment he is receiving is excessive and unreasonable, he invariably stops treatment or questions the doctor's competence based upon the opinion of his "peers."…

This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements with participating pharmacies, may not be the "business of insurance" within the meaning of the Act.

47 U.S.L.W. at 4210 n.37. See also *Lowe v. Aarco-American, Inc., 536 F.2d 1160, 1162 (7th Cir. 1976)* (per curiam) (premium finance company engaged in "business of insurance"); *Manasen v. California Dental Services, 424 F. Supp. 657, 662-66 (N.D. Cal. 1976)* (prepaid health care plan engaged in "business of insurance").

[6] The statute defines "person" to mean "any individual, corporation, association, partnership… and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters." Ins. Law § 271.

While this plaintiff is in no position to demonstrate specifically which plaintiffs ceased treatment because of these statements, since each of the patients who did so became alienated from the plaintiff as a result of the statements made about his professional competence, he will clearly demonstrate at trial that this in fact, was the effect of the actions of the defendants.

(Plaintiff's Affidavit in Opposition to NYSCA's Motion for Summary Judgment, p. 19) (emphasis added).

The question at this stage of the proceedings is whether plaintiff **[*19]** has come forward with sufficient evidentiary support for a claim of boycott -- a claim not even raised in his complaint -- to justify a trial on the merits. Plaintiff cannot preserve the issue of boycott for trial while sitting on his evidence concerning the defendant's inducement of his patients to refuse to deal with him. ***HN10***[] "A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial." *Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972)*. Accord, *United States v. Pent-R-Books, Inc., 538 F.2d 519, 529 (2d Cir. 1976)*; *Applegate v. Top Associates, Inc., 425 F.2d 92, 96 (2d Cir. 1970)*; *Dressler v. MV Sandpiper, 331 F.2d 130, 132-33 (2d Cir. 1964)*. *Rule 56(e), Fed. R. Civ. P.*, provides that a party opposing summary judgment "may not rest upon the mere allegations… of his pleadings but… must set forth specific facts showing that there is a genuine issue for trial." Although summary judgment must be used sparingly in antitrust actions, see, e.g., *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)*, *Rule 56(e)* remains fully applicable and significant **[*20]** evidence in support of a claim must be produced if a well-supported motion for summary judgment is to be defeated. See, e.g., *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 686-87 (1975)*; Proctor v. State Farm Mutual Auto Ins. Co., supra, 561 F.2d at 275; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 109-10 (2d Cir. 1975)*. As the Supreme Court has stated:

Rule 56(e) should [not], in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaint, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations… While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a fulldress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

First National Bank v. Cities Service Co., 391 U.S. 253, 289-90 (1968).Where, as here, the facts concerning the plaintiff's claim are not **[*21]** otherwise discoverable by the defendants, the plaintiff's failure to come forth with such evidence cannot be excused. Despite the extensive discovery engaged in to date, [7] there is inadequate record support for finding a conspiracy among the defendants with the purpose or effect of boycotting plaintiff. The court thus concludes that the defendant's actions are exempt from application of the antitrust laws and that plaintiff's Sherman Act claim must be dismissed with prejudice.

B. The State Law Claim for Defamation

The sole remaining claim in the complaint is the state law claim for defamation. The complaint does not explicitly allege any jurisdictional predicate for this claim, but it appears that the principles of pendent jurisdiction are the only possible basis. [8] The court undoubtedly has the power to decide the state claim. Plaintiff's **[*22]** federal claim, though dismissed pre-trial, is not so obviously insubstantial as to prohibit the exercise of pendent jurisdiction, *Hagans v. Lavine, 415 U.S. 528, 543 (1974)*, and the federal and state claims "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)*. In considering whether to exercise its discretionary power to decide pendent claims, however, the court is mindful of the Supreme Court's admonition that:

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[7] This discovery consists of the following: 1. deposition of plaintiff by NYSCA; 2. deposition of plaintiff by ULL; 3. deposition of NYSCA by plaintiff; 4. interrogatories by plaintiff to NYSCA; 5. interrogatories by plaintiff to ULL; 6. interrogatories by NYSCA to plaintiff; and 7. interrogatories by ULL to plaintiff.

[8] There is no complete diversity of citizenship among the parties; plaintiff and NYSCA are both citizens of New York for the purposes of *28 U.S.C. § 1332*.

HN11[] Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surerfooted reading of applicable law. 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.

Id. at 726. Accordingly, the court declines to exercise jurisdiction over plaintiff's defamation claim, and it is dismissed for lack of subject matter jurisdiction.

Conclusion

Defendants' NYSCA and ULL motions **[*23]** for summary judgment are granted. As to plaintiff's Sherman Act claim only, the dismissal is with prejudice.

Let the Clerk enter judgment accordingly.

So Ordered.

[United States v. Southern Motor Carriers Rate Conference, Inc.]

United States District Court for the Northern District of Georgia, Atlanta Division

March 20, 1979 ; March 20, 1979, Filed

Civ. A. No. 76-1909A

Reporter

467 F. Supp. 471 *; 1979 U.S. Dist. LEXIS 13640 **; 1979-1 Trade Cas. (CCH) P62,552

UNITED STATES of America, Plaintiff, v. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., Motor Carriers Traffic Association, Inc., North Carolina Motor Carriers Assoc., Inc., National Association of Regulatory Utility Commissioners, Defendants

Core Terms

rates, regulation, carriers, Sherman Act, motor carrier, compulsion, state action, immunity, parties, common carrier, conferences, sovereign, charges, public service commission, anti trust law, private party, defendants', shippers, intrastate, exempt, proposals, Commerce, Railroad, tariffs, fixing, state commission, transportation, Interstate, antitrust, practices

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN1[] **US Department of Justice Actions, Civil Actions**

The Sherman Act, *15 U.S.C.S § 4* provides in part: the several district courts of the United States are invested with jurisdiction to prevent and restrain violations of *15 U.S.C.S. §§ 1-7*; 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.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Sherman Act, *15 U.S.C.S. § 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.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN3[] **Judgments, Summary Judgment**

To the extent that there is a dispute among the parties, the court will of course view the facts in a light most favorable to the defendants.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Energy & Utilities Law > Utility Companies > General Overview

Transportation Law > Commercial Vehicles > Traffic Regulation

Transportation Law > Carrier Duties & Liabilities > General Overview

Transportation Law > Commercial Vehicles > General Overview

HN4[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Title 48, Ala. Code § 301(5) states: 1. the duty to regulate common carriers by motor vehicle as provided in this article and to that end the commission may establish reasonable rules and requirements with respect to adequate service, transportation of passengers, baggage, freight and express, 4. to supervise and regulate common carrier in all matters affecting the relationship between such common carriers and the traveling and shipping public.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

Transportation Law > Intrastate Commerce

Transportation Law > Carrier Duties & Liabilities > General Overview

Transportation Law > Carrier Duties & Liabilities > Through Rates

Transportation Law > Carrier Duties & Liabilities > Water Carriers

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN5[] **Common Carrier Duties & Liabilities, State & Local Regulation**

Ala. Code § 301(17) places concomitant duties on the common carriers with respect to rates, fares, and charges, including : B. the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the intrastate transportation of property in the State of Alabama; to establish, observe and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto for all matters relating to or connected with the intrastate transportation of property in the State of Alabama. C. Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad or express or water. In case of such joint rates, fares or charges, it shall be the duty of the carrier parties thereto to establish just and reasonable regulations and practices.

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Energy & Utilities Law > Utility Companies > General Overview

Transportation Law > Intrastate Commerce

HN6[] Commercial Drivers & Vehicles, Rates & Tariffs

Ga. Code Ann. § 68-613. Rule 10(a), General Motor Carrier Rules and Regulations of the Georgia Public Service Commission provides that: motor carriers of property operating under certificates class "A" will be required to receive property destined to stations located on routes of other class "A" carriers, and to interchange such property at rates prescribed by this commission, with such connecting carriers.

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

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

HN7[] Commercial Drivers & Vehicles, Rates & Tariffs

Rule 39d(4) of the Mississippi Public Service Commission pursuant to the Motor Carrier Regulatory Act of 1938 provides: where two or more freight rates are published to apply on certain articles or commodities between points in Mississippi, by the same motor carriers, or by different motor carriers, the lowest rate, whether class or commodity, shall be applied over all motor carriers accepting and transporting freight between such points; and in no instance should a rate be published or applied which exceeds the aggregate of published intermediate rate, class or commodity, or class and commodity, unless and until proof of the reasonableness of such rate is submitted to and approved by the commission, provided that in the initial filing penalties will not apply for violation of this rule until such is called to the attention of the carriers and reasonable opportunity is given for adjustment or justification.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

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

Energy & Utilities Law > Utility Companies > General Overview

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN8[] Air & Space Transportation, Charters

The Interstate Commerce Act, 49 U.S.C.S. § 5b, provides: the rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, division, allowances or charges including charges between carriers and compensation paid or received for the use of facilities or equipment, or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation, or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act, 42 U.S.C.S. § 5b are hereby adopted by the Tennessee Public Service Commission; providing, however, that the final determination on any rates, fares, classification, divisions, allowances, charges, rules and regulations or procedures shall be left in its final determination to the Tennessee Public Service Commission.

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

HN9[] **Commercial Drivers & Vehicles, Rates & Tariffs**

Within the range of rates that will be approved as just and reasonable, the states do not impede the ability of the carriers to set prices competitively.

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

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

HN10[] **Exemptions & Immunities, Parker State Action Doctrine**

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign.

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

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

HN11[] **Exemptions & Immunities, Parker State Action Doctrine**

The state action doctrine implies a requirement that the state's regulatory interest be evidenced by active supervision and a clear statement of intent to regulate the alleged activity.

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

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Antitrust & Trade Law > Regulated Industries > General Overview

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

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

Collective setting of interstate railroad rates is not exempt from the antitrust laws merely because the interstate commerce commission holds power to approve the rates.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN13[] **Parker State Action Doctrine, Local Governments & Private Parties**

Private conduct, if it is to come within the state-action exemption, must be not merely prompted but compelled by state action.

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

HN14[] **Exemptions & Immunities, Parker State Action Doctrine**

The court must begin with the threshold determination of whether the defendants' acts are compelled by direction of the State acting as a sovereign. Only where that milepost is reached may the court test the extent of the state's involvement in the compelled activity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

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

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Governments > Local Governments > Claims By & Against

Governments > State & Territorial Governments > General Overview

Real Property Law > Subdivisions > State Regulations

HN15[] **Exemptions & Immunities, Parker State Action Doctrine**

The Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

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

HN16[] Exemptions & Immunities, Parker State Action Doctrine

Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.

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

Governments > Local Governments > Employees & Officials

HN17[] Exemptions & Immunities, Parker State Action Doctrine

A municipality may claim to act as an agent of the State. Thus the standard governing the antitrust immunity accorded state subdivisions differs from, but does not modify, the rules applicable to a private party.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Regulated Industries > General Overview

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

HN18[] Transportation, Common Carriers

The Sherman Act protects competition, not competitors, and the added fact that the state scheme adversely affects smaller shippers does not justify an antitrust exemption.

Antitrust & Trade Law > Sherman Act > Defenses

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

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

HN19[] Sherman Act, Defenses

The Noerr-Pennington Doctrine holds that concerted action consisting solely of activities aimed at influencing public officials does not violate the Sherman Act. The Supreme Court has expressly extended the doctrine to lobbying efforts before state administrative agencies.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Expressive Conduct

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

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

HN20[] **Freedom of Speech, Expressive Conduct**

Even an activity which is itself communicative may nevertheless be penalized because of its non-speech aspects.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN21[] **Antitrust & Trade Law, Sherman Act**

Collective rate-making violates the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > State & Local Regulation

HN22[] **Antitrust & Trade Law, Sherman Act**

State participation in an anticompetitive scheme does not render the private party a non-actor.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN23[] **Sherman Act, Claims**

Price fixing among competitors is a per se violation of *§ 1* of the Sherman Act, 15 U.S.C.S.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Regulated Practices, Price Fixing & Restraints of Trade**

Any arrangement whose purpose or effect is to inhibit price competition is illegal. Such an arrangement need not be outright cartelization, so long as it brings about, or is intended to bring about, the raising, depressing, fixing, pegging, or stabilizing of prices.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

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

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

Civil Procedure > Judgments > Summary Judgment > General Overview

HN25[] **Remedies, Injunctions**

Summary judgment is appropriate in per se price fixing cases.

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**

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.

Counsel: [1]** Robert M. Silverman, Robert N. Dempsey, Judy L. Goldstein, Antitrust Div., U. S. Dept. of Justice, Washington, D. C., Joen Grant, Washington, D. C., William L. Harper, U. S. Atty., Atlanta, Ga., Paul Rodgers, Nat. Ass'n of Regulatory Utility Comm'rs, Washington, D. C., for plaintiff.

J. Raymond Clark, L. C. Warren, Washington, D. C., for Motor Carriers Traffic Ass'n, Inc.

Allen I. Hirsch, Ellis Arnall, Arnall, Golden & Gregory, Atlanta, Ga., for Southern Motor Carriers Rate Conference, Inc.; Homer S. Carpenter, Rice, Carpenter & Carraway, Washington, D. C., of counsel.

Charles L. Gowen, King & Spalding, Chas. Shaffer, Jr., Michael Eric Ross, Atlanta, Ga., for N. C. Motor Carriers Ass'n, Inc.

Alabama Service Commission, Susan Beth Farmer, Asst. Atty. Gen., Montgomery, Ala., Georgia Public Service Commission, R. Douglas Lackey, Asst. Atty. Gen., Atlanta, Ga., Tennessee Public Service Commission, William C. Koch, Jr., Deputy Atty. Gen., Nashville, Tenn., Eugene W. Ward, Gen. Counsel, Tennessee Public Service Commission, Nashville, Tenn., Mississippi Public Service Comm., Bennett E. Smith, Jackson, Miss., North Carolina Utilities Commission, Maurice W. Horne, Deputy Gen. Counsel, **[**2]** Utilities Commission, Raleigh, N. C., David H. Coburn, Counsel for NMFTA, Rea, Cross & Auchincloss, Washington, D. C., Paul Rodgers, Charles A. Schneider, William R. Nusbaum, Washington, D. C., John Wallace, Asst. Atty. Gen., Raleigh, N. C., Homer S. Carpenter, Arlington, Va., Charles D. Gray, Deputy Asst. Gen. Counsel, National Assn. of Regulatory Utility Commissioners, Washington, D. C., for amicus curiae.

Judges: Richard C. Freeman, United States District Judge.

Opinion by: FREEMAN

Opinion

[*473] ORDER

On November 17, 1976 the United States filed a complaint under *Section 4* of the Sherman Act, *15 U.S.C. § 4*, [1] **[**4]** to enjoin the continuing violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. [2] The three rate bureau defendants, Southern Motor Carriers Rate Conference, Inc. ("SMCRC"), Motor Carriers Traffic Association, Inc. ("MCTA"), and North Carolina Motor Carriers Association, Inc. ("NCMCA"), represent common carriers before the regulatory commissions of the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. On behalf of their members, the defendants publish tariffs containing proposed rates for intrastate for-hire transportation of general commodities. **[**3]** The complaint alleges that the defendants and their co-conspirators have engaged in a continuing conspiracy to fix these rates within the five subject states. The parties completed discovery following the court's ruling, on July 4, 1977, on the defendants' motions to dismiss the complaint and the plaintiff's motion to strike certain affirmative defenses. *United States v. Southern Motor Carriers Rate Conference, Inc., 439 F. Supp. 29 (N.D.Ga.1977)*. As a part of that order, we invited the Attorneys General of the States of Alabama, Georgia, Mississippi, Tennessee and North Carolina "to participate in the instant action by filing briefs, memoranda, or evidence which may be a critical aid in the ultimate resolution of the issues presented . . . ." *Id. at 52*. The action is presently before the court on the parties' cross-motions for summary judgment, *Rule 56, Fed.R.Civ.P.* For the reasons set forth below, we GRANT the government's motion for summary judgment and DENY the summary judgment motions filed by the defendants.

Discovery in this action has led to the development of a substantial record. While the parties vigorously dispute the significance of the facts in the record, they do not dispute the facts themselves, and have filed extensive stipulations of fact. The statement of the case which follows will review first, the regulatory schemes in the five subject states; second, the operations of the defendants in formulating and publishing intrastate rates before the state commissions; and finally, the procedures followed by the commissions in reviewing the proposed rates. The regulatory schemes of the various states differ somewhat, and we will survey each separately. As the rate formulation practices are similar among the defendant conferences, and as the review mechanisms are similar among the commissions, we will describe these by **[**5]** reference to the North Carolina example. ***HN3***[] To the extent that there is a dispute among the parties, we will of course view the facts in a light most favorable to the defendants. See *Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*; *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)*.

THE STATE REGULATORY SCHEMES

Alabama Under Alabama law, all non-exempted motor carriers are subject "to control, supervision and regulation by the **[*474]** (Alabama Public Service) Commission." Title 48, Ala.Code § 301(3). That authority includes regulation of intrastate commerce "except insofar as the same may be in conflict with the provisions of the constitution of the United States and the acts of congress" in force in 1940 or thereafter enacted. Title 48, Ala.Code § 301(4). The powers and duties of the Alabama Public Service Commission are set forth in ***HN4***[] Title 48, Ala.Code § 301(5), and include:

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[1] ***HN1***[] *Section 4* of the Sherman Act, *15 U.S.C. § 4*, provides in pertinent 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. . . .

[2] ***HN2***[] *Section 1* of the Sherman Act, *15 U.S.C. § 1*, provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

> 1. (The duty) to regulate common carriers by motor vehicle as provided in this article and to that end the commission may establish reasonable rules and requirements with respect to adequate service, transportation of passengers, **[**6]** baggage, freight and express, . . .
>
> 4. To supervise and regulate common carrier in all matters affecting the relationship between such common carriers and the traveling and shipping public. . . .

HN5[] Alabama Code § 301(17) further places concomitant duties on the common carriers with respect to rates, fares, and charges, including, Inter alia:

> B. . . . the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the intrastate transportation of property in the State of Alabama; to establish, observe and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto . . . (for) all . . . matters relating to or connected with the intrastate transportation of property in the State of Alabama.
>
> C. Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad or express or water; . . . In case of such joint rates, fares or charges, it shall be the duty of the carrier parties thereto to establish just **[**7]** and reasonable regulations and practices . . . . [3]

These provisions illustrate a common pattern among the subject states: motor carriers are required to cooperate for the limited purpose of establishing joint rates, i. e., rates covering a shipment in which one carrier operates over only part of the route and another carrier serves the remainder. In this fashion, a shipper is able to obtain a single price for a shipment involving more than one carrier. On the other hand, Alabama does not require that two carriers providing identical service along the Same route charge identical prices, or confer as to the prices each will charge.

Georgia Motor **[**8]** common carriers came under the jurisdiction of the Georgia Public Service Commission in 1929. Pursuant to the requirements of the Georgia statutes all common carriers must obtain certificates of public convenience and necessity. The Public Service Commission has the sole authority to prescribe just and reasonable rates, fares and charges. The Commission maintains a staff of seven professionals and additional clerical personnel to analyze motor common carrier costs of Class "A" carriers. [4] As in Alabama, Georgia law sanctions cooperation between motor carriers in establishing through routes at prescribed joint rates. The statutory framework requires that the Georgia Public Service Commission

> prescribe just and reasonable rates, fares, and **[**9]** charges for transportation by motor **[*475]** common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, and the tariffs therefor shall be in such form, and shall be filed and published in such manner and on such notice as the commission may prescribe, and shall be subject to change on such notice and in such manner as the commission may prescribe.

HN6[] Ga.Code Ann. § 68-613. Rule 10(a), General Motor Carrier Rules and Regulations of the Georgia Public Service Commission provides that

> Motor carriers of property operating under certificates Class "A' will be required to receive property destined to stations located on routes of other Class "A' carriers, and to interchange such property at rates prescribed by this Commission, with such connecting carriers.

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[3] Interstate Commerce Tariff Circular No. 3 provides, "The term joint rate means a rate that applies over the lines or routes of two or more carriers. . . ." Horace F. Hartley, Director of Transportation Rates and Services, Georgia Public Service Commission, described a joint rate as a rate derived by two or more carriers to cover a single interlining movement of freight in which those carriers participate. Deposition of Horace F. Hartley at 61-62.

[4] Rule 2 of the Rules and Regulations defines Class A carriers as:

common carriers of passengers and/or property operating over a fixed route or between fixed termini in intrastate and interstate commerce, under Certificates of Public Convenience and Necessity.

Mississippi The regulation of motor common carriers operating in intrastate commerce within Mississippi was vested in the Mississippi Public Service Commission by the Motor Carrier Regulatory Act of 1938. The public policy expressed by the 1938 Act substantially paraphrases the National Transportation Policy, See 49 U.S.C. preceding *§§ 1*, 301, **[**10]** *901* and *1001*, and provides that the purpose of the regulation of motor common carriers is to ensure "reasonable charges . . . without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices . . . ."

Mississippi law comes the closest to requiring uniform rates to be charged by competing carriers serving the same route. ***HN7***[] Rule 39d(4) of the Mississippi Public Service Commission provides:

> Where two or more freight rates are published to apply on certain articles or commodities between points in Mississippi, by the same motor carriers, or by different motor carriers, the lowest rate, whether class or commodity, shall be applied over all motor carriers accepting and transporting freight between such points; and in no instance should a rate be published or applied which exceeds the aggregate of published intermediate rate, class or commodity, or class and commodity, unless and until proof of the reasonableness of such rate is submitted to and approved by the Commission, provided that in the initial filing penalties will not apply for violation of this rule until such is called to the attention of the carriers and reasonable opportunity **[**11]** is given for adjustment or justification.

Even here, however, a carrier retains the right to file an independent rate, which may be lower than class rates in a tariff. See Deposition of David Screws at 73-75. A Transportation Rate Specialist for the Mississippi Commission has described the uniformity generally occurring in Mississippi intrastate rates as "unwritten law." *Id. at 71*.

North Carolina Since 1947 the North Carolina Utilities Commission has been charged with the exclusive authority to make rates for all motor common carriers subject to its jurisdiction.

House Bill 417 of the North Carolina Legislature, entitled "An Act to provide for Uniform and Joint Rates Among Motor Carriers of the Same Class" contains provisions similar to those in the federal Motor Carrier Act. The bill, which was enacted by the state legislature, *N.C.Gen.Stat. § 62-152.1*, allows two or more carriers to enter into an agreement relating to "rates, fares, classifications, divisions, allowances or charges . . . (f)or the purpose of achieving a stable rate structure." The law further provides that it "shall be the policy of (the State of North Carolina) to fix uniform rates for the same or similar **[**12]** services by carriers of the same class." As in Section 5a of the Motor Carrier Act, the parties to the agreement may apply to the state public service commission for approval of the agreement. The parties to any agreement so approved are relieved from the operation of the state antitrust laws in the making and carrying out of the agreement.

Tennessee Under Tennessee law, the Tennessee Public Service Commission fixes the rates which motor carriers may charge. Although any carrier is permitted to reduce **[*476]** its rates without prior authorization of the Commission, no general increase is permitted until hearings have been held and the approval of the Commission secured. Rule .40 of Chapter 1220-2-1 of the Tennessee Public Service Commission, Division of Motor Carriers, adopts Section 5a of the ***HN8***[] Interstate Commerce Act, 49 U.S.C. § 5b, providing:

> The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, division, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures **[**13]** for the joint consideration, initiation, or establishment thereof as set forth by the Interstate Commerce Commission in Section 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; providing, however, that the final determination on any rates, fares, classification, divisions, allowances, charges, rules and regulations or procedures shall be left in its final determination to the Tennessee Public Service Commission.

THE ROLE OF THE RATE CONFERENCES

Each of the three defendant conferences operates in the state of North Carolina. NCMCA's procedures are typical of all three. Its rate proposals to the North Carolina Utilities Commission are formulated in NCMCA's rate committee and then submitted to the Commission for approval, disapproval, or modification. Each member of NCMCA is entitled to have a representative on the rate committee; when the rate committee meets to consider rate proposals, shippers are invited to be and are present during the discussion of rate proposals. Approximately 300 shippers subscribe to the NCMCA tariff, and therefore receive notice of all meetings of the NCMCA rate committee. Many shippers send their professional **[**14]** rate specialists to the rate committee meetings. After a discussion of a rate proposal by carriers and shippers, the shippers and their rate specialists leave and the members of the rate committee vote on the proposal by secret ballot. Members of NCMCA are not bound by the action of the rate committee, but instead have the right to announce and file an independent rate proposal with the Commission.

Where general rate increase proposals are involved, the rate committee of NCMCA may meet with members of the two other North Carolina rate bureaus, SMCRC and MCTA. On some occasions NCMCA gives its members notice of the meeting dates of the general commodity rate committees of SMCRC and MCTA. Shippers are also invited to and do attend the meetings, and many shippers send their rate specialists. The defendants claim the joint meetings are encouraged by the shippers because they can attend just one rate committee meeting on a proposed general rate increase rather than three. After a discussion of the proposed increase by shippers and carriers, the shippers and their rate specialists leave and the members of the NCMCA rate committee vote by secret ballot on a rate proposal separately **[**15]** from the rate committees of SMCRC and MCTA.

Where general rate increase proposals are involved, the rate bureaus may submit the same proposals to the Commission with the same effective date, but each conference makes a separate decision on the proposal, and submits its proposal to the Commission separately. When a general rate increase is proposed to the Commission for its action, NCMCA may avail itself of SMCRC personnel to prepare traffic studies to be presented at the hearing, and these studies are sometimes presented by the three bureaus at a Commission hearing.

REGULATORY PROCEDURE

Procedures within each commission for review of published rates tend to be uniform. A published rate goes into effect unless set down for a hearing by the commission. The commissions consistently require hearings, however, and an order scheduling a hearing automatically suspends a proposed tariff.

[*477] In North Carolina, no general rate increase has been granted without a hearing before the Commission, with the exception of an emergency fuel surcharge allowed on an interim basis during the Arab oil embargo in 1974. Prior to the hearing, the North Carolina Commission's Public Staff undertakes **[**16]** a separate, independent study into the necessity of the proposed increase. The Public Staff will require the carriers to furnish freight bills and information concerning other expenses so that it can arrive at an operating ratio to submit as evidence at the hearing. In addition, the Public Staff undertakes on-site review and verification of motor carrier books and records in order to gather evidence to be submitted at the hearing. After its investigation, the Public Staff through sworn testimony at the hearing will make a recommendation as to a proposed rate increase.

Where a general rate increase proposal is involved, the matter is heard by the Commission en banc or by a panel of three Commissioners. The hearing is open to the public, and evidence may be submitted by any interested party, including the applicant, any intervenor, the Public Staff and the utility division of the Attorney General's office in North Carolina. At a hearing on a general rate increase, NCMCA and MCTA may rely on a rate justification statement prepared for them by SMCRC. The statement may contain information about rates in other cases.

The record, in sum, reveals a relationship between the defendants **[**17]** and the regulatory processes in which they participate that ranges from friendly to intimate. The states, as amici, have stressed the integral role of the conferences, and it is clear that, at the least, they are a part of daily regulatory life. Amidst the many ties between the states and the conferences, however, two important factors are not present in any of the subject states. First,

no state requires that all rates among competing carriers for identical service be uniform. [5] Second, no state requires, either by statute or regulation, or other express legislative or administrative mandate, that rates proposed by carriers be formulated or published by rate conferences. These facts, particularly **[*478]** the second, provide the primary basis for our resolution of the issues before the court.
[18]**

Based on the existing record, the parties are in agreement that the action is ripe for summary judgment. We concur, not merely because of the cross-motions, but because we agree that the existing disputes among the parties and amici are ones of characterization and law, not of fact. Extensive briefing of the action has narrowed the issues to three: first, whether the defendants' activities are immunized from antitrust liability by the "state action" doctrine; second, whether the defendants are protected by the "Noerr-Pennington" doctrine; and finally, whether their practices, if unprotected, are antitrust violations as to which the court should now enter summary judgment. We resolve each of these in the government's favor and conclude that the defendants are in violation of the Sherman Act.

STATE ACTION IMMUNITY

The pivotal issue in this action is whether the challenged practice of collective rate publication falls within the category of private activities that are immune from the antitrust laws under the "state action" doctrine. This question has received by far the greatest attention from the parties in their extensive briefing of the cross-motions for summary judgment. Besides **[**19]** being central to the case, the issue is, we think, a particularly difficult one. Application of the state action doctrine may call for extended inquiry and analysis of a state's regulatory statutes and programs; of the mix of public and private participation in administrative decisions; and even, perhaps, of the economic theory underlying a legislative scheme. See L. Sullivan, Handbook of the Law of Antitrust 738 (1977). To an extent, our resolution of the question obviates the need for such extraordinary probing, for we will conclude that the absence of actual compulsion renders the state action doctrine unavailable to each of the defendants. Nevertheless, any venture into the twilight zone dividing the realms of uncontested state and federal sovereignty requires that the traveller proceed with extraordinary caution.

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[5] Had the defendants argued, or had they established, that state law required all prices for identical services along the same route be uniform, this would be a very different case. We do not doubt that the five subject states are capable of entirely displacing the marketplace mechanism of setting prices with a system in which price competition plays no part. The states might have determined that their businesses and consumers would be best protected by a regulatory rate-making process that mandates uniform prices for a given service, typically based on a "just and reasonable" standard, than by the marketplace. Consequently, they could have replaced price competition with a state-mandated price-setting scheme in which intrastate common carriers would compete, but only by means other than price competition.

The nature of the carrier's participation in such a system regulated by legislative or administrative mandate would seem to be entirely different from the nature of its role in the marketplace. Where price competition is permitted (and protected), the individual participant attempts to lower prices so as to attract business from his competitors. Once prices are regulated, however, his participation in the price-setting "system" changes significantly, for his interest will usually lie in raising prices instead of lowering them. By charging a lower price he will ordinarily not gain an advantage over his competitors, who must always charge an identical price. Moreover, he will act in essentially the same manner regardless of whether he is alone or combining with other carriers, by attempting to convince the regulatory body to accept higher tariffs.

Were prices made uniform by state mandate, we would question the applicability of an antitrust theory designed to stimulate price competition. Indeed it would be doubtful that such practices as are engaged in by the defendant conferences could correctly be said to be "in restraint of trade," within the meaning of *Section 1* of the Sherman Act. The parties have made it clear, however, that each of the subject states guarantees to individual carriers the right to charge rates lower than their competitors' rates for identical service. E.g., Statement of Material Facts, submitted in support of SMCRC's motion for summary judgment, filed Aug. 1, 1978, at 3, 4. By preserving the carriers' right of independent action, the subject states have permitted, to an admittedly limited degree, price competition. ***HN9***[] Within the range of rates that will be approved as just and reasonable, See *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 294 U.S. 499, 506, 55 S. Ct. 462, 79 L. Ed. 1023 (1935)*, the states do not impede the ability of the carriers to set prices competitively.

The state action doctrine begins with *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. California, by statute, had established a scheme whose admitted purpose was to maintain prices and restrict competition among raisin growers. The growers would develop, in combination, marketing and pricing programs which they would submit to a state commission **[**20]** for approval. The commission would sanction a program where it found, after a hearing, that the program would prevent agricultural waste without allowing excessive profits to the growers, and where the program was approved upon referendum by a requisite number of growers.

A raisin grower brought suit in federal court challenging the program, Inter alia, as invalid under the Sherman Act. Chief Justice Stone rejected the challenge, holding that Congress, in enacting the Sherman Act, did not intend to prohibit state action regulating economic activity:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, **[**21]** in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation **[*479]** and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

317 U.S. at 352, 63 S. Ct. at 314 (citations omitted).

Unresolved by the decision in Parker and perhaps unresolved to this day [6] is the question whether the doctrine announced in that case would protect not only the state itself, but private parties acting under state mandate. Read most conservatively, the quoted passage holds only that the state's immunity as a sovereign is not undermined by private participation in **[**22]** the state program. Yet the language also hints that the state may, in the exercise of its sovereignty, shelter individuals from antitrust liability, and that this immunity may in turn survive even where the private party has participated in the state's actions. Thus, Parker offered a basis for believing first, that a private individual acting at the command of a state sovereign could avoid the effect of federal antitrust laws, and second, that the individual's participation in bringing about the state action would not threaten his immunity thereunder.

[23]**

Neither of these notions was significantly shaken in *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*. The Supreme Court held that enforcement of a price-fixing schedule by state and county bars was not exempt under Parker v. Brown because the activity was not compelled by the state:

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[6] See *Bates v. State Bar of Arizona, 433 U.S. 350, 361 n.13, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*, noting that only four justices joined in that part of *Cantor v. Detroit Edison, 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*, holding Parker inapplicable to private defendants. In Cantor, however, Justice Stevens went on to suggest circumstances under which merely private conduct required by state law would still be exempt from the Sherman Act. Since his discussion of those circumstances was adopted by a majority of the court, the question of whether private parties are protected under Parker is largely mooted: a private party claiming "state action" exemption must always satisfy the stricter Cantor requirements.

> HN10[] The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign.

421 U.S. at 790, 95 S. Ct. at 2015. Thus, the court rejected the respondents' assertion that because their actions were "prompted" by the state, no antitrust liability could attach. Moreover, the court suggested that compulsion would not be the sole criterion, but that before the Parker doctrine afforded him safe conduct through the forbidden territory of anticompetitive practices, a private party might have to make a yet-unspecified additional showing:

> Here, we need not inquire further into the state-action question because it cannot fairly be said that the state of Virginia through its Supreme Court Rules required the anti-competitive activities **[**24]** of either respondent.

Precisely what would have to be shown in such a case was the subject of *Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*. Detroit Edison, an investor-owned public utility, operated under a regulatory scheme similar to those involved in this action. Detroit Edison would file tariffs for the sale of electric power with the Michigan Public Service Commission, which was empowered by state statute "to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." *428 U.S. at 584, 96 S. Ct. at 3114*. The Commission would approve, modify, or reject the tariffs as filed. While Detroit Edison was free to propose modifications at any time, Michigan law forbade deviation from any tariff actually in force.

[*480] The Commission had approved one of Detroit Edison's tariffs containing a program of free distribution of standard-size light bulbs to customers. The petitioner, a retail druggist selling light bulbs, attacked the scheme as an illegal tying arrangement. The petitioner claimed the scheme allowed Detroit **[**25]** Edison to use its monopoly status in the electric power market to increase its power and reduce competition in the light bulb market. Detroit Edison answered that the program was protected under Parker and Goldfarb, because it was compelled by the state acting as sovereign.

As augured in Goldfarb, the court determined that the respondent's showing of formal compulsion was not enough. Justice Stevens' opinion for the court analyzed the state action in two sections. First, he held that Parker v. Brown only conferred antitrust immunity on the state agents acting in their official capacity. *428 U.S. 579 at 590-91, 96 S. Ct. 3110, 49 L. Ed. 2d 1141*. The language of Parker, Justice Stevens reasoned, was carefully chosen so as to exclude mere private parties claiming to be acting under compulsion of state law. *428 U.S. 579 at 590-92* & n.24, *96 S. Ct. 3110, 49 L. Ed. 2d 1141*.

Only three other justices joined in the portion of Justice Stevens' opinion holding Parker inapplicable to the Cantor facts. *428 U.S. 579 at 581, 96 S. Ct. 3110, 49 L. Ed. 2d 1141*. Backed by a majority of the court, however, Justice Stevens went on to suggest two instances where private conduct required by state **[**26]** law might still be exempt from the Sherman Act. First, Justice Stevens suggested that "it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command." *428 U.S. at 592, 96 S. Ct. at 3118*. This "unfairness" theory recognizes the predicament of the citizen caught between conflicting demands of independent sovereigns, but only where the conflict is real. Justice Stevens refused to find unfairness in the facts before him because the predicament with which the respondent might claim to be faced was largely illusory. The respondent could not claim to have "done nothing more than obey the command of (its) state sovereign," Id.; Justice Stevens' perceptive analysis of the regulatory process revealed it to be "a blend of private and public decisionmaking" in which the private element of participation is so significant as to render the notion of coercion inapplicable to a characterization of the individual's compliance. The tying arrangement had not merely been imposed upon the respondent by the state Commission. It was the respondent who conceived, developed, and proposed the program; who argued the program's merits before the **[**27]** Commission; and who chose not to exercise its ever-present right to petition the Commission for elimination of the program.

Justice Stevens also supposed that Congress did not intend to impose conflicting antitrust standards upon an area already pervasively regulated by the state. *428 U.S. at 595, 96 S. Ct. at 3119*. Any private party seeking a defense under this "already regulated" theory, however, would necessarily face three obstacles:

> First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.

Id.

Each of these related considerations in part explained Justice Stevens' refusal to exempt the tie-in under the **[**28]** "already regulated" theory. Most significant was the fact that the Michigan regulatory scheme was not to any meaningful degree concerned with the sale of light bulbs. This peripheral market was an "essentially unregulated area:"

> **[*481]** The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired.

428 U.S. at 598, 96 S. Ct. at 3121.

The court's willingness in Cantor to probe the degree of state interest and involvement has led to the generally-approved supposition that ***HN11***[] the state action doctrine implies a "requirement that the state's regulatory interest be evidenced by active supervision and a clear statement of intent to regulate" the alleged activity. **[**29]** See *United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 41 (N.D.Ga.1977)*, Quoting 81 Harv.L.Rev. 1, 229-47 (1976). The defendants have striven to present the five subject regulatory processes in a light that best demonstrates that this standard has been more than satisfied. They have pointed to the close scrutiny with which they contend the state commissions review proposed rates and to the central function which collective ratemaking purportedly plays in the overall system of rate proposal and review. MCMCA also emphasizes North Carolina's "little section 5(a)," which announces a state policy approving of collective ratemaking and exempting the conference activities from the North Carolina antitrust laws.

The government, on the other hand, refuses to concede what it insists is the pivotal state action question. The government insists that as private parties, none of the defendants may invoke the state action doctrine without first showing that its challenged activities are compelled by the states acting as sovereigns. Nothing in any case decided after Goldfarb, the government argues, modifies this basic requirement, and regardless of the virtual romance **[**30]** between the states and their ratemaking conferences, no state Requires that rates be published collectively.

At the outset, we note that even under a test that does not include state compulsion, the defendants face an uphill battle. The Supreme Court held in *Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 435-64, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)* that ***HN12***[] collective setting of interstate railroad rates was not exempt from the antitrust laws merely because the Interstate Commerce Commission held power to approve the rates. And in Cantor, 428 U.S. at 596, 96 S. Ct. at 2120, the Court reasoned, "Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws." Moreover, even though rate publication generally may be more central to the regulatory schemes here than light bulb sales were in Cantor, the Collective aspect of rate publication might prove peripheral. We need not decide the question here, however, for we agree with the government that compulsion by the state acting as a sovereign remains, as expressed in Goldfarb, a threshold barrier to application of the state action doctrine. **[**31]**

The first reason why compulsion is necessary is that this is the precise principle for which Goldfarb stands. The Goldfarb court found that further inquiry into the state action question was pretermitted by an absence of state compulsion. This holding, at least as it applies to private defendants, has been untroubled by subsequent decisions.

The defendants rely principally on Cantor in arguing that the compulsion requirement is less than absolute. Yet compulsion was the very starting point of that case. After holding Parker inapplicable to activities of private parties, Justice Stevens considered the availability of analogous state action principles to a private defendant:

> In this case we are asked to hold that private conduct Required by state law is exempt from the Sherman Act. Two quite different reasons might support such a rule.

[*482] *428 U.S. at 592, 96 S. Ct. at 3118* (emphasis supplied). The court went on to enunciate the "unfairness" and "already regulated" concepts that might support state action protection. The court premised its discussion, however, on the fact that the tie-in arrangement was "required," by state law.

The debate between the majority **[**32]** and dissenting opinions took place within the context of a private party's undertaking of state-mandated practices, and it is this context which gives meaning to the debate. Justice Stevens, writing for the court, and Justice Stewart, writing for the three dissenting justices, focused upon two related themes. The first was the extent to which courts might inquire beyond the formality of state compulsion. Justice Stewart found compulsion sufficient to invoke state action immunity anytime a state approved or established a practice, where the effect of approval was to proscribe subsequent deviation. The regulatory process, he reasoned, was a three-step affair in which the private party proposes, the state decides, and the private party complies. Proposal was protected by the *First Amendment* principles expressed in *Eastern Railroad Conference v. Noerr Motor, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. Compliance was protected by Parker and Goldfarb. *428 U.S. 579 at 624, 96 S. Ct. 3110, 49 L. Ed. 2d 1141*.

Justice Stevens answered that this analysis was simplistic, for it ignored the reality that regulatory decision making is typically a process in which public and private **[**33]** input are continuously combined. Formal compulsion by the state, he argued, ought not be given automatic deference by the courts where the compulsion also lacked substance.

The second, related, debate in Cantor centered on notions of federalism. Justice Stewart contended that Goldfarb compulsion was sufficient to bar federal incursion into the state realm:

> Goldfarb clarified Parker by holding that ***HN13***[] private conduct, if it is to come within the state-action exemption, must be not merely "prompted" but "compelled" by state action. Thus refined, the doctrine performs the salutary function of isolating those areas of state regulation where the State's sovereign interest is, by the State's own judgment, at its strongest, and limits the exemption to those areas.
>
> Beyond this the Court cannot go without disregarding the purpose of the Sherman Act not to disrupt state regulatory laws.

428 U.S. at 637-38, 96 S. Ct. at 3140 (footnotes omitted).

The majority conceived of a more forceful application of federal law. The "already regulated" theory of immunity, for instance, was only to be invoked where confrontation was unavoidable, and even then did not constitute a rule **[**34]** of automatic deference:

> First, merely because certain conduct may be subject both to state regulation and to federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; . . .

428 U.S. at 595, 96 S. Ct. at 3120.

Each of these questions is given meaning in the context of state compulsion of private activity. The first challenges the genuineness of the coercion. Such an inquiry would be unnecessary as it was in Goldfarb were there no coercion to judge. Similarly, the federalism debate derives its intensity from the circumstance of opposing Demands from discrete sovereigns.

Thus, the Goldfarb inquiry is not discarded by Cantor. ***HN14***[] The court must begin with the threshold determination of whether the defendants' acts are "compelled by direction of the State acting as a sovereign." *421 U.S. at 791, 95 S. Ct. at 2015*. Only where that milepost is reached may we test the extent of the state's involvement in the compelled activity. [7] In the case before the **[*483]** court, there is no such necessity: it **[**35]** is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states. Though informally ratified and even encouraged by the procedures and pronouncements of the various regulatory agencies and, to a limited degree, by the states' laws themselves, the practice is nowhere compelled.

The parties have not produced, and we have not found, a single case decided subsequent to Goldfarb in which activities not required by the state were held immune under the state action doctrine. See *New Motor Vehicle Board v. Fox, 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978)*; *Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*. Indeed, the subsequent cases have tended to reiterate the compulsion requirement. E.g., *Bates, 433 U.S. at 350, 97 S. Ct. **[**36]** 2691* [8], *53 L. Ed. 2d 810* .

[37]**

A related strain of cases might suggest a less stringent test. In *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*, the Court examined the extent to which Parker immunity was available to a city operating a municipal electric utility. The Court concluded:

> ***HN15***[] (T)he Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. . . .

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7 For an excellent presentation of the pertinent inquiry in such a case, See Sullivan, supra, § 238 at 738-39.

8 A review of existing authority on the state action doctrine suggests the necessity of specifying the meaning we ascribe to the notion of compulsion by the state. Professors Areeda and Turner have argued that courts ought not require state "compulsion" of a private activity as a prerequisite to invocation of the state action defense. P. Areeda & Turner, I ***Antitrust Law*** § 215 (1977). Over-application of the Cantor principle that many regulatory decisions are industry-initiated, these observers fear, may lead courts to find antitrust liability in circumstances where, unlike Cantor, the challenged private practice lies at the heart of the regulatory scheme. Areeda and Turner cite the facts in Parker to illustrate a situation in which industry participation in regulatory decision making should not render the state action defense unavailable.

Areeda and Turner, are employing a special definition of state "compulsion." They characterize both Parker and Cantor as cases in which there was not "compulsion," evidently based on the fact that the Impetus for the state action came from the regulated entities.

The language of Cantor, and our discussion here, however, analyses compulsion differently. Justice Stevens specifically described the light bulb tie-in as "required." *428 U.S. 579 at 592, 96 S. Ct. 3110, 49 L. Ed. 2d 1141*. He then determined that such compelled activity might be protected under either an "unfairness" or an "already regulated" theory. In either case, the threshold compulsion that existed arose from the fact that state law Formally required the tie-in by virtue of the Commission's having approved Detroit Edison's tariff: so long as there was no new filing, Detroit Edison had to continue the light bulb distribution program. It is only this minimal, formal, compulsion that we find to be a necessary element to a Parker defense.

> While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of" (*City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976))*.

435 U.S. at 413-415, 98 S. Ct. at 1137, 1138 (footnote omitted). **[**38]** [9]
[39]**

[*484] City of Lafayette does announce a standard of state action immunity that protects activities "contemplated" by the state legislature, but confers this immunity only on state subdivisions. That a municipality should have to make a smaller showing than a private party is only natural, for the municipality is already a limited sovereign, exercising, to the extent conferred by the state, an array of governmental features and powers. The Court made this very point when it distinguished Cantor, pointing out that ***HN17***[] a municipality may claim to act "as an agent of the State." *435 U.S. at 411 n.40, 98 S. Ct. at 1135-36 n.40*. Thus the standard governing the antitrust immunity accorded state subdivisions differs from, but does not modify, the rules applicable to a private party. See also *Duke & Co., Inc. v. Foerster, 521 F.2d 1277 (3d Cir. 1975)*.

Finally, we realize that state compulsion might not always be an absolutely immutable requirement. The case may arise in which a regulatory or legislative scheme, while not explicitly requiring a particular act, is structured so as to render the act indispensable to compliance with the scheme. In this sense an anticompetitive activity **[**40]** may be protected because it is impliedly or constructively compelled by the state. We think, however, that this argument is foreclosed to the present defendants by *Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*. That case held collective rate setting by railroads to be subject to the antitrust laws despite the regulation of railroad rates by the Interstate Commerce Commission. It is true that the cost-saving features of collective ratemaking, which obviate the need for each carrier to make an independent investigation into the economic factors affecting rates he should publish, may be more significant in the trucking industry. The defendants' memberships include many small businesses, which, unlike railroads, may be hard pressed to absorb the added expense incurred in making individual rate formulations. This, however, merely means that by imposing their respective regulatory systems upon the intrastate truckers, the subject states have increased the cost of doing business. ***HN18***[] The Sherman Act protects "competition, not competitors," *Brown Shoe, Inc. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, and the added **[**41]** fact that the state scheme adversely affects smaller shippers does not justify an antitrust exemption.

NOERR-PENNINGTON DOCTRINE

The defendants have devoted considerably less effort to advancing a Noerr-Pennington defense theory. The doctrine, briefly stated, ***HN19***[] holds that concerted action consisting solely of activities aimed at influencing

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[9] Earlier in its opinion, the Court quoted, with apparent approval, the order of the Fifth Circuit:

"A subordinate state governmental body is not Ipso facto exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in Goldfarb, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. ***HN16***[] Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent. *532 F.2d, at 434-435* (footnotes omitted).

435 U.S. at 393-394, 98 S. Ct. at 1126-27.

public officials does not violate the Sherman Act. [10] The Supreme Court has expressly extended the doctrine to lobbying efforts before state administrative agencies. *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. The defendants argue that since all of their challenged activity is directed toward influencing the state commissions, no antitrust liability may attach.

The government answers that the complaint **[**42]** charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that **[*485]** the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

This case is not technically one to which Noerr-Pennington has traditionally been applied. Noerr and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. See Sullivan, supra, § 238 at 740. The parties have cited no cases in which courts have invoked Noerr-Pennington to immunize price fixing among competitors.

The *First Amendment* principles underlying Noerr-Pennington are nevertheless applicable by analogy. If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he **[**43]** intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

The difficulty with this analysis is that it ignores the teaching of Cantor. Justice Stevens' characterization of the regulatory process as a blend of public and private decision making illustrates that the regulated industry does not merely propose, but also decides. Even though the proposals require state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decisionmaker.

This does not, of course, mean that Noerr-Pennington is inapplicable to rate making and related administrative activities. It does, however, suggest that a court may properly accord independent significance to the defendants' activities of rate formulation and proposal. *First Amendment* law has always recognized that ***HN20***[] even an activity which is itself communicative may nevertheless be penalized because of its non-speech aspects. See, e.g., *United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)* (draft card burning is conduct not protected by the *First Amendment*); *Cox v. Louisiana,* ***[**44]*** *379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965)* (civil rights demonstration on a sidewalk opposite a courthouse is "speech plus," entitled to a lesser degree of protection than pure speech); *Teamsters Local 695 v. Vogt, 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957)* (the state may prohibit picketing directed at achieving a union shop in violation of state law). Here, we agree with the government that the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of *First Amendment* protection or the Noerr-Pennington doctrine.

THE SHERMAN ACT VIOLATION

In *Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*, the Supreme Court held that collective rate publication by railroads constituted price fixing illegal under the antitrust laws even though the published rates were reviewed and approved by the Interstate Commerce Commission:

> (T)he Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. Thus a "zone of reasonableness exists between maxima and minima within which a carrier **[**45]** is ordinarily free to adjust its charges for itself." *United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 506, 55 S. Ct. 462, 465, 79 L. Ed. 1023*. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the rate-making function is freed from the unlawful restraints of the

[10] For a discussion by this court of the doctrine and its origins, See *United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 46-47 (N.D.Ga.1977)*. See also Sullivan, supra, § 238 at 740-43.

alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.

324 U.S. at 460-61, 65 S. Ct. at 728. Relying on Pennsylvania Railroad, the courts appear to have assumed that **HN21**[] collective rate-making **[*486]** violates the Sherman Act. See Pan American World Airways v. United States, 371 U.S. 296, 305-06 & n.11, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963); Marnell v. United Parcel Service of America, Inc., 260 F. Supp. 391, 404-05 (N.D.Cal.1966).

The Pennsylvania Railroad case leaves the defendants very little breathing room. They argue, however, that their activities do not violate the Sherman Act (1) because the states, rather **[**46]** than the defendants, determine the prices to be charged by intrastate carriers; and (2) because the defendants' activities, properly viewed under Rule of Reason analysis, do not unreasonably restrain trade.

Throughout their extensive briefing of this case, the parties have debated the correct characterization of the defendants' actions. The government contends that the defendants are responsible for fixing intrastate trucking rates, and that the state commissions furnish no more than a formal stamp of approval. The defendants insist that they only propose, and that the "fixing" of rates is performed exclusively by the commissions.

The cases establish a middle ground and have the effect of refuting the defendants' protestations of nonparticipation in regulatory decision making. As a consequence, the government is correct to describe collective rate publication as price "fixing:" this is precisely the language employed by Justice Douglas in the Pennsylvania Railroad decision. 324 U.S. 439 at 460-61, 65 S. Ct. 716, 89 L. Ed. 1051. Similarly, the state action cases have uniformly recognized that **HN22**[] state participation in an anticompetitive scheme does not render the private party a **[**47]** non-actor. See Cantor, 428 U.S. at 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 ; Goldfarb, 421 U.S. at 773 & n.21, 95 S. Ct. 2004, 44 L. Ed. 2d 572 .

Moreover, the practice of collective rate publication easily fits the classic description of a "naked price restraint." Since United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), it has been established law that **HN23**[] price fixing among competitors is a Per se violation of Section 1 of the Sherman Act. See, e.g., Goldfarb ; United States v. McKesson & Robbins, Inc., 351 U.S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 (1956); United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948); Hartford-Empire Co. v. United States, 323 U.S. 386, 65 S. Ct. 373, 89 L. Ed. 322 (1945). Because the guiding principle behind all Sherman Act jurisprudence is the protection of competition, See United States v. Joint Traffic Ass'n, 171 U.S. 505, 577, 19 S. Ct. 25, 43 L. Ed. 259 (1898), **HN24**[] any arrangement whose purpose or effect is to inhibit price competition is illegal. Such an arrangement need not be outright cartelization, so long as it brings about, or is intended to bring about, the "raising, depressing, **[**48]** fixing, pegging, or stabilizing" of prices. Socony-Vacuum, 310 U.S. at 223, 60 S. Ct. at 844.

The defendants' activities have precisely such an effect. The very function they serve is to coordinate the rates that their member carriers will charge. Within the "zone of reasonableness" in which, free from regulatory interference, market forces would otherwise determine price, the defendants have displaced competition with concerted pricing decisions. In so doing, they violate the Sherman Act at its most sensitive spot. The defendants' practices of collective rate coordination and publication are Per se violations of Section 1, subject to injunction by this court. See White Motor Co. v. United States, 372 U.S. 253, 259-60, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1960) **HN25**[] (summary judgment is appropriate in Per se price fixing cases) (dictum). See also First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). [11] We will therefore GRANT the **[*487]**

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[11] Nor would we necessarily reach a different result under rule of reason analysis. **HN26**[] "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." Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918). Considerations such as the need of the smaller shippers for the supposed efficiencies accompanying collective rate formulation and the fact that current intrastate rates are materially lower than interstate rates in the subject states,

government's motion for summary judgment, holding that the defendants have violated *Section 1* of the Sherman Act.

[49]**

RELIEF

The arguments by the defendants and Amici intimate that the relief sought by the government will significantly interfere with the regulation of intrastate trucking in the subject states. We are of course hopeful that whatever transition is necessitated by this order be effected in the least disruptive manner possible. At the same time, it is apparent that the transition will inevitably cause difficulties, and that these must not stand in the way of swift compliance with the Sherman Act. The court will therefore direct the parties to this action to confer in an attempt to reach agreement as to the proper relief to be afforded by the court. [12] Within thirty (30) days of the date of this order, the parties shall, if possible, submit to the court a joint agreement detailing the nature and precise terms of the relief to be awarded. If the parties are unable to reach an accord, they shall within the same thirty-day period: (1) so notify the court; (2) indicate those matters as to which there is agreement; and (3) submit proposals from each side in the areas of disagreement. The court will refrain from ordering interim relief, but expects that the parties will diligently proceed **[**50]** in complying with this order.

Accordingly, the court hereby GRANTS the government's motion for summary judgment and DENIES the defendants' motions for summary judgment.

IT IS SO ORDERED.

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while perhaps quite meaningful from a policy standpoint, would have only limited significance to our inquiry. The focus would continue to be on the effect of collective rate-making on price competition among intrastate carriers.

[12] The court expects that amici will be allowed full participation in all negotiations among the parties.

Knutson v. Daily Review, Inc.

United States District Court for the Northern District of California

March 21, 1979

No. C-73-1354-CBR

Reporter

468 F. Supp. 226 *; 1979 U.S. Dist. LEXIS 13593 **; 1979-1 Trade Cas. (CCH) P62,532; 4 Media L. Rep. 2424

Douglas K. KNUTSON, Arlen N. Benham, Geoffrey Beatty, Laura Duarte, Evan Francis Williams, Joseph W. Berthiaume, Kenneth W. Jackson, Jean E. Nyland, Daniel A. Dutra, Willard B. Kittredge, Robert A. Dutra, and Gayle C. Ely, Plaintiffs, v. The DAILY REVIEW, INC., a corporation, Bay Area Publishing Co., a corporation, Floyd L. Sparks, an Individual, William Chilcote, an Individual, Dallas Cleland, an Individual, John Clark, an Individual, Carl Felder, Individually and doing business as Felder Enterprises, Defendants

Core Terms

dealer, prices, profit-maximizing, plaintiffs', publisher, damages, circulation, subscription price, amount of damages, antitrust, hike, presume, profits, advertising revenue, fact of damage, maximization, restrains, burden of proof, nominal damages, district court, fixed price, maximum, converting, distribution system, pricing policy, lost profits, defendants', speculation, newspaper, rebutted

LexisNexis® Headnotes

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

HN1[] **Private Actions, Remedies**

Plaintiffs in an antitrust suit have the burden of proving damages. As many courts have noted, this requires them to prove both the fact of damage and the amount of damage. These are two separate proofs. For the former, plaintiffs must establish with reasonable probability the existence of a causal connection between defendants' violation of the ***antitrust law*** and plaintiffs' revenue-impairing injury. For the latter, plaintiffs must show the extent of the financial impact of defendants' antitrust violation. Generally, this can be accomplished through proof of lost profits.

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

HN2[] **Private Actions, Remedies**

The measure of proof needed in an antitrust case to prove the existence and amount of damages differs significantly. Plaintiffs must bear a heavier burden in proving the fact of damage than in proving the amount of damage. Thus, although a plaintiff cannot recover damages that are uncertain in the sense that they are not the certain result of defendant's violation, once this fact of damage has been established, plaintiffs can recover all damages definitely attributable to that wrong, even if the amount of damage is uncertain or difficult to ascertain.

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

HN3[] **Private Actions, Remedies**

In calculating damages for antitrust violations, the trier of fact can rely upon probable and inferential as well as direct and positive proof. It is permitted to make a just and reasonable estimate of the damage suffered by plaintiffs based on relevant data presented, and these findings will be sustained even if the result is only approximate. The essential requirement is only that plaintiffs develop a reasonable theory for calculating the amount of damages and that they introduce the data necessary to make this calculation. However, even where the defendant by his own wrong has prevented a more precise computation, the trier of fact may not render a verdict based on speculation or guesswork.

Counsel: **[**1]** G. Joseph Bertain, Jr., Timothy H. Fine, Patrick J. Carter, Edward Stadum, San Francisco, Cal., for plaintiffs.

Broad, Khourie & Schulz, Michael N. Khourie, Thomas Paine, San Francisco, Cal., for defendants.

Opinion by: RENFREW

Opinion

[*227] MEMORANDUM OF OPINION

In August 1973 a group of independent newspaper dealers brought suit in this Court against the publishers and certain officers of the newspapers they distributed, alleging violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. After extensive discovery and a lengthy trial, this Court on September 23, 1974, rejected three of plaintiffs' claims for relief but found that the publisher's written Dealership Agreement, which prohibited the dealers from selling their papers to subscribers at a price above the publisher's suggested price, constituted a vertical price restraint that violated *Section 1* of the Act. See *Knutson v. Daily Review, 383 F. Supp. 1346, 1357 (N.D.Cal.1974)*. [1.] Because plaintiffs had **[*228]** failed to prove either the fact or amount of their injury, however, the Court declined to award damages. *383 F. Supp. at 1384*.

[2]** On appeal, the Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. It agreed that plaintiffs were not entitled to recover on the three claims for relief this Court had rejected. However, it disagreed with the Court's reasons for denying plaintiffs damages for the *Section 1* violation. Noting that plaintiffs need only prove Some damages to establish the fact of damage, and that once the fact of damage has been shown, the amount of damage can be established according to a relaxed standard of proof, the Court of Appeals remanded for a reconsideration of the damage issue. *Knutson v. Daily Review, 548 F.2d 795, 813* (9 Cir.), Cert. denied, *433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)*. [2.]

[1.] Actually, because the dealers sold their papers to carriers, who in turn sold to the public, the agreement established a "resale-resale price." *Knutson v. Daily Review, 548 F.2d 795, 800 n.2* (9 Cir.), Cert. denied, ***433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)***. For the sake of simplicity, and because the dealers took "all reasonable steps to insure that the carriers sold at the announced subscription price," Ibid., this Court will discuss the damage evidence as though plaintiff-dealers sold directly to the public. See *Knutson v. Daily Review, 383 F. Supp. 1346, 1376 n.35 (N.D.Cal.1974)*.

[2.] The Court of Appeals also ordered "a limited remand on the *Section 2* count." *Knutson, supra, 548 F.2d at 800*. However, it did not indicate which aspects of this Court's findings should be reconsidered. Having fully weighed the evidence presented at trial, and having considered the legal analysis contained in the Court of Appeals' decision, this Court reaffirms its finding that there has been no *Section 2* violation.

[3]** The case is now before this Court on remand. Having considered the opinion of the Court of Appeals, the arguments of counsel, and all the evidence presented, both at trial and at a post-trial remand hearing, this Court concludes that plaintiffs are entitled only to nominal damages for defendants' violation of *Section 1* of the Sherman Act.

ANTITRUST DAMAGES

Before discussing the facts of this case and analyzing the Ninth Circuit's damage holding, it may be helpful to reiterate the standards applicable to the computation of antitrust damages. For it is only in the context of a long line of Supreme Court and **[*229]** Ninth Circuit antitrust damage opinions that the Court of Appeals' decision can properly be applied to the evidence before this Court.

HN1[] Plaintiffs in an antitrust suit have the burden of proving damages. As many courts have noted, this requires them to prove both the Fact of damage and the Amount of damage. These are two separate proofs. See *Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 562, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*; *Flintkote Co. v. Lysfjord, 246 F.2d 368, 392* (9 Cir.), Cert. denied, *355 U.S. 835, 78 S. Ct. 54, 2 L. Ed. 2d 46 (1957)*; **[**4]** *Newberry v. Washington Post Co., 438 F. Supp. 470, 483 (D.D.C.1977)*. For the former, plaintiffs must establish with reasonable probability the existence of a causal connection between defendants' violation of the ***antitrust law*** and plaintiffs' revenue-impairing injury. See *Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1205-1206* (9 Cir. 1975), Cert. denied, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*; *Flintkote, supra, 246 F.2d at 392*; But see *Sunkist Growers v. Winckler & Smith Citrus Products Co., 284 F.2d 1, 32* (9 Cir. 1960), Rev'd on other grounds, *370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)* (plaintiff must provide proof to a "reasonable certainty"). [3] For the latter, plaintiffs must show the extent of the financial impact of defendants' antitrust violation. Generally, this can be accomplished through proof of lost profits.

Plaintiffs' *Section 2* claim was that "sometime prior to 1970 defendants attempted and conspired to monopolize the publication of community or suburban daily newspapers in the southern Alameda County area in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*," and that "as an integral part of that attempt to monopolize defendants fixed resale prices, imposed territorial restraints on dealer distribution, and terminated all independent home-delivery dealers." *383 F. Supp. at 1369, 1370-1371*. An attempt and conspiracy to monopolize can only be established if plaintiffs have proven that defendants "possessed "a specific intent to acquire unlawful monopoly power.' " *Id. at 1371*, Quoting *Chisholm Brothers Farm Equipment Co. v. Int'l Harvester Co., 498 F.2d 1137, 1144* (9 Cir. 1974). Because there was "no indication in the evidence as a whole * * * of predatory or knowingly unlawful activity in connection with defendants' effort to establish, by contract, the subscription price of their newspapers," *Id. at 1372*, and because defendants in fact "took prompt action to bring their distribution practices into compliance with the antitrust laws * * *," Ibid., this Court found that there was no specific intent to monopolize and denied plaintiffs relief on their *Section 2* claim. *Id. at 1372, 1376*.

The Court of Appeals agreed with the standards used to determine whether there had been a *Section 2* violation and disagreed only with the Court's determination that defendants had not knowingly engaged in any unlawful activity in setting a maximum resale price. *548 F.2d at 814*. However, despite this disagreement, the Court of Appeals concluded that

" * * * the *Section 1* violation alone, or in conjunction with (the publisher's) newspaper acquisitions, the questionable promotional practices, and the padding of circulation figures would have supported a district court finding of specific intent, but that finding was not compelled and We cannot say that the district court's contrary determination was clearly erroneous." *Id. at 815* (emphasis added).

Despite the Court of Appeals' assertion that defendants' conduct was "knowingly unlawful," the evidence demonstrates that there was no specific intent to monopolize and this Court therefore reaffirms its earlier holding that "plaintiffs have failed to prove that * * * defendants attempted or conspired to monopolize the publication of community daily newspapers in the southern Alameda County area." *383 F. Supp. at 1376*.

3. Defendant's violation need not be the sole cause of the injury; however, it must be at least a substantial factor in bringing the injury about. See *Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1075 n.3* (9 Cir. 1970), Cert. denied, ***402 U.S. 923, 91 S. Ct. 1377, 28 L. Ed. 2d 662 (1971)***. Moreover, the injury must be of the type the antitrust laws were intended to prevent and

[5]** ***HN2***[]

The measure of proof needed to meet these burdens differs significantly. Plaintiffs must bear a heavier burden in proving the fact of damage than in proving the amount of damage. See *Flintkote, supra, 246 F.2d at 392*. Thus, although a plaintiff cannot recover damages that are uncertain in the sense that they are not the certain result of defendant's violation, once this Fact of damage has been established, plaintiffs can recover all damages definitely attributable to that wrong, even if the Amount of damage is uncertain or difficult to ascertain. See *Story Parchment, supra, 282 U.S. at 562, 51 S. Ct. 248*; *Flintkote, supra, 246 F.2d at 392*. [4.]

[6]** ***HN3***[]

In calculating damages for antitrust violations, the trier of fact can rely upon probable and inferential as well as direct and positive proof. See *Story Parchment, supra, 282 U.S. at 561-564, 51 S. Ct. 248*; *Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 377-379, 47 S. Ct. 400, 71* ***[*230]*** *L. Ed. 684(1927)*. It is permitted to make a "just and reasonable estimate of the damage (suffered by plaintiffs) based on relevant data" presented, and these findings will be sustained even if the result is only approximate. See *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 580, 90 L. Ed. 652 (1946)*; *Story Parchment, supra, 282 U.S. at 563, 51 S. Ct. 248*; *Eastman Kodak Co., supra, 273 U.S. at 379, 47 S. Ct. 400*; *Greyhound Computer Corp., Inc. v. Int'l Bus. Mach. Corp., 559 F.2d 488, 506* (9 Cir. 1977), Cert. denied, *434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)*. The essential requirement is only that plaintiffs develop a reasonable theory for calculating the amount of damages and that they introduce the data necessary to make this calculation. *Lehrman v. Gulf Oil Corp., 500 F.2d 659, 668* (5 Cir. 1974), Rehearing denied, *503 F.2d 1403*, Cert. denied, *420* ***[**7]*** *U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975)*; *SCM Corp. v. Xerox Corp., 463 F. Supp. 983, at 1019 (D.Conn.1978)*; L. Sullivan, Handbook of the Law of Antitrust, § 251, at 786 (1977). However, "even where the defendant by his own wrong has prevented a more precise computation, the (trier of fact) may not render a verdict based on speculation or guesswork." *Bigelow, supra, 327 U.S. at 264, 66 S. Ct. at 579, 580*. The burden may be relaxed, but it is never eliminated.

LAW OF THE CASE

In addition to being influenced by these general standards for evaluating damage evidence, the Court must follow the more detailed instructions given it by the Court of Appeals in this case. *548 F.2d 795*. First, the Court of Appeals found that the Daily Review plaintiffs had met their initial burden of proving the fact of damage. [5.]

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must flow from that which makes defendant's acts unlawful. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847, 850-851 (N.D.Cal.1978)*.

[4.] There are two reasons why plaintiff's burden of proving the amount of damages is relaxed in an antitrust case: first, the "self-evident intangible nature of the subject matter"; and second, the recognition that most difficulties in computing antitrust damages arise as a result of defendant's own wrongful conduct. See *Flintkote Co. v. Lysfjord, 246 F.2d 368, 391* (9 Cir.) Cert. denied, ***355 U.S. 835, 78 S. Ct. 54, 2 L. Ed. 2d 46 (1977)***. Precise calculation of damages is often made impossible where defendant has restrained plaintiff in his profit-making activities, as this restraint obscures the conditions that would have prevailed in a free market. Further, courts have recognized that to allow defendants to escape payment of damages because they have made it difficult for the plaintiff to prove the exact amount of injury would be to permit a wrongdoer to profit by his own wrongdoing. Such defendants should not be permitted to argue that inexact and imprecise damages are improper. If the courts were willing to accept such arguments, potential defendants would be encouraged to act in a manner that would render damages as uncertain and speculative as possible, and this would of course undercut the policies underlying the antitrust laws. See *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-265, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*; *Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*; *Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 377-379, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*; *Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1207* (9 Cir. 1975).

[5.] There were two groups of independent newspaper distributors who brought this lawsuit, those who sold The Daily Review and those who sold the Argus. On remand, this Court is only concerned with The Daily Review plaintiffs, Joseph W. Berthiaume, Robert A. Dutra, Kenneth W. Jackson, Willard B. Kittredge, Jean E. Nyland, and Evan F. Williams. Gayle C. Ely, the seventh

Recognizing that "different standards govern proof of the fact and proof of the amount of damages," and that to prove the fact of damage, plaintiffs need only offer " "proof of Some damage flowing from the unlawful conspiracy,' " the Court of Appeals concluded that The Daily Review "plaintiffs (have) produced evidence that despite circulation drops their net profits would **[**8]** have been higher in some amount" had there been no price restraint. *Knutson, supra, 548 F.2d at 811, 813*. In addition, the Court of Appeals concluded that these "reduced net profits were "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause,' " and that therefore, even though there may be "some infirmities in (plaintiffs') evidentiary showing," these "Infirmities are not so significant as to call into question the fact of damage, but relate only to the amount of damage." *Knutson, supra, 548 F.2d at 813*, Quoting *Zenith Radio Corp., supra, 395 U.S. at 125, 89 S. Ct. 1562* (emphasis added).

[9]** This conclusion might be subject to some dispute, both on the grounds that plaintiffs' evidence of profit loss was found by this Court not to be credible, [6.] **[**10]** and because the alleged loss probably was not of "the type **[*231]** that the statute was intended to forestall." [7.] See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S.*

Daily Review plaintiff, did not appeal from the adverse decision below. The Court of Appeals has agreed that the Argus plaintiffs are not entitled to damages, stating that

" * * * the Argus plaintiffs * * * did not meet the-fact-of-damage Flintkote test. * * * Unlike other plaintiffs, the Argus plaintiffs had a complete failure of proof of damages, not simply some deficiencies in the proof of amount of damages." *Knutson, supra, 548 F.2d at 813*.

6. Plaintiffs' proof of lost profits was based on a "before/after" theory under which the "before" period was the time during which plaintiffs were restrained from raising their prices and the "after" period was the time subsequent to September 1, 1973, when plaintiffs were free to charge whatever prices they wished. All the Daily Review plaintiffs raised their subscription prices during the "after" period. They all claim increased net profits resulting from this price hike, despite losses in circulation. See *Knutson, supra, 548 F.2d at 810*. As a result, they contend that the evidence proves that their profits would have been higher before September 1, 1973, had they been allowed to charge their subscribers the "profit-maximizing" price.

After considering the testimony and demeanor of the Daily Review plaintiffs, this Court found that their post-September 1973 actions were self-serving and that the evidence taken from the "after" period was unreliable:

"Since plaintiffs' crucial profit and loss data, * * * was recorded and compiled well after the complaint was filed in the very litigation in which it was to be used to prove actual injury, its credibility is certainly suspect. Plaintiffs clearly had the opportunity to vary their gross income and expense figures during the "after' period in order to exaggerate the favorable impact that price increases might have on profitability. * * * Some of plaintiffs' profit data strains the Court's credulity to the breaking point. * * *

" * * * Moreover, when assessing the credibility of these profit and loss statements the Court cannot ignore the fact that the unaudited financial statements originally offered by several of the plaintiffs purportedly reflecting their actual operations indicated significantly higher net profit figures than were reported on those plaintiffs' federal income tax returns for the years in question. * * *

"Another and equally fundamental weakness in plaintiffs' proof of the fact of damage arises from the artificiality of the "after' period upon which the claims of lost profits are based. Plaintiffs conceded that "damages must be predicated on real market conditions * * *.' (Footnote omitted.) Yet during the entire "after' period one dominant market factor the wholesale price charged by the publisher and paid by the dealers has been under a court-imposed restraint that prevents defendants from raising that price." *Knutson, supra, 383 F. Supp. at 1382-1383*.

Moreover, as will be seen later in this opinion, the evidence demonstrates that plaintiffs would not have charged a higher price for their papers, even if it had been profitable to do so, because of their fear of publisher response. Because of the need to maintain a uniform sales price and a high level of circulation, the publisher could not have permitted the dealers to raise their prices with the resulting drop in circulation without taking action to protect his interests.

For these reasons, it appears to this Court that there remains a substantial question as to whether plaintiffs have produced evidence that they were in fact injured by defendants' maximum resale price restraint.

7. Because vertical resale price restraints have long been viewed as Per se violations of *Section 1* of the Sherman Act, See *Albrecht v. Herald Co., 390 U.S. 145, 151-152, 88 S. Ct. 869, 19 L. Ed. 2d 998*, Rehearing denied, ***390 U.S. 1018, 88 S. Ct. 1258, 20 L. Ed. 2d 169 (1968)***; *Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213, 71 S. Ct. 259, 95 L. Ed. 219*,

477, 487-488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977), Quoting Wyandotte **[*232]** Co. v. United States, 389

Rehearing denied, ***340 U.S. 939, 71 S. Ct. 487, 95 L. Ed. 678 (1951)***, courts have not found it necessary to evaluate the anti-competitive consequences of each violation. However, recent case law has called into question the continued application of Per se analysis to this type of case. See *Continental T. V. Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (vertical territorial restrictions should be subjected to rule of reason rather than Per se analysis); *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883, 885-886* (1 Cir. 1978), Cert. denied, ***439 U.S. 833, 99 S. Ct. 112, 58 L. Ed. 2d 128 (1978)*** (resale price restraint having lesser anti-competitive effect than pure territorial restriction analyzed under rule of reason in light of Continental). For this reason, it seems appropriate for the Court to consider whether the purposes of the antitrust laws are truly served by a finding that plaintiffs have proven a violation and the fact of injury. See *Brunswick, supra, 429 U.S. at 487-488, 97 S. Ct. 690, 697* (respondents not allowed to recover under Clayton § 7 for lost profits suffered when large manufacturer acquired their competitors, thus preventing competitors from going out of business; Court held that because respondents sought to recover "the profits they would have realized had competition been reduced," their "injury was not of "the type that the statute was intended to forestall,' " and that it would be "inimical to the purposes of (the antitrust) laws to award damages for the type of injury claimed * * * "); *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847, 851-852 (N.D.Cal.1978)* (Brunswick reasoning applicable to Sherman *§ 1* claim).

The anticompetitive consequences that usually flow from the imposition of maximum resale price restraints were articulated by the Supreme Court in *Albrecht, supra* :

"(First,) agreements to fix maximum prices "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' (Footnote and citation omitted.)

" * * * (Second, maximum prices may be fixed too low for the dealer to furnish services * * * and conveniences which consumers desire and for which they are willing to pay. (Third, maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant non-price competition. * * * (Fourth,) if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *390 U.S. at 152-153, 88 S. Ct. at 873*, Quoting *Kiefer-Stewart, supra, 340 U.S. at 213, 71 S. Ct. 259*.

None of these "evils" are present in this case. First, even if the restraint "cripple(d) the freedom" of plaintiffs, the Supreme Court has expressly rejected this factor as a basis for imposing antitrust liability. See *Continental T. V. Inc. v. GTE Sylvania, Inc., supra, 433 U.S. at 53 n. 21, 97 S. Ct. 2549*.

Second, plaintiffs have not alleged that they would have provided additional services or conveniences to their subscribers if they had been allowed to charge a higher price. The motivation for raising prices was to effect a decrease in circulation that, because of the dual rate structure, would lead to higher net profits. Setting higher prices In order to increase services would appear to be counterproductive; it would retard the desired circulation drop.

Third, there is no indication that the price restraint protected any dealer from "significant non-price competition." In fact, the dealers did not compete among themselves for subscribers and, if anything, the elimination of the price restraint would have made inter-dealer competition even less likely. The dealers wanted to restrict distribution. Because of the dual rate structure they had no interest in expanding their distribution into other dealers' territories. See *Knutson, supra, 548 F.2d at 809, 810*.

Fourth, it cannot be said that the price ceiling was actually a cover for a minimum price setting scheme. The resale price was not set at the dealers' cost. Had the dealers wanted to increase circulation, they could have afforded to undercut the suggested price. The reason they chose not to sell at a lower price was simply because they had no need and no motivation to increase circulation once the base level of sales had been reached.

In fact, it is not unreasonable to conclude that defendants' maximum resale price restraint had a pro-competitive effect and that price freedom would have had anticompetitive consequences. By seeking the removal of the resale price restrictions, plaintiffs sought the power to increase profits by raising subscription prices in their areas of distribution. However, because each plaintiff had a De facto monopoly in his or her area, these increased profits could only be characterized as monopoly rents. The result of lifting the price ceiling would therefore be to encourage each dealer's fortification and exploitation of his or her particular monopoly. Moreover, because the effect of a price hike would be to decrease circulation, a dealer's freedom to raise prices would logically lead to the elimination of any inter-dealer competition that may have existed on the fringes of each dealer's area of distribution.

This analysis suggests that although plaintiffs' alleged losses may be of the type that the claimed violation would be likely to cause, they are not of the type that the antitrust laws were intended to prevent. For this reason, the Court questions whether

U.S. 191, 202, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967). However, as the law of the case, these findings must be accepted on remand, and this Court must assume the fact of damages. Therefore, all that remains for this Court to do is ascertain the amount of damages to which each Daily Review plaintiff is entitled.

[11]** THE AMOUNT OF DAMAGES

After considering all the evidence presented at trial, this Court concluded that plaintiffs had failed to meet their burden of proving either the fact or the amount of damage. [8] The Court of Appeals disagreed, finding that this holding, by requiring proof to a reasonable probability that plaintiffs **[*233]** actually would have raised their prices, created "a nearly insurmountable barrier to recovery in maximum price-fixing cases." Knutson, supra, 548 F.2d at 812. As a result, and in order to ease plaintiffs' burden, the Court of Appeals established a presumption that the dealers' pricing policies would have been guided by the principle of profit-maximization. It did so in a paragraph that deserves extended scrutiny, for it is in this paragraph that the Court of Appeals sets forth the guidelines for evaluating the evidence on "amount of damages." The Court of Appeals stated:

[12]**

> "Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers. (Footnote omitted.) This assumption merely amounts to a recognition that a "restraint' in fact restrains. The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior. Contrary evidence might include dealer testimony that he would not have raised his price, or a showing by the defendants that the dealers had reasons other than the restraint for selling below a profit-maximizing price." 548 F.2d at 812.

Central to the Court of Appeals' holding was its "assumption" that absent the price restraint, each dealer would have raised his or her prices so long as it would have been profitable to do so. Although the Court of Appeals used the word "assume" rather than "presume," the context in which the word appears suggests that the Court was creating a rebuttable presumption that all dealers are profit maximizers. **[**13]** See Knutson, supra, 548 F.2d at 816 (Smith, J., dissenting).

But what does this presumption mean? At first glance, the language would suggest that the burden of proving damages at least in maximum price restraint cases should be shifted from plaintiff to defendant; that plaintiffs are presumed to have intended to charge the price at which they would have received the greatest profit; and that because a "restraint in fact restrains," this profit-maximizing price is presumed to be higher than the fixed price. However, this interpretation could place on the district court the burden of determining the profit-maximizing price, and the Court of Appeals could not have intended such a result.

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plaintiffs should have been found to have demonstrated a violation and resulting fact of injury. See Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) (antitrust laws were enacted for the protection of competition, not competitors); Cf. Albrecht, supra, 390 U.S. at 156-159, 88 S. Ct. 869 (Harlan, J., dissenting).

[8] Noting that "(t)he evidence * * * presented * * * amounted to no more than conjectural hindsight and even contained contradictory assertions of interested parties," 383 F. Supp. at 1379, that "(t)he credibility of the evidence is further diminished by the fact that these claims (of damage) were first made during the trial and lack any corroborating circumstantial evidence," 383 F. Supp. at 1380, that "plaintiffs' crucial profit and loss data * * * recorded and compiled well after the complaint was filed * * * is certainly suspect * * * (and) strains the Court's credulity to the breaking point," 383 F. Supp. at 1382, and that "the "after' period upon which the claims of lost profits are based" constitutes "an artificial rather than a real market experience thereby destroying the probative value of the "before/after' test relied upon by plaintiffs," 383 F. Supp. at 1383, the Court held

" * * * that plaintiffs have not shown that there is a reasonable probability that they actually would have increased their prices during the damage period if they had been permitted to do so or that they actually would have realized higher profits had they raised their prices. Consequently, plaintiffs have failed to prove both the fact and amount of damage on their lost profits claim." 383 F. Supp. at 1384.

The inappropriateness of this result is illustrated by the hypothetical case in which neither party has introduced any evidence as to the amount of damages. In such a case, even though plaintiffs have not shown what their pricing policies would have been, the district court, in presuming that plaintiffs would have raised their prices to the profit-maximizing level, would itself have the burden of determining what that level would be. Because the parties would have introduced no supporting evidence, **[**14]** the district court could only make this determination by combining economic analysis with speculation and conjecture. The district court would first have to determine whether the Court of Appeals' presumption was based on short-term profit maximization or on long-term profit maximization. Then it would have to calculate the optimum price to be charged. In doing so, it would be compelled independently to consider such factors as the effect of a price rise on circulation, the impact of intra-and inter-brand competition, and the response of the publisher to a dealer's pricing change. The obligation to undertake this type of speculative economic analysis should not be thrust on the district courts. See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 742-743, 97 S. Ct. 2061, 52 L. Ed. 2d 707*, Rehearing denied, *434 U.S. 881, 98 S. Ct. 243, 54 L. Ed. 2d 164 (1977)*.

Moreover, adoption of this interpretation of the Ninth Circuit's decision would create a conflict with the clear line of judicial authority. In all other cases in which antitrust plaintiffs have sought compensation for lost profits, the courts have required them to introduce at least some evidence of the extent to which defendants' **[**15]** anti-competitive practices caused damage. See, e.g., *Bigelow, supra, 327 U.S. at 264-266, 66* ***[*234]*** *S. Ct. 574*; *Story Parchment, supra, 282 U.S. at 561, 51 S. Ct. 248*; *Eastman Kodak, supra, 273 U.S. at 379, 47 S. Ct. 400*; *Greyhound, supra, 559 F.2d at 505-506*; *Gray v. Shell Oil Co., 469 F.2d 742, 748* (9 Cir. 1972), Cert. denied, *412 U.S. 943, 93 S. Ct. 2773, 37 L. Ed. 2d 403 (1973)*; *Siegel v. Chicken Delight, 448 F.2d 43, 52-53* (9 Cir. 1971), Cert. denied, *405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972)*; *Lessig v. Tidewater Oil Co., 327 F.2d 459, 471-472* (9 Cir.), Cert. denied, *377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1974)*; *Flintkote, supra, 246 F.2d at 392-394*; *Newberry, supra, 438 F. Supp. at 483* ("There is simply no proof that provides a basis for determining when, if ever, a price increase would have been attempted by any (plaintiff news dealer) or in what amount * * * "). These courts have dealt with the problem of uncertain damages by relaxing plaintiffs' burden of proof, not by shifting the entire burden to defendants.

For these reasons, it seems more appropriate to interpret the Knutson decision in such a way as to maintain the burden of proof on the plaintiffs. **[**16]** This can be done by focusing on the "had it been profitable to do so" language.

The Ninth Circuit "assume(d) that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers." *548 F.2d at 812*. As noted above, this statement could be read as creating a presumption that absent a restraint, each dealer would have charged the profit-maximizing price, I. e., the price determined by the district court to be profit maximizing. However, the statement can also be read as holding that Once plaintiffs have proved that, absent restraints, it would have been profitable for them to have raised their prices, the Court must presume their intent to have done so. This interpretation would place on plaintiffs the burden of proving that the profit-maximizing price was greater than the price charged while the restraint was in effect. If plaintiffs produced no probative evidence in support of this contention, then they would not be entitled to damages. However, if they could demonstrate by use of the before/after test, the yardstick test, or by the use of experts that they would have profited by charging more for their **[**17]** product than defendants had allowed them to charge, the Court would presume their intent to have done so, and the burden would shift to defendants to offer evidence to the contrary. [9.]

[9.] As noted by the Court of Appeals, defendants could rebut the presumption that plaintiffs would have charged the profit-maximizing price by introducing contrary evidence such as

"dealer testimony that he would not have raised his price, or (other testimony) that the dealers had reasons other than the restraint for selling below a profit-maximizing price." *548 F.2d at 812*.

It is significant that these examples rebut the presumption that each dealer intended to charge the profit-maximizing price, not the presumption that the profit-maximizing price was higher than the fixed price.

The Court of Appeals' statement that a restraint in fact restrains is not necessarily inconsistent with this interpretation. That language should not be read as a declaration that a maximum price restraint restrains only if it is set below the profit-maximizing **[**18]** price and that the district court must therefore presume that the profit-maximizing price was higher than the fixed price. Rather, it should be read merely to state that the restraint imposed by defendants prevented plaintiffs from exercising free choice in setting prices, and that whether plaintiffs would in fact have set their prices above the imposed price still depends on whether they can show that it would have been profitable to have done so. See *Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)* ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.")

Thus, in evaluating the evidence on remand, this Court will not presume that plaintiffs would have set their prices at a level higher than the fixed price. Rather, **[*235]** plaintiffs must first demonstrate to this Court's satisfaction that the profit-maximizing price was higher than the fixed price. If the evidence presented does not support that contention, then plaintiffs are not entitled to more **[**19]** than nominal damages. [10.] However, if plaintiffs can demonstrate that the profit-maximizing price was higher than the fixed price, then the Court will presume that they would have charged that higher price to their customers, and it will shift the burden to defendants to rebut that presumption.

THE PROFIT-MAXIMIZING PRICE

In determining whether plaintiffs have met their burden of proving that the profit-maximizing price exceeded the fixed price, the Court must focus on the period from September 1, 1969 to September 1, 1973. This is the time interval during which plaintiffs are potentially entitled to damages, for defendants terminated their illegal dealership agreements with plaintiffs on August 31, 1973, **[**20]** and the applicable statute of limitations for private causes of action under the federal antitrust laws is four years. See *15 U.S.C. § 15b*; *Knutson, supra, 383 F. Supp. at 1353*.

Plaintiffs concede that from the start of this damage period to January 1, 1971, a period of sixteen months, the profit-maximizing price was virtually identical to the maximum resale price set by defendants. Their expert economist concluded that the prices were "so close" during this period that the dealers "would have followed the suggested price," and none of the plaintiffs alleged that the profit-maximizing price would have been higher. See Plaintiffs' Proposed Finding of Fact 17; Transcript, Oct. 13, 1978, at 7; Transcript, Jan. 25, 1978, at 23. Therefore, because there has been no showing that it would have been more profitable for plaintiffs to have charged a higher price for The Daily Review subscriptions from September 1, 1969 to January 1, 1971, this Court finds that plaintiffs are not entitled to any damages for that time period.

Plaintiffs argue that as of January 1, 1971, however, the profit-maximizing price of The Daily Review rose approximately fifty cents per month. On that date, the **[**21]** Oakland Tribune raised its monthly subscription price from $ 3.25 to $ 3.75. Plaintiffs contend that the Tribune's pricing policies had a direct competitive impact on their own prices, that their profit-maximizing price was fifty cents lower than whatever price the Tribune happened to be charging, and that this Court should therefore find that as of January 1, 1971, the profit-maximizing price of The Daily Review was approximately $ 3.25 per month. See Plaintiffs' Proposed Finding of Fact 13.

Plaintiffs support this contention with three arguments. First, they point to their own testimony that the price of the Tribune was a significant influence on their pricing policies and that they felt it important to maintain approximately a fifty-cent price differential. See Transcript, Jan. 26, 1978, at 18, 29-30, 44-45; Transcript, Jan. 27, 1978, at 56; Plaintiffs' Exhibit Nos. 1009-1014, Affidavits of Robert Dutra, Kenneth Jackson, Willard Kittredge, Joseph Berthiaume, Evan Williams, and Jean Nyland. Next, they point to the historical fact, that the subscription price of The Daily Review was set fifty cents below that of the Tribune from October 1, 1960 to May 18, 1967, from

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[10.] Under most circumstances, plaintiffs who fail to establish the amount of their injury are not entitled to any damage award. However, in this case, the Court of Appeals' determination that "fact of injury" has been established compels a finding that plaintiffs are entitled to at least nominal damages.

November **[**22]** 1, 1967, to November 1, 1968, and again from October 1, 1969 to January 1, 1971. See Plaintiffs' Proposed Finding of Fact 13. Presumably, this indicates that there is a correlation between the profit-maximizing price of The Daily Review and the price of the Tribune. Finally, they note that Floyd Sparks, the publisher of The Daily Review, testified on numerous occasions that his pricing policies were greatly influenced by competition from the Tribune and that fifty cents seemed to be the most appropriate margin by which to **[*236]** undersell that paper. See Transcript, Vol. 3, Nov. 16, 1973, 11:50 A.M. Session, at 119; Transcript, Vol. 4, Nov. 30, 1973, 2d Session, at 12; Transcript, Jan. 27, 1978, at 13-14.

In light of plaintiffs' arguments and the testimony adduced at trial and on remand, the Court is willing to find that plaintiffs have met their initial burden of proving that as of January 1, 1971, the profit-maximizing price of The Daily Review rose to approximately $ 3.25 per month, fifty cents above the maximum subscription price set by defendants. The Court realizes the artificiality of this figure. Certainly the profit-maximizing price is in a constant state of flux **[**23]** and is influenced by many factors, including competition from other newspapers and news sources, the quality of the product, carrier demands, the state of the local economy, etc. However, the Court concludes that plaintiffs have produced enough evidence to show that a fifty-cent Daily Review price hike on or after January 1, 1971 would have led to increased dealer profits, assuming that the publisher continued to sell his papers to them at pre-1971 prices. Therefore, the Court finds that plaintiffs' initial burden has been met.

Having established that the profit-maximizing price was higher than the fixed price after January 1, 1971, the Court must determine whether defendants have rebutted the presumption that plaintiffs would actually have raised their prices to this level. The Court is mindful of the Court of Appeals' suggestion that this rebuttal can consist of evidence such as

> "dealer testimony that he would not have raised his price, or a showing by the defendants that the dealers had reasons other than the restraint for selling below a profit-maximizing price." *Knutson, supra, 548 F.2d at 812*.

After considering the testimony of the witnesses and the evidence presented, **[**24]** this Court finds that defendants have rebutted the presumption, and it therefore finds that plaintiffs are only entitled to nominal damages.

Defendants have rebutted the presumption that plaintiffs would have raised their subscription prices on January 1, 1971 with two arguments. First, they point to subsequent events which demonstrate that plaintiffs would have delayed for a period of at least several months before reacting to the Tribune's January 1, 1971 price hike. Second, they contend that plaintiffs were aware that if they had raised their prices on or after January 1, 1971, the publisher would have been forced to convert his independent distributor system to an employee distribution system or to take some other action that would have jeopardized the dealers' independent status. Knowing that their future existence as independent dealers would have been jeopardized by instituting a price hike, defendants argue that plaintiffs would voluntarily have maintained the publisher's suggested price even though their "profit-maximizing" price may have been higher.

TIME LAG

In late July 1973, defendants notified all plaintiffs that their Dealership Agreements would be terminated effective **[**25]** at the close of business on August 31, 1973. *Knutson, supra, 383 F. Supp. at 1353*. On August 6, 1973, plaintiffs filed this lawsuit. Shortly thereafter, the parties agreed, Inter alia, that during the pendency of this litigation, plaintiffs could continue to distribute The Daily Review, setting their own subscription price, but that defendants would be prohibited from selling the papers to them at other than the then prevailing rates. See *Knutson, supra, 548 F.2d at 801*; *383 F. Supp. at 1354*. In other words, as of September 1, 1973, plaintiffs could sell The Daily Review at any price they chose while defendants could not raise their prices or react to plaintiffs' decisions in any way.

The existence of this agreement provides the Court with an ideal situation for testing the profit-maximizing presumption. As of September 1, 1973, all of plaintiffs' pricing restraints had been lifted, the publisher's hands had been tied, and the Tribune's selling price had been established at one dollar higher than The Daily Review's. If plaintiffs were truly profit maximizers, they all **[*237]** would have immediately raised their prices to $ 3.25 per month. However, they did not. Although **[**26]** plaintiff Berthiaume raised his subscription price on September 1, plaintiffs Kittredge, Williams, and Nyland did not act until October 1, and plaintiffs Dutra and Jackson did not raise their prices until November 1. *Knutson, supra, 383 F. Supp. at 1378 n.40*. These time lags between the date of price freedom and the date of dealer response prove just how fragile the presumption of profit maximization can be.

At a minimum, the Court must find that five of the six plaintiff dealers would have hesitated one to two months after achieving price freedom before raising their prices to the profit-maximizing level. Their delay in responding to the actual lifting of the maximum price restraint compels such a result. Moreover, in light of this Court's earlier determination regarding plaintiffs' credibility, the Court now finds that the time lag would have been greater.

Plaintiffs knew that their entitlement to damages would depend in part on the profits they received after September 1, 1973. They knew that the sooner their prices were raised, the more likely it would be that this Court would find them to be immediate profit maximizers. Their delay in responding to price freedom only shows **[**27]** that the presumption of immediate profit maximization is unsupported here, and that plaintiffs actually would have hesitated for at least a few months before raising their prices to the "profit-maximizing" level. The Court must so find. [11.]

DEALER REACTION

The second piece of rebuttal evidence offered by defendants is even more harmful to plaintiffs' claim for damages. It consists of testimony that the publisher would have responded to plaintiffs' price freedom by converting to an employee distribution system, and that knowledge of the likelihood of this response would have been a "(reason) other than the restraint for (plaintiffs') selling below a profit-maximizing price." *Knutson, **[**28]** supra, 548 F.2d at 812*.

Although the publisher and the dealers all earned their income through sales of The Daily Review, their strategies for maximizing profits appear to have been in conflict. See Transcript, Vol. 11, Feb. 8, 1974, at 304. The publisher, whose gross income was derived 88% From advertising revenue, was predominantly concerned with maintaining a high circulation in order to promote his sales of advertising lineage. See Transcript, Vol. 4, Nov. 30, 1973, 2d Session, at 27; Transcript, Vol. 11, Feb. 8, 1974, at 319. Advertising rates are in large part a function of total circulation. The greater the circulation, and therefore the greater the potential market, the more willing advertisers are to purchase space from a newspaper. Therefore, because circulation tends to increase as subscription prices decrease, the publisher can maximize his profit by keeping the price of his paper low. This low price leads to higher circulation and therefore to more substantial advertising revenues. See *Albrecht v. Herald Co., 390 U.S. 145, 169 n.2, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* (Stewart, J., dissenting); *Knutson, supra, 383 F. Supp. at 1363*; Transcript, Vol. 4, Nov. 30, **[**29]** 1973, 2d Session, at 9.

Unlike the publisher, the dealers' profit picture depends solely upon circulation. *Knutson, supra, 383 F. Supp. at 1363-1364*. Their income is derived exclusively from sales of The Daily Review, not from sales of advertising.

Under the dual rate structure established by the publisher, the dealers pay a base rate for each paper purchased up to a specified number, and a higher rate for each additional paper purchased. *Id. at 1352 n.4*. These payments, plus the carriers' earnings, are subtracted from total subscription revenues to determine dealers' profits. *Id. at 1351-1352*; *548 F.2d at 808*. Because a dealer's profit per paper is higher when he **[*238]** pays the publisher only at the lower base level rate, his most logical profit strategy would be to raise subscription prices to the point that circulation drops to the base level. See Transcript, Vol. 9, Feb. 6, 1974, 2d Session, at 25; Transcript, Jan. 27, 1978, at 53. This strategy is obviously in conflict with the publisher's high circulation strategy. See *Knutson, supra, 383 F. Supp. at 1364*.

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11. This conclusion is supported by plaintiffs' "Second Supplemental Damage Study," submitted after trial, in which their expert, Dr. David Bradwell, calculated damages based on the assumption that plaintiffs would not have raised their prices until July 1, 1971. See, e.g., Plaintiffs' Exhibits 1002B, 1005B, 1006B, and 1007B.

Sparks, the publisher of The Daily Review, acknowledged that a dealer's decision to raise subscription prices **[**30]** would seriously impair the profitability of his paper. See Transcript, Jan. 27, 1978, at 20-21. He had no doubt that a dealer price hike would lead to a drop in circulation that would in turn lead to diminished advertising revenues. See Transcript, Vol. 4, Nov. 30, 1973, 2d Session, at 9; Transcript, Jan. 26, 1978, 4 P.M. Session, at 23. [12.] This problem would have been particularly severe toward the beginning of the damage period because of the strong competition for advertising revenues then existing between The Daily Review, the San Leandro Morning News, and the Fremont News Register. Transcript, Jan. 27, 1978, at 22. However, the problem would continue so long as advertising revenues were the publisher's main source of income. Moreover, because a diminution of advertising revenues would decrease the funds available for future circulation promotions, a dealer price hike would trigger a downward profit spiral, ultimately leading to tremendous financial losses for The Daily Review. See Transcript, Vol. 11, Feb. 8, 1974, at 341; Transcript, Vol. 14, Feb. 14, 1974, at 220.

[31]** Sparks recognized also the need to maintain a uniform subscription price for his paper, both to avoid confusion among his subscribers and to make widespread circulation promotions more feasible. See *Knutson, supra, 383 F. Supp. at 1363*, Transcript, Vol. 2, Nov. 15, 1973, at 426; Transcript, Vol. 3, Nov. 16, 1973, 11:50 A.M. Session, at 127, 147; Transcript, Vol. 5, Dec. 1, 1973, at 27. For all these reasons, he testified that he would have responded to price freedom in such a way as to maintain as much control over subscription prices as would have been legally possible. See Transcript, Vol. 2, Nov. 15, 1973, at 421; Transcript, Vol. 3, Nov. 16, 1973, 11:50 A.M. Session, at 146; Transcript, Vol. 4, Nov. 30, 1973, 2d Session, at 34. [13.]

[32]** The Court finds that the need for swift reaction to a dealer price hike in order to maintain price uniformity and advertising revenues would have caused Sparks to respond to dealer price freedom either by immediately converting to an employee distribution system or by converting to a system of free distribution, even if that required cutting back on the frequency of publication. [14.] The evidence amply supports this finding. See Transcript, Vol. 11, Feb. 8, 1974, at 373; Transcript, Vol. 22, Apr. 25, 1974, at 194, 2 P.M. Session, at 6; Transcript, Jan. 26, 1978, 4 P.M. Session, at 21, 26-28, 44; Transcript, Jan. 27, 1978, at 35-36; Transcript, Feb. 2, 1978, at 148.

[33]** Furthermore, this conclusion is not undermined by Sparks' failure to respond to the dealer price hikes that occurred between September 1, 1973, and November 1, 1973. As noted above, the publisher's hands were tied by the stipulation of the parties approved **[*239]** by the Court that enjoined him from refusing to sell The Daily Review to plaintiffs at the established rates. See *Knutson, supra, 383 F. Supp. at 1354*. He was thus prohibited from raising his prices or from terminating their distributorships during the pendency of the litigation. The publisher's inaction during the post-September 1, 1973 period does not therefore provide probative evidence of whether Sparks would have converted to a new distribution system when the dealers gained price freedom.

DEALER AWARENESS

The presumption that plaintiffs would have charged the "profit-maximizing" price cannot be rebutted merely by evidence that their dealerships would have been terminated if they had raised their prices. If plaintiffs were unaware that the publisher would have been forced to respond to a price increase, they might have raised their

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12. Plaintiffs' own expert, Dr. David Bradwell, testified that if the dealers had been permitted to effect the proposed price hike, circulation levels would have dropped approximately 22%. Transcript, Jan. 25, 1978, at 151.

13. Either of these options could have been pursued without violating the antitrust laws, particularly insofar as they would have been the result of a good-faith, valid business decision, having across-the-board effect, and authorized by the explicit terms of the termination clause of the Dealership Agreements. See *Knutson, supra, 548 F.2d at 804-807*; *383 F. Supp. at 1358, 1359-1367*.

14. This conclusion is reinforced by Sparks' "termination" letter of July 25, 1973, in which he stated that the conversion of his distribution system was "necessary to obtain closer supervision over our circulation, and in particular over efforts to increase such circulation. * * * Any loss in circulation to (our) competitors would adversely affect our advertising revenue." *Knutson, supra, 383 F. Supp. at 1353-1354*.

prices regardless of the likely consequences. [15.] However, upon consideration **[**34]** of the evidence, this Court concludes that plaintiffs Were aware of potential publisher response and that this awareness would have kept them from raising their subscription prices even if they had had price freedom earlier than September 1, 1973. See *Knutson, supra, 383 F. Supp. at 1364 n.19*A.

The presumption established by the Court of Appeals that plaintiffs were profit maximizers was partially based on the assumption that these dealers were knowledgeable business persons with the aptitude and inclination to act in their own self interest. After having observed the demeanor and having **[**35]** heard the testimony of these individuals during trial, this Court agrees; plaintiffs were sophisticated newsdealers who understood the dynamics of their industry and who therefore should be found to have been aware of the consequences of a price hike.

A number of plaintiffs admitted during trial that they had at least considered the impact of a dealer price hike on the publisher's profits. See, e.g., Transcript, Vol. 7, Dec. 13, 1973, Morning Session, at 16; Transcript, Vol. 8, Feb. 5, 1974, at 135. In addition, the evidence demonstrates plaintiffs' awareness of the "market fact" that subscription price, circulation, and advertising revenues are all interrelated. See Transcript, Vol. 8, Feb. 5, 1974, at 142; Transcript, Vol. 14, Feb. 14, 1974, at 363-364. Moreover, their own expert economist, Dr. David Bradwell, testified during the remand trial that plaintiffs were aware of the publisher's need to maintain a high circulation, and that they would not have raised prices if it meant putting themselves out of business. [16.]

[36]** **[*240]** In light of this evidence, and plaintiffs' testimony that their pricing decisions would be influenced by long-term rather than by short-term objectives, See Transcript, Jan. 26, 1978, 1:30 P.M. Session, at 11, 40; Transcript, Jan. 27, 1978, at 47, 49, the Court concludes that plaintiffs would not have been "profit-maximizers." Surely they were aware that any action on their part to raise subscription prices even if it would have been in their immediate self-interest would in the long run have had disastrous consequences for their businesses. Any price hike or threat of price hike would have caused the publisher to convert to an employee distribution system or to take some action that would destroy plaintiffs' positions as independent newsdealers. Therefore, because the evidence

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[15.] If that were the case, the Court could award plaintiffs damages for the profits they lost between the date they would have responded to price freedom by raising prices and the date the publisher would have responded by converting his distribution system. Because of the time lag in dealer response mentioned earlier, however, and the publisher's need to act quickly, this damage period would have been very short indeed.

[16.] "Q. Did you happen to discuss with any of the plaintiffs the emphasis that the circulation department placed upon maintenance and growth of circulation and volume at the Hayward Daily Review?"

"A. Yes, there was some discussions (Sic) of the promotional activities of the circulation department.

"Q. Well, and the emphasis upon the part of the circulation management that the dealers' primary function was to develop circulation?

"A. Yes.

"Q. And the dealers recognized that, the extreme importance of that fact to circulation management?

"A. Oh, no question."

Transcript, Jan. 25, 1978, at 148-149.

"Q. Of course you recognize there are substantial differences in the factors which a publisher considered from those which a dealer considered, do you not?

"A. Yes.

"Q. Do you assume that the dealer is equally (concerned) about the impact of his actions upon the newspaper firm?

"A. In a different way, yes.

"Q. In which way, Doctor Bradwell?

"A. Well, if he were to act in such a predatory way that he destroyed his source of supply, he would be out of business."

Transcript, Jan. 25, 1978, at 153, 155.

shows that plaintiffs would not have raised their prices even if they had been free to do so, the Court can award only nominal damages. [17.] This award will be trebled pursuant to *15 U.S.C. § 15*. See *Newberry v. Washington Post Co., supra, 438 F. Supp. at 483*; *Siegfried v. Kansas City Star Co., 193 F. Supp. 427, 440 (W.D.Mo.1961)*, *Aff'd, 298 F.2d 1* (8 Cir.), Cert. denied, *369 U.S. 819, 82 S.* **[**37]** *Ct. 831, 7 L. Ed. 2d 785 (1962)*.

Plaintiffs' damage award is significant in two respects. First, it incorporates the finding of the Court of Appeals applicable here as the law of the case that plaintiffs **[**38]** have established the Fact of damages. See p. 230, Supra. Second, it indicates that even though the fact of damages has been established, plaintiffs have not proven the Amount of damages; they have failed to demonstrate to the Court's satisfaction that they suffered lost profits due to defendants' illegal maximum price restraint. In fact, the evidence points to the contrary conclusion, that the Sherman Act violation did not affect plaintiffs' profits.

In *Newberry, supra*, the court found that the publisher of the Washington Post violated *Section 1* of the Sherman Act by illegally restraining the price at which its dealers sold the newspaper. Those plaintiffs who had raised their prices despite the restraint were awarded treble damages based on their evidence of lost profits. *438 F. Supp. at 483*. The remaining plaintiffs received only nominal damages, however, because the Court found that

> "(there) is simply no proof that provides a basis for determining when, if ever, a price increase would have been attempted by any of (the plaintiffs) or in what amount * * *. The Court has found that (defendant restrained plaintiffs') freedom to price without interference; but this does not **[**39]** establish that but for the Post's action, all prices would have been raised, or by what amount. * * * Cognizant of the Supreme Court's establishment of a relaxed standard of proof of the amount of damages once an antitrust violation has been shown (citation omitted), the Court concludes nonetheless that it would be the sheerest speculation to award more than nominal damages." *438 F. Supp. at 483*.

In this case as well, the Court concludes that it would be sheer speculation, and in fact contrary to the evidence, to award more than nominal damages. Cf. *SCM Corp. v. Xerox Corp., supra, 463 F. Supp. at 1017-1020 (D.Conn.1978)* (evidence does not support plaintiff's lost profits damage theory). Accordingly, the Court concludes that plaintiffs are each entitled to an award of three dollars. See *Morning Pioneer Inc. v. Bismarck Tribune Co., 493 F.2d 383, 388* (8 Cir.), Cert. denied, *419 U.S. 836, 95 S. Ct. 64, 42 L. Ed. 2d 63 (1974)*; Siegfried v. Kansas City Star Co., supra, 298 F.2d 1, 6 (8 Cir.), **[*241]** Cert. denied, *369 U.S. 819, 82 S. Ct. 831, 7 L. Ed. 2d 785 (1962)*; *Newberry, supra, 438 F. Supp. at 483*; *United Exhibitors v. Twentieth Century Fox F. D. Corp., 31 F. Supp. 316,* ***[**40]*** *317 (W.D.Pa.1940)*. But see *Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 909 n.4* (2 Cir.), Cert. denied, *369 U.S. 865, 82 S. Ct. 1031, 8 L. Ed. 2d 85*, Rehearing denied, *370 U.S. 920, 82 S. Ct. 1552, 8 L. Ed. 2d 500 (1962)* (dictum); *Ledge Hill Farms, Inc. v. W. R. Grace & Co., 230 F. Supp. 638, 640 (S.D.N.Y.1964)*.

Accordingly, IT IS HEREBY ORDERED that The Daily Review plaintiffs Joseph W. Berthiaume, Robert A. Dutra, Kenneth W. Jackson, Willard B. Kittredge, Jean E. Nyland, and Evan F. Williams are each awarded damages from defendants in the amount of three dollars ($ 3.00).

IT IS HEREBY FURTHER ORDERED that a hearing will be held on Thursday, May 3, 1979, at 9 A.M. to determine reasonable attorneys' fees. Counsel shall file memoranda accordingly.

[17.] Although the record has not been fully developed, evidence of the Sacramento Union dealers' experience seems to support this conclusion. The Sacramento Union Dealership Agreements did not set any maximum resale prices; those dealers were free to charge whatever price they wished. See Transcript, Vol. 16, Apr. 16, 1974, at 74-75; Transcript, Vol. 16, Apr. 17, 1974, at 168, 232. However, none of them actually sold their papers at other than the publisher's suggested price. See Transcript, Jan. 25, 1978, at 134. This lends support to the Court's conclusion that because of the need for uniformity of prices and the need to maintain circulation at a level that would support advertising revenues, a newsdealer would not vary from his publisher's suggested resale price even if he or she were free to do so.

Paceco, Inc. v. Ishikawajima-Harima Heavy Industries Co.

United States District Court for the Northern District of California

March 22, 1979

No. C-78-910 ACW

Reporter

468 F. Supp. 256 *; 1979 U.S. Dist. LEXIS 13558 **

PACECO, INC., a California Corporation, Plaintiff, v. ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES CO., LTD., Nissho Iwai American Corp., Hitachi, Ltd., Hitachi America, Ltd., and I. H. I. Inc., a Delaware Corporation, Defendants

Core Terms

purchaser, steel, commerce, seller, price discrimination, cases, cranes, commodity, discriminatory, manufacturers, customer, alleges, wholesaler, retailer, indirect, supplier, resale, buyer, Robinson-Patman Act, defendants', consumer, prices, competitive injury, motion to dismiss, consumption, Sections, products

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 appraising the sufficiency of the complaint the court follows, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. On a motion to dismiss, material allegations of the complaint are taken as admitted, and the complaint is to be liberally construed in plaintiff's favor. The question presented is whether in the light most favorable to plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief.

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

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN2[] **Price Discrimination, Buyer Liability**

Section 2(f) of the Robinson-Patman Act (Act) renders it unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. The last clause of that section makes buyer liability dependent upon plaintiff's ability to meet the requirements of § 2(a) of the Act dealing with seller liability. Thus to state a claim based on buyer liability for price discrimination, plaintiff must allege the jurisdictional requirements of §§ 2(a) and (f) of the Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

International Trade Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN3[] **Robinson-Patman Act, Claims**

Commerce, as used in the Clayton Act, which includes § 2 of the Robinson-Patman Act, refers to trade or commerce among the states and among the states and foreign nations. Section 2(f) covers persons engaged in commerce, who in the course of such commerce commit the proscribed acts.

Antitrust & Trade Law > Clayton Act > Scope

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Clayton Act > General Overview

International Law > Authority to Regulate > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

The term "commerce" is defined in § 1 of the Clayton Act, *15 U.S.C.S. § 12*, as follows: Commerce, as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

Antitrust & Trade Law > Robinson-Patman Act > Claims

International Trade Law > General Overview

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

HN5[] **Robinson-Patman Act, Claims**

The commerce requirements of the Robinson-Patman Act must be strictly construed. However, seller liability under § 2(a) extends to activities that occur in the flow of commerce.

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

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

HN6[] **Robinson-Patman Act, Jurisdiction**

The operation of the flow of commerce test is as follows: A sale across state lines can carry the flow back to the initial shipment of the goods after manufacture and carry the flow forward to transformation or storage in the state of resale, embracing every transaction in between.

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

HN7[] **Antitrust & Trade Law, Robinson-Patman Act**

Subsequent transactions that fall within commerce may bring into the flow of commerce earlier transactions that considered on their own would not be viewed as within commerce.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

HN8[] **Robinson-Patman Act, Claims**

One of the jurisdictional elements of § 2(a) of the Robinson-Patman Act is that the commodities that are sold at discriminatory prices be sold for use, consumption, or resale within the United States.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN9[] **Robinson-Patman Act, Claims**

Section 2(a) of the Robinson-Patman Act does not bar an indirect purchaser from maintaining a price discrimination suit.

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

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

HN10[] **Price Discrimination, Competitive Injuries**

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.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

HN11[] **Robinson-Patman Act, Claims**

If a plaintiff, even as an indirect purchaser, can show that it has suffered competitive injury at the secondary level from conduct proscribed under the Robinson-Patman Act, it has the right to maintain a price discrimination action.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN12[] **Robinson-Patman Act, Claims**

The competitive injury requirement of § 2(a) of the Robinson-Patman Act arises out of the following language of that section: It shall be unlawful 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.

Counsel: [1]** Harold C. Nachtrieb, Nachtrieb, Williams & Streitz, APC, San Francisco, Cal., for plaintiff.

Shigeru Watanabe, Mori & Ota, John J. Quinn, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Cal., Robert H. Kreutzer, Morton M. Maneker, Proskauer, Rose, Goetz & Mendelsohn, New York City, John A. Edginton, Graham & James, San Francisco, Cal., for defendants.

Opinion by: WOLLENBERG

Opinion

[*257] ORDER

This case involves the jurisdictional requirements of Sections 2(a) and 2(f) of the Robinson-Patman Act that deal with buyer and seller liability for acts of price discrimination. The imprecise language of the statute [1.] and the incompleteness of the case law has left undetermined the jurisdictional reach of those sections. Plaintiff's unique factual allegations touch upon several open questions that require determination by this Court.

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1. See *F. T. C. v. Fred Meyer, 390 U.S. 341, 349, 88 S. Ct. 904, 908, 19 L. Ed. 2d 1222 (1968)* ("the Robinson-Patman amendments by no means represent an exemplar of legislative clarity"); and *Automatic Canteen Co. v. F. T. C., 346 U.S. 61, 65, 73 S. Ct. 1017, 1020, 97 L. Ed. 1454 (1953)* ("precision of expression is not an outstanding characteristic of the Robinson-Patman Act").

[2]** Plaintiff, Paceco, Inc., initially filed this antitrust action on April 25, 1978, against defendants Ishikawajima-Harima Heavy Industries Co., Ltd. ("IHI"), Nissho Iwai American Corp., Hitachi, Ltd. ("Hitachi"), Hitachi America, Ltd., I.H.I. Inc., and Does 1-100. The original complaint alleged several federal antitrust violations and violations of various state statutes. Jurisdiction of this Court was invoked pursuant to *28 U.S.C. § 1337*, *Sections 4* and 12 of the Clayton Act (*15 U.S.C. §§ 15* and *22*), and the doctrine of pendent jurisdiction.

On July 24, 1978, the named defendants filed motions pursuant to *Rule 12 of the Federal Rules of Civil Procedure* seeking to dismiss Counts III, IV, and V of the complaint and to strike references to "Doe" defendants. [2.] After further briefing and a hearing, this Court ordered the dismissal of Counts III and V and the striking of the fictitious defendants and granted plaintiff leave to amend Count IV.

[3]** In anticipation of the Court's order, plaintiff had filed on September 27, 1978, an amended complaint that incorporated certain paragraphs of the original complaint, deleted others, and added new Counts IVa and IVb which, respectively, charged defendants Hitachi and IHI with violations of Section 2(f) of the Robinson-Patman Act. Subsequently, defendants Hitachi and IHI filed the motion presently before the Court seeking to dismiss these counts under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for plaintiff's failure to state a claim.

FACTS

Plaintiff's complaint alleges the following factual situation. Defendants IHI and Hitachi are Japanese corporations engaged in the manufacture of large steel cranes used at ports for unloading freight containers from ships. Defendants sell those cranes, which are often taller than fifty feet, to ports and shipping companies in the United States. As a domestic manufacturer of similar cranes, plaintiff competes with defendants for American business.

Steel is the principal component of the cranes. The price at which the parties bought their steel gives rise to the price discrimination claim. Defendants purchase their steel directly from **[**4]** various Japanese steel manufacturers. Plaintiff alleges that it acquires steel from these manufacturers, and it is apparent from its pleadings that it is an indirect purchaser who buys this steel from domestic wholesalers. [3.] The complaint **[*258]** alleges that defendants, as sellers' favored buyers, knew that the price at which they purchased this steel was lower than the price at which the steel manufacturers sold to the United States market, and as a result of this discrimination, defendants consistently outbid plaintiff on domestic contracts.

The parties dispute the method by which the steel is incorporated into the finished product. To what degree the steel is processed at the premises of the crane manufacturer as **[**5]** opposed to the purchaser's chosen locale bears on several issues before the Court. The complaint alleges and the Court must accept that allegation as true on a motion to dismiss that defendants ship the steel in a relatively unprocessed state to the United States and assemble and erect the cranes at the purchaser's premises.

STANDARD OF REVIEW

The Supreme Court set out the standard test used to determine the sufficiency of a complaint in *Conley v. Gibson, 355 U.S. 41, at 45-46, 78 S. Ct. 99, at 102, 2 L. Ed. 2d 80 (1955)* when it stated that:

> ***HN1***[] In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

[2.] Defendant IHI also brought a motion for dismissal under *Rule 12(b)(5) Fed.R.Civ.P.* for insufficiency of process. Plaintiff subsequently complied with the applicable service requirements.

[3.] Plaintiff's amended complaint states at paragraphs 156 and 183 that certain (named) Japanese steel manufacturers "furnish steel of like grade and quality to the United States market which is purchased by Paceco and incorporated into container cranes sold in competition with defendant(s)."

On a motion to dismiss, material allegations of the complaint are taken as admitted, and the complaint is to be liberally construed in plaintiff's favor. *Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)*; *Kennedy v. H. & M. Landing, Inc., 529 F.2d 987 (9th Cir. 1976)*. The question presented is whether in the light **[**6]** most favorable to plaintiff, and with every doubt resolved in its behalf, the complaint states any valid claim for relief.

DISCUSSION

HN2[] Section 2(f) of the Robinson-Patman Act renders it "unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." The last clause of that section makes buyer liability dependent upon plaintiff's ability to meet the requirements of Section 2(a) dealing with seller liability. Thus to state a claim based on buyer liability for price discrimination, plaintiff must allege the jurisdictional requirements of Sections 2(a) and (f) of the Act. See *Great Atlantic & Pacific Tea Co. v. F. T. C., 440 U.S. 69, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*; *Automatic Canteen Co. of America v. F. T. C., 346 U.S. 61, 70-71, 73 S. Ct. 1017, 97 L. Ed. 1454 (1953)*.

Defendants base their motion to dismiss on plaintiff's failure to allege three jurisdictional elements required by those sections. First, they claim that plaintiff's complaint does not cover transactions that have occurred in the course of commerce as required by Section 2(f). Second, they argue that the **[**7]** complaint admits that the commodity allegedly sold at a discriminatory price was not sold "for use, consumption, or resale within the United States" as required by Section 2(a). And, finally, they argue that plaintiff lacks standing to sue because Section 2(a) allows only direct purchasers from the discriminatory seller to prosecute a price discrimination claim.

1. Commerce Requirements of Section 2(f)

Defendants claim that the fact that the purchase and delivery of their steel occurred solely within the boundaries of Japan demonstrates that the actions complained of herein do not involve commerce. ***HN3***[] Commerce, as used in the Clayton Act, which includes Section 2 of the Robinson-Patman Act, refers to trade or commerce among the states and among the states and **[*259]** foreign nations. [4.] **[**8]** Section 2(f) covers persons "engaged in commerce, (who) in the course of such commerce" commit the proscribed acts. Defendants read this language to require that the discriminatory sale to the buyer must occur in the course of commerce and that since a sale and delivery within Japan does not occur in commerce, plaintiff has failed to state a claim. [5.]

Case law demonstrates that transactions that initially or subsequently fail to cross state or international boundaries may still fall within the course of commerce as that term is used in the Robinson-Patman Act. The Supreme Court recently directed that ***HN5***[] the commerce requirements of the Robinson-Patman Act must be strictly construed; however, the Court noted that seller liability under Section 2(a) extends to activities that occur "in the flow of

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[4.] ***HN4***[] The term "commerce" is defined in Section 1 of the Clayton Act (*15 U.S.C. § 12*) as follows:

"Commerce,' as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

[5.] Without referring to any applicable case law, defendants also contend that the "engaged in commerce" language requires an allegation that they purchased the commodity in question from a supplier in the United States. In analyzing commerce questions under the Robinson-Patman Act, courts have exclusively focused on the "in the course of commerce" language. Since defendants' reasoning on this issue simply reformulates their other commerce arguments, the Court rejects this contention without further consideration.

commerce." *Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)*. [6.] One treatise has described ***HN6***[] the **[**9]** operation of the flow of commerce test as follows:

> (A) sale across state lines can carry the flow back to the initial shipment of the goods after manufacture and carry the flow forward to transformation or storage in the state of resale, embracing every transaction in between.

P. Areeda & D. Turner, ***Antitrust Law*** 1, P 233 (1978). Thus, ***HN7***[] subsequent transactions that fall within commerce may bring into the flow of commerce earlier transactions that considered on their own would not be viewed as within commerce.

In this case plaintiff argues that defendants' shipment to the United States of the unassembled steel cranes brings their purchases of steel into the flow of commerce. Plaintiff relies on a line of cases holding that the flow of commerce **[**10]** continues through the intrastate aspect of the transaction in cases in which raw materials purchased interstate and sold intrastate are not substantially altered by processing or manufacturing. See *Dean Milk Co. v. F. T. C., 395 F.2d 696 (7th Cir. 1968)*; *Foremost Dairies, Inc. v. F. T. C., 348 F.2d 674* (5th Cir.), Cert. denied, *382 U.S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965)*; *Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp., 283 F. Supp. 202 (C.D.Cal.1968)*. Plaintiff and defendants dispute the degree of processing of the steel that occurs in Japan. Because on a motion to dismiss the Court must resolve every doubt in the plaintiff's behalf, the allegation that the cranes are assembled and erected in the United States and the implication that the steel is not substantially altered in Japan must be accepted as true. On this basis, the Court finds that the complaint sufficiently alleges that defendants' activities fall within commerce. [7.]

[11]** **[*260]** 2. The Use, Consumption, or Resale Requirement of Section 2(a)

[6.] In Gulf Oil, the Court rejected the claims that allegations that certain activities had a "close nexus" to interstate commerce or "affected" interstate commerce would suffice to meet the jurisdictional requirements of Section 2(a) of the Robinson-Patman Act.

[7.] The Court also notes a potential alternative basis for this decision. Defendants claim that the commerce language of Section 2(f) requires that the wrongdoing buyer receive the discriminatory price concession in the course of its commerce. The Court acknowledges that a plain reading of the section supports this argument. On the basis of the Supreme Court's mandate in Gulf Oil to construe strictly the commerce requirements of the Robinson-Patman Act, one circuit court has specifically accepted this interpretation. *Great Atlantic & Pacific Tea Co. v. F. T. C., 557 F.2d 971, 979 (2d Cir. 1977)*, Aff'd on other grounds, *440 U.S. 69, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*.

Limiting buyer liability to those situations in which the buyer has received the discriminatory price concession in the course of its commerce creates an anomaly between buyer and seller liability. See generally, Von Kalinowski, Antitrust Laws and Trade Regulation 16D, § 36.04 (1976). Section 2(a) covering seller liability requires only that one of the two sales giving rise to the discrimination the higher or the lower be in interstate commerce. See e.g., *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 118, 75 S. Ct. 148, 99 L. Ed. 145 (1954)*; *Foremost Dairies, Inc. v. F. T. C., 348 F.2d 674, 677 n.5 (5th Cir. 1965)*. Thus in a case in which a seller conveys to a favored buyer in a transaction that is wholly intrastate and sells to the disfavored buyer interstate, the buyer could escape liability on jurisdictional grounds whereas the seller in the same transaction would be liable on account of having made one of the two sales interstate. (This situation could arise in the case at hand if the Court determined that defendants substantially altered the steel in Japan.)

This anomaly may be inconsistent with the purposes of Section 2(f). The Supreme Court has recently noted the "derivative nature of liability under § 2(f)" stating that "buyer liability under § 2(f) is dependent on seller liability under § 2(a)." *Great Atlantic & Pacific Tea Co. v. F. T. C., 440 U.S. 69, 99 S. Ct. at 928, 931 (1979)*. The brief legislative history of this section indicates that its authors intended to make coextensive buyer and seller liability under the Act. 80 Cong. Rec. 9419 (1936) (remarks of Rep. Utterback). Several commentators have stated that they can conceive of no logical reason why Congress would have intentionally created this exception for favored buyers who purchase intrastate from discriminatory sellers. See Von Kalinowski, Antitrust Laws and Trade Regulation 16D, at § 36.04 (1976) and the authority cited therein. Thus, in order to give effect to the Congressional intent, it might be necessary to read liberally the commerce language of Section 2(f) and hold that that language imposes no additional requirements than those found in Section 2(a).

HN8[] One of the jurisdictional elements of Section 2(a) is that the commodities that are sold at discriminatory prices be sold "for use, consumption, or resale within the United States." Defendants contend that this language requires that commodities sold at Both the higher and lower price eventually end up in the United States for use, consumption, or resale. They further contend that the complaint only alleges that cranes were sold for use in the United States, but fails to allege that steel the commodity involved in the discrimination was used in the United States.

Two district court cases support defendants' interpretation of the statute. In *Zenith Radio Corp. v. Matsushita Electrical Industrial Co., 402 F. Supp. 244, 248 (E.D.Pa.1975)*, the court held that Section 2(a) would not apply to defendants' sales of consumer products in Japan (at higher prices) and in the United States because the products sold in Japan were not destined for use, consumption, or resale within the United States. Similarly, in *Fimex Corp. v. Barmatic Products, Co., 429 F. Supp. 978, 980 (E.D.N.Y.1977)*, the court held that seller's **[**12]** discriminatory sales to two purchasers within the United States did not violate the Act because one of the purchasers exported for sale abroad all of the products that he bought.

Neither of these cases appear directly relevant to this case. However defendants wish to characterize plaintiff's pleading, they now have ample notice that plaintiff alleges that the steel Was used in the United States in order to construct the cranes. This issue raises a question of fact not suitable for determination at this stage of the proceedings. Additionally, the subsequent sale of the cranes in the United States with the steel incorporated in that finished product might constitute sufficient use or resale to meet the jurisdictional element in question.

3. The Different Purchaser and Competitive Injury Requirements of Section 2(a)

Defendants also claim that plaintiff's failure to allege that it purchased the commodity in question Directly (not through middlemen) from the same discriminatory seller who sold to the favored purchaser necessitates the dismissal of this case. **[*261]** Plaintiff's ambiguous pleading that certain Japanese steel manufacturers "furnish steel of like grade and quality to **[**13]** the United States market which is purchased by PACECO and incorporated into container cranes sold in competition with defendant(s)," Plaintiff's Amended Complaint at PP 156 and 183, makes it clear that plaintiff cannot allege that it is a direct purchaser. The Court has determined, however, that *HN9*[] Section 2(a) does not bar an indirect purchaser from maintaining a price discrimination suit.

Defendants offer a two-pronged attack in support of their argument. First, they claim that case law incontrovertibly stands for the proposition that only an actual purchaser may sue under Section 2(a). Second, they argue that a party who must purchase the seller's goods through a wholesaler and who is in competition with a direct-buying favored customer of the seller cannot as a matter of law show the competitive injury required by Section 2(a).

With regard to their first claim, defendants have not misstated the bulk of the extant case law. Courts have often stated that only actual purchasers may bring an action under Section 2(a). See, e.g., *Klein v. Lionel Corp., 138 F. Supp. 560* (D.Del.), *Aff'd, 237 F.2d 13, 14-15 (3rd Cir. 1956)*; *Wales Home Remodeling Co. v. Alside Aluminum Corp., 443 F. Supp. **[**14]** 908, 911-12 (E.D.Wis.1978)*. Yet several factors lead to the conclusion that this line of cases does not preclude an indirect purchaser from maintaining such a suit if it alleges that Its wholesaler is a victim of discriminatory pricing vis-a-vis a competitor of plaintiff.

The case law upon which defendants rely contains key factual differences from this case and indicates no reasons why the actual purchaser rule should not be limited to the facts presented in those cases. The case law generally involves two different factual situations. In the leading case of *Klein v. Lionel Corp., 138 F. Supp. 560, at 566* (D.Del.), *Aff'd, 237 F.2d 13 (3rd Cir. 1956)*, recently relied upon in *Wales Home Remodeling Co. v. Alside Aluminum Corp., 443 F. Supp. 908 (E.D.Wis.1978)*, the court specifically held that:

> (A) plaintiff has no cause of action for discrimination under *15 U.S.C.A. Section 13(a)* where it appears that plaintiff was not a purchaser from the seller but a retailer purchasing from a jobber.

While Klein and Wales Home involve the dismissal of price discrimination suits brought by indirect purchasers, they both lack a crucial factual allegation present herein. In both cases plaintiffs **[**15]** did not allege that the wholesaler from whom they purchased suffered price discrimination vis-a-vis the favored purchasers; in fact, it was admitted that the jobbers received the Same price as the direct-buying competitors of plaintiffs and plaintiffs suffered because of the jobbers' surcharge passed on to them. The gravamen of plaintiffs' claims thus focused on sellers' refusal to deal directly with them. Here, plaintiff alleges that the wholesalers have purchased the steel at discriminatorily high prices vis-a-vis the defendants and that this discrimination as opposed to seller's legal choice as to whom it would sell directly has caused it injury.

The other cases cited in support of defendants' proposition deal with a related factual question. The cases upon which Klein relies involve situations in which seller has refused to deal with plaintiff either directly or indirectly. See cases cited at *237 F.2d at 14 n.1*. Since seller has a right under the Sherman Act to pick its customers, courts have used the "different purchasers" language of Section 2(a) to dismiss cases in which these plaintiffs have sought to characterize this seller action as price discrimination on the legitimate **[**16]** ground that the refusal to sell case involves only One purchaser. But this question raises a wholly different issue than that of the case at hand in which there are different purchasers.

A number of factors suggest that these cases, while correct on their facts, have overstated the rule. First, a review of the statute reveals that Section 2(a) does not contain explicit language limiting the right to sue to actual purchasers. The relevant language states:

> **[*262]** ***HN10***[] 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 . . .

Courts have focused on the "different purchasers" language in divining the actual purchaser rule. Yet the statute makes no reference to who has the right to maintain a price discrimination suit.

Second, two cases have rejected an across-the-board application of the actual purchaser rule. In *Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 377-78 (N.D.Ga.1975)*, *Aff'd, 535 F.2d 313 (5th Cir. 1976)*, *Cert. Denied, 429 U.S. 1096, 97 S. Ct. 1113, 51 L. Ed. 2d 543 (1977)* (appeals **[**17]** taken on other issues), the court rejected the purchaser-standing requirement, directing that a non-purchaser who was injured by reason of the price discrimination could bring an action under Section 2(a). That court relied on a previous Fifth Circuit case, *Littlejohn v. Shell Oil Co., 483 F.2d 1140*, Cert. denied, *414 U.S. 1116, 94 S. Ct. 849, 38 L. Ed. 2d 743 (1973)*. There, plaintiff was a gas station operator who alleged that defendants sold gas to consumers at lower prices than it sold it to other gas stations. Plaintiff failed to allege that he bought gas from defendants. The court, in a footnote, rejected the theory that plaintiff lacked standing simply because it was not a purchaser on the ground that one of the purposes of Section 2(a) was to grant protection to a competitor whose business is injured by the discriminatory pricing policies. *483 F.2d at 1143 n.3*. Plaintiff had alleged the occurrence of such an injury.

This Court submits that Littlejohn properly focuses the inquiry as to who has the right to sue on whom the discriminatory pricing injures. Two Supreme Court cases interpreting the coverage of Sections 2(a) and 2(d) indicate that any statutory construction of the **[**18]** Robinson-Patman Act requires a broad look at the basic purposes of the Act with a view towards ending the injury that results from the proscribed conduct.

In *Perkins v. Standard Oil Co., 395 U.S. 642, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)* the Court held that plaintiff, a direct buyer from seller-defendants, could recover damages suffered as a result of a price advantage granted to another buyer from defendant and passed on through two subsidiaries, the final subsidiary being a competitor of plaintiff. The Court's analysis rested on the conclusion that where a plaintiff can show a causal link between a price discrimination violation and an injury that it suffered, recovery of damages is proper "regardless of the "level' in the chain of distribution on which the injury occurred." *395 U.S. at 648, 89 S. Ct. at 1874*.

In *F. T. C. v. Fred Meyer, 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968)*, the Court interpreted Section 2(d) of the Act making it unlawful for a supplier in interstate commerce to grant advertising or other sales promotional allowances to one "customer" who resells the supplier's "products or commodities" unless the allowances are " "available on proportionally **[**19]** equal terms to all other customers competing in the distribution of such products or commodities.' " Fred Meyer raised the question of the proper construction of the term "customer." Defendants argued for a narrow construction limiting its scope to customers who were similarly situated in the chain of distribution. Thus when a retailer who was a direct buyer (Fred Meyer) was given a promotional allowance by the supplier but retailers who purchased supplier's goods through a wholesaler were not provided such allowances there would be no violation of the Act. The Court rejected this narrow view. Noting that the purpose of the Act was to protect small retailers who had to compete with big concerns such as Fred Meyer, the Court held that indirect purchasers were "customers" for purposes of Section 2(d).

While defendants correctly argue that neither Perkins nor Fred Meyer is directly on point to the question of whether an indirect purchaser may sue under Section 2(f), the cases do indicate that any statutory inquiry regarding the right to **[*263]** bring an action should focus on the substantive questions of causation and injury. [8.] One of the central purposes of the Robinson-Patman **[**20]** amendments was to remedy competitive injury at the secondary level that arises from price discrimination. See *F. T. C. v. Anheuser-Busch, Inc., 363 U.S. 536, 543-44, 80 S. Ct. 1267, 4 L. Ed. 2d 1385 (1960)*; *F. T. C. v. Morton Salt Co., 334 U.S. 37, 43, 68 S. Ct. 822, 92 L. Ed. 1196 (1948)*. Thus ***HN11***[] if plaintiff, even as an indirect purchaser, can show that it has suffered competitive injury at the secondary level from conduct proscribed under the Act, it has the right to maintain a price discrimination action.

[21]** Defendants also argue, however, that an indirect purchaser cannot as a matter of law show that it has suffered competitive injury as required by Section 2(a). [9.] Plaintiff has pled that the price discrimination enabled defendants to outbid it and win many domestic contracts. Defendants' contention that plaintiff cannot possibly make such a showing may be reduced to a question of practical economics.

In the leading case of *Secatore's, Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (C.D.Mass.1959)*, the court held that a supplier may discriminate in price between a **[**22]** retail customer and a consumer customer, giving the latter a lower price, where the retailer would not have been able to compete with the supplier for the business of that consumer customer were he to have been afforded equal price treatment. The basis of this argument is simple: the direct-purchase consumer will purchase a standardized commodity from the cheapest source. If the supplier sells to the retailer at the same price that it offers the consumer, the consumer will buy from the supplier since the retailer will have to add a surplus to make a sale worthwhile. Secatore's reasoned that if equality cannot help, and that is all the law requires, then discrimination cannot injure.

Defendants apply that reasoning to this case, arguing that since it is apparent that plaintiff purchases through a middleman while defendants have the legal competitive advantage of direct purchasing, plaintiff cannot be injured even if seller does practice price discrimination.

The problem with a general application of this theory is that the price of the commodity involved in the discriminatory transaction may not be the sole factor in determining competition. In dealing with a standardized product **[**23]** such as gasoline where a retailer acquires it for immediate resale, the price of that commodity plays the determinative role in competition. Yet in the sale of a complicated product like steel cranes, the price of steel is only one factor of an eventual sale. Assuming equality in the price of steel, as sold to defendants and the wholesalers, perhaps plaintiff could show that lower shipping costs, advanced technology, absence of duty payments, cheaper labor costs, etc., would enable it to compete with defendants even if it had to absorb the wholesalers' surcharge on the steel. In *Sano Petroleum Corp. v. American Oil Corp., 187 F. Supp. 345, 355*

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8. See also, *Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954)*, in which the Court held that a plaintiff who maintained an Intrastate business could bring a price discrimination action against a competitor who maintained prices in interstate transactions but cut prices in intrastate transactions, thereby driving plaintiff out of business. Despite the local nature of the commerce involved, the Court noted that the requisite injury under the Act had occurred competitive injury at the primary level and defendant's connections with interstate commerce sufficed to meet Section 2(a)' § jurisdictional requirements.

9. ***HN12***[] The competitive injury requirement of Section 2(a) arises out of the following language of that section:

It shall be unlawful . . . 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 . . .

(E.D.N.Y.1960), a case cited by defendants, the court relied on Secatore's, but also recognized the limits **[*264]** of its application. Thus until plaintiff has had an opportunity to show the existence of manufacturing, transportation, or labor efficiencies that would have absorbed the wholesalers' surcharge, the Court would be acting prematurely if it dismissed these claims.

ACCORDINGLY IT IS HEREBY ORDERED that for the reasons stated herein, defendants' motion to dismiss for failure to state a claim is DENIED.

[Mid-West Paper Products Co. v. Continental Group, Inc.]

United States Court of Appeals for the Third Circuit

December 12, 1978, Argued ; March 26, 1979, Decided

Nos. 78-1736, 78-1746, 78-1776, 78-1796

Reporter

596 F.2d 573 *; 1979 U.S. App. LEXIS 15930 **; 1979-1 Trade Cas. (CCH) P62,531

MID-WEST PAPER PRODUCTS COMPANY, Appellant v. CONTINENTAL GROUP, INC., AMERICAN BAG AND PAPER CORPORATION, CHASE BAG COMPANY, HARLEY CORPORATION, ST. REGIS PAPER COMPANY; SHOPPING CART, INC., Individually and on behalf of all others similarly situated, Appellant v. CONTINENTAL GROUP, INC., AMERICAN BAG AND PAPER CORPORATION, CHASE BAG COMPANY, HARLEY CORPORATION, ST. REGIS PAPER COMPANY; 86TH STREET FOOD SPECIALTY, INC. C. G. DIARIES, INC. and 3 J'S FARMS, INC., Appellants v. CONTINENTAL GROUP, INC., AMERICAN BAG AND PAPER CORPORATION, CHASE BAG COMPANY, HARLEY CORPORATION, ST. REGIS PAPER COMPANY; MURRAY'S OF BAEDERWOOD, INC., on behalf of itself and all others similar situated, Appellant v. CONTINENTAL GROUP, INC., AMERICAN BAG AND PAPER CORPORATION, CHASE BAG COMPANY, HARLEY CORPORATION, ST. REGIS PAPER COMPANY.

Subsequent History: **[**1]** As Amended April 5, 1979.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA D.C. Nos. 76-3935, 76-3524, 76-3956, and 77-1516

Core Terms

purchasers, treble damages, bags, anti trust law, antitrust, injunctive relief, competitors, consumer, price-fixing, overcharge, indirect, prices, defendants', supermarket, violators, pass-on, courts, conspiracy, district court, subsidiary, damages, summary judgment, manufacturer, factors, standing to sue, anticompetitive, cost-plus, suits, products, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

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

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN1[] **Remedies, Damages**

As a matter of law an antitrust violator may not, as a general matter, interpose as a defense that the direct purchaser has not been injured because it had passed on the illegal overcharge to its own customers.

Antitrust & Trade Law > Clayton Act > General Overview

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

See Section 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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN3[] **Remedies, Damages**

A direct purchaser suing for treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, is injured within the meaning of § 4 by the full amount of the overcharge paid by it and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge.

Antitrust & Trade Law > Clayton Act > Defenses

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

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN4[] **Clayton Act, Defenses**

Illinois Brick adopted a rule of symmetry with respect to the offensive use of "pass-on," thereby barring indirect purchasers from suing for treble damages whenever the antitrust defendant would be precluded from asserting the pass-on defense against a direct purchaser.

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

HN5[] **Private Actions, Remedies**

Under Hanover Shoe and Illinois Brick, the pass-on theory may still be used, offensively or defensively, in the limited circumstances when tracing the interaction of market forces is unnecessary. The only situation clearly delimited by the Supreme Court, is an exception carved out for the situation where there is a pre-existing, fixed-quantity, cost-plus contract between the direct purchaser and its customer, as well as between all other parties in the distribution chain from the direct purchaser to the plaintiff, so that the plaintiff has absorbed the illegal overcharge in its entirety.

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

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

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

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

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN6[] **Discovery, Methods of Discovery**

At times, a remedy may be had through summary judgment, by which the protracted pretrial process may be brought to a prompt adjudication 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. This device has considerable utility, because although the non-moving party is entitled to the benefit of all reasonable doubts and inferences, when a motion for summary judgment is made and supported as provided in *Fed. R. Civ. P. 56*, 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.

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

HN7[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment, when appropriately granted, has been upheld even in antitrust actions, where summary procedures traditionally are sparingly used.

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

HN8[] **Private Actions, Remedies**

In order to recover treble damages, the plaintiff must prove actual causation that it has been harmed by the defendants' infraction of the antitrust laws with "reasonable certainty."

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

HN9[] Actual Monopolization, Anticompetitive & Predatory Practices

Admittedly, at least in an oligopolistic market, a price-fixing arrangement creates an umbrella under which a competitor may safely raise its prices without fear of a corresponding decrease in demand for its product. But in order to prevail, a purchaser from a competitor must prove more than the creation of an umbrella; it must also establish the more difficult proposition that its supplier would have sold to it at a lower price had the conspiracy not existed.

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

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

HN10[] Private Actions, Standing

Although many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of someone who is an immediate victim of the violation, and if the flood-gates were opened to permit treble damage suits, the lure of a treble recovery would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress.

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

HN11[] Private Actions, Standing

When a manufacturer sells its product to a subsidiary before making it available to the public, to bar the purchaser from the subsidiary from suing on the authority of Illinois Brick would invite evasion of the antitrust laws by the simple expedient of inserting a subsidiary between the violator and the first noncontrolled purchaser.

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN12[] Establishment, Elements

Under certain circumstances, a court will regard a parent and subsidiary as one entity. This is so, for example, when the parent dominates and controls the subsidiary to such an extent that the subsidiary is deemed to be an agent of the parent.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

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

HN13[] Remedies, Injunctions

See *Section 16* of the Clayton Act, *15 U.S.C.S. § 26*.

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

HN14[] Private Actions, Remedies

In contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses that the Supreme Court emphasized when limiting the availability of treble damages.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN15[] Clayton Act, Claims

Courts have held that for purposes of *§ 16* of the Clayton Act the complainant need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur, and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under *§ 16* has been framed in terms of a proximate cause standard that is less constrained than that under § 4 of the Clayton Act and which might in fact be no more rigorous than the general rule of standing.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN16[] Clayton Act, Remedies

For *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

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

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Environmental Law > Air Quality > Enforcement > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

HN17[] **Justiciability, Standing**

Section 16 of the Clayton Act imposes a lower threshold standing requirement than § 4 of the Clayton Act. *Section 16* has been applied more expansively, both because its language is less restrictive than that of § 4, and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy. A party with standing under § 4 ordinarily will have standing under *§ 16*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

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

HN18[] **Remedies, Damages**

Courts take a less constrained view of standing in suits involving injunctive relief than in those demanding treble damages to achieve standing under *§ 16* of the Clayton Act the petitioner must demonstrate that he is threatened with loss or injury proximately resulting from the antitrust violation.

Antitrust & Trade Law > Clayton Act > Claims

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

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 > Injunctions

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

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

HN19[] **Clayton Act, Claims**

It is apparent from the language of *§ 16* of the Clayton Act that the applicable standing rules in suits to enjoin antitrust violations are the general rules of standing. The plaintiff need show only that he is threatened by injury proximately caused by the defendant.

Counsel: Mitchell A. Kramer (argued), Steven Kapustin, Stuart Peim, Kramer & Salus, Philadelphia, Pa., for appellant Mid-West Paper Products Co.

Patrick T. Ryan (argued), William J. Lehane, Wilson M. Brown, III, Drinker, Biddle & Reath, Philadelphia, Pa., Larry L. Williams, Clifford, Warnke, Glass, McIlwain & Finney, Washington, D. C., for appellee Continental Group, Inc.

Arnold Levin (argued), Josephine Stamm, Adler, Barish, Daniels, Levin & Creskoff, Philadelphia, Pa., Richard J. Molish, Langhorne, Pa., for appellant Shopping Cart, Inc.

Edward C. German, Joseph Manta, Philip A. Ryan, LaBrum & Doak, Philadelphia, Pa., for appellee American Bag and Paper Corp.

Richard D. Greenfield, Bala Cynwyd, Pa., Philip Stephen Fuoco, Haddonfield, N. J., Eric L. Keisman, Wolf, Popper, Ross, Wolf & Jones, New York City, for appellants 86th Street Food Specialty, Inc., C. G. Dairies, Inc., and 3 J's Farms, Inc.

Henry T. Reath (argued), Michael M. Baylson, Peter J. Hoffman, Duane, Morris & Heckscher, Philadelphia, Pa. **[**2]** , for appellee Chase Bag Co.

Bernard M. Gross, Warren Rubin (argued), Gross & Sklar, P. C., Philadelphia, Pa., for appellant Murray's of Baederwood, Inc.

Benjamin M. Quigg, Jr., Morgan, Lewis & Bockius, Philadelphia, Pa., Michael L. Denger, Sutherland, Asbill & Brennan, Washington, D. C., for appellee Harley Corp.

Ralph W. Brenner (argued), T. Michael Mather, Steven R. Fischer, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., H. Richard Wachtel, Grant S. Lewis, LeBoeuf, Lamb, Leiby & MacRae, New York City, for appellee St. Regis Paper Co.

Judges: Before ALDISERT, ADAMS and HIGGINBOTHAM, Circuit Judges.

Opinion by: ADAMS

Opinion

[*575] OPINION OF THE COURT

In this appeal we are called upon to apply the teaching of *Illinois Brick Co. v. State of Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, to a number of settings, all in the context of a series of antitrust actions brought against manufacturers of consumer bags, alleging illegal price fixing under the Sherman Act and seeking both treble damages and injunctive relief. Because none of the plaintiffs purchased bags directly from the defendants, the district court relied on the holding **[**3]** in Illinois Brick that indirect purchasers from antitrust violators may not as a general matter sue for treble damages, granted defendants' motions for summary judgment, and dismissed the suits in their entirety.

With respect to all the plaintiffs, excepting only Mid-West Paper Products Company, we agree with the district court that Illinois Brick bars their claims for treble damages. But in our view such plaintiffs may still seek injunctive relief. We also believe that summary judgment on Mid-West's suit is inappropriate at least at this time.

I. FACTUAL AND PROCEDURAL HISTORY

These private antitrust actions were instituted in the wake of a grand jury indictment charging five corporations and seven individuals engaged in the manufacture of consumer bags with fixing prices in violation of *section 1* of the Sherman Act. [1]

[4]** The criminal indictment, the language of which was closely tracked in the complaints filed in the private civil actions, described consumer bags as single or multilayered paper bags that may also contain linings or coatings made from other materials and that are employed to prepackage products then marketed in them. Consumer bags are designed for capacities of less than twenty-five pounds. They often have printed exterior designs describing their contents and are used for packaging a variety of products, including pet foods, cookies, tea, coffee, and chemicals.

Plaintiffs in the civil actions fall into three categories: The first group, which includes Shopping Cart, Inc., 86th Street Food Specialty, Inc., C. G. Dairies, Inc. and 3 J's Farms, Inc., consists of supermarkets and retail grocery stores that do not purchase consumer bags directly from the defendants or from anyone else, but purchase products that are packaged in consumer bags for resale to their customers.

In the second category is Murray's of Baederwood, Inc. (Murray), a grocery store and delicatessen that sells products packaged in consumer bags, and also purchases empty consumer bags in which it packages its own **[**5]** brand of ice cream. The bags admittedly are not purchased directly from **[*576]** any of the defendants, but are for the most part bought from middlemen and wholesalers. However, one of Murray's officers suggested in a deposition that one of the firms from which Murray purchases bags "is a paper supplier and it's possible they manufacture. I don't know." [2] Together, the first two classifications will be referred to as the "supermarket plaintiffs."

Finally, there is Mid-West Paper Products Company (Mid-West), a middleman that purchases bags for resale to automobile manufacturers, which in turn put machine parts in the bags. Mid-West buys bags directly from various manufacturers, including Great Plains Bag Company (Great Plains), a subsidiary of defendant Continental Group, Inc. The parties are in dispute whether these bags are properly denominated consumer bags, rather than kraft bags.

Named as defendants in these actions are the five corporations listed in the criminal indictment: Continental **[**6]** Group, Inc., American Bag and Paper Corp., Chase Bag Co., Harley Corp., and St. Regis Paper Co. The cases involved in this appeal as well as other suits were consolidated for trial in the Eastern District of Pennsylvania, where plaintiffs sought certification to represent a class, and asked for treble damages and injunctive relief.

The district judge at first limited discovery to matters relevant to the class certification question. After the Supreme Court's decision in Illinois Brick, however, the judge requested the parties to show cause why the cases should not be dismissed because of that precedent. On April 5, 1978, summary judgment was granted in favor of the defendants on the authority of Illinois Brick. The order was not accompanied by an opinion. Plaintiffs filed a timely appeal.

II. Illinois Brick

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[1] Of the five corporations indicted, two entered pleas of nolo contendere, two were convicted after jury trials, and one was found not guilty by the jury. *United States v. Continental Group, Inc., 456 F. Supp. 704 (E.D.Pa.1978)*. In addition to the criminal actions, the government filed a civil suit seeking injunctive relief, Civ. No. 76-3377 (E.D.Pa.), and several direct purchasers have sued for treble damages and injunctive relief.

[2] App. 231a.

According to Justice White, the author of the Illinois Brick opinion, the result there was logically compelled by the Court's earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In Hanover Shoe, a company that had illegally overcharged its customers was sued by one of them for treble **[**7]** damages under § 4 of the Clayton Act. [3] It was determined there that ***HN1***[] as a matter of law an antitrust violator may not, as a general matter, interpose as a defense that the direct purchaser has not been injured because it had passed on the illegal overcharge to its own customers. As described in Illinois Brick, the Court in Hanover Shoe

[8]**

> held that except in certain limited circumstances, ***HN3***[] a direct purchaser suing for treble damages under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge paid by it and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were in fact injured by the illegal overcharge. *392 U.S., at 494, 88 S. Ct. at 2232*. The first reason for the Court's rejection of this offer of proof was an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge. *Id., at 492-493, 88 S. Ct. at 2231*. A second reason for barring the pass-on defense was the Court's concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality" because indirect purchasers "would have only a tiny stake in **[**9]** the lawsuit" and hence little **[*577]** incentive to sue. *Id., at 494, 88 S. Ct. at 2232*. [4]

With Hanover Shoe already foreclosing the defensive use of "pass-on" except in limited circumstances, the Court in ***HN4***[] Illinois Brick adopted a rule of symmetry with respect to the offensive use of "pass-on", thereby barring indirect purchasers from suing for treble damages whenever the antitrust defendant would be precluded from asserting the pass-on defense against a direct purchaser.

The Court reasoned that symmetry was required to protect defendants from the serious risk of multiple liability. [5] Also, it considered the "principal basis for the decision in Hanover Shoe " the perception that it would greatly complicate and reduce the effectiveness of treble damages proceedings if they were to include an analysis of the price and output decisions of a direct purchaser to determine how much of the illegal overcharge was **[**10]** absorbed by it and how much was passed on to be equally applicable to the assertion of pass-on theories by plaintiffs. [6] In sum, Illinois Brick concluded: "Permitting the use of pass-on theories under § 4 essentially would

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[3] ***HN2***[] Section 4 of the Clayton Act, *15 U.S.C. § 15* provides:

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

[4] *431 U.S. at 724-26, 97 S. Ct. at 2064* (footnotes omitted).

[5] Such risk was described as follows:

Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed-on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.

Id. at 730, 97 S. Ct. at 2067.

[6] *Id. at 731-33, 97 S. Ct. at 2068*.

transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers." [7]

[11]**

HN5[] Under Hanover Shoe and Illinois Brick, however, the pass-on theory may still be used, offensively or defensively, in the limited circumstances when tracing the interaction of market forces is unnecessary. Of relevance here, and the only situation clearly delimited by the Supreme Court, [8] is an exception carved out for the situation where there is a pre-existing, fixed-quantity, cost-plus contract between the direct purchaser and its customer, as well as between all other parties in the distribution chain from the direct purchaser to the plaintiff, so that the plaintiff has absorbed the illegal overcharge in its entirety.

[12]**

> In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. [9]

[13]**

[*578] Like many Supreme Court decisions that are the product of a system in which the cases to be reviewed are carefully selected, Illinois Brick not only addresses the immediate problem presented, it also serves as a guidepost for future litigation. Accordingly, we frame our response to the issues raised in this appeal with an eye toward

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[7] *Id. at 737, 97 S. Ct. at 2070*.

[8] In a footnote the Court commented, "another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id. at 736 n.16, 97 S. Ct. at 2070*. We relied on this remark to fashion an exception to the Illinois Brick rule in ***In re Sugar Industry Antitrust Litigation (Stotter & Co., Inc. v. Amstar Corp.), 579 F.2d 13 (3d Cir. 1978)***, where although the plaintiff purchased directly from a division (as well as from a subsidiary) of two of the alleged offenders, it did not buy the price-fixed product itself but rather, a product that incorporated the price-fixed product as one of its ingredients. See discussion in Part III.C. Infra.

[9] *431 U.S. at 736, 97 S. Ct. at 2070*. Under a cost-plus contract a product is sold at a specified markup above the seller's own cost. The supermarket plaintiffs submit that this exception should be interpreted expansively so as to permit recovery even if the pre-existing cost-plus contract does not fix the quantity of goods to be purchased. Under such circumstances, plaintiffs point out, it is always true that the illegal profit earned by defendants is traceable in its entirety to the indirect purchaser. Also, plaintiffs suggest, the exception should be stretched to include informal arrangements and patterns of cost-plus pricing. Nevertheless, we are bound by the clear dictate of Illinois Brick and may not extend the exception beyond the limited circumstances recognized by the Supreme Court. The Court explicitly rejected any exception for "cost-based rules of thumb" and other informal arrangements. See *id. at 743-44, 97 S. Ct. 2061*. Furthermore, the Court has deemed it to be legally significant that when a cost-plus contract does not specify a fixed quantity of goods, the direct purchaser may suffer a loss in sales to its customers and seek damages for its losses, thereby complicating the allocation of the recovery. See *id. at 736, 97 S. Ct. 2061*. But rather than instruct that whenever a direct purchaser sells under a variable quantity cost-plus contract, the indirect purchaser to whom the entire burden of the overcharge is traceable may sue for treble damages in the full amount while the direct purchaser may sue separately for additional damages attributable to lost sales, the Supreme Court evidently has concluded that even in such circumstances, the entire overcharge, multiplied threefold, is to be awarded to the direct purchaser. The Court's approach is understandable in that it avoids the complexities that would inevitably result from an alternative rule, such as that urged by the supermarket plaintiffs, since under an alternative rule, inquiry would have to be made into each sale consummated by the direct purchaser to ascertain the terms under which it was made and determine accordingly who may sue for recovery. Even more important, by adopting a general rule with a very circumscribed exception the Court has ensured that under all circumstances there will be an incentive for direct purchasers to sue, a factor that, in the Court's view, is necessary to promote effective enforcement of the antitrust laws, See e. g., *id. at 734-35, 97 S. Ct. 2061*. See Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. & Mary L.Rev. 883, 916-18, 925-26 (1975); Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L.Rev. 309, 329-30 (1978); Note, The Supreme Court, 1976 Term, 91 Harv.L.Rev. 70, 229-30 (1977).

blending with and complementing the themes that have been accentuated by the High Court. Thus, we must determine first, whether any of the supermarket plaintiffs qualify under the cost-plus contract exception so as to be in a position to sue defendants for treble damages. Second, although the Ratio decidendi in Illinois Brick focused upon the narrow issue of the necessity for symmetrical application of defensive and offensive use of the pass-on theory, defendants contend that that decision has broad implications regarding the general question of standing to sue. Therefore, we are required to assess whether Illinois Brick bars suits by purchasers from competitors of the antitrust defendants who allege that defendants' anticompetitive activity made it possible for their competitors to charge higher prices, thereby injuring plaintiffs. Third, **[**14]** it is necessary that we ascertain whether indirect purchasers, who may not sue for treble damages under § 4, may nonetheless seek injunctive relief under *§ 16*.

III. TREBLE DAMAGE CLAIMS

A. Indirect Purchasers

It is evident that none of the plaintiffs grouped in the first category supermarkets that purchased consumer bags only indirectly from the defendant manufacturers may maintain actions for treble damages unless they can prove that there were pre-existing, fixed-quantity, cost-plus contracts at each level of distribution between the direct purchasers from the defendants and the plaintiffs, and that therefore they have absorbed the illegal overcharge in its entirety. Similarly, to prevail on one of its theories, Murray must establish the existence of cost-plus contracts at each level of distribution. The district court apparently concluded on the basis of the documents before it that the plaintiffs could not prove that such contracts existed and that since there was no genuine issue as to any material fact, the defendants were entitled to judgment as a matter of law. On appeal, the supermarkets argue that summary judgment was inappropriate inasmuch as discovery with respect **[**15]** to the merits of the controversy had not yet proceeded, and since it was still possible for them to prove that they qualify under the cost-plus exception.

Any review of the propriety of a grant of summary judgment at the early stages of discovery is instructed by an appreciation of **[*579]** the nature of the trial process in federal courts. The Federal Rules of Civil Procedure are designed "to put an end to the "sporting theory of justice,' by which the result depends on the fortuitous availability of evidence or the skill and strategy of counsel." [10] **[**16]** One cornerstone of this scheme is the discovery apparatus, through which the issues in dispute may be isolated, defined, and clarified before trial and through which a party may ascertain what evidence, if any, his opponent intends to introduce on each issue. [11] It has been recognized, however, that the liberal discovery devices still leave ample room for strategic maneuvering by counsel. Protracted discovery could be used by a wealthy party to coerce an adversary with limited resources into submission. [12] Also, as the Supreme Court has warned,

> to the extent that (discovery) permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an In terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. [13]

Often, there will be no easy solution to the problem presented by an overuse of discovery. But, ***HN6***[] at times, a remedy may be had through summary judgment, another cornerstone of civil procedure, **[**17]** by which the protracted pretrial process may be brought to a prompt adjudication "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

[10] 8 Wright & Miller, Federal Practice and Procedure § 2001 at 18-19 (1970).

[11] See, e. g., *Hickman v. Taylor, 329 U.S. 495, 500, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*.

[12] See, e. g., *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110 (D.C.Tex.1976)*.

[13] *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S. Ct. 1917, 1928, 44 L. Ed. 2d 539 (1975)*.

any material fact and that the moving party is entitled to a judgment as a matter of law." [14] This device has considerable utility, because although the non-moving party is entitled to the benefit of all reasonable doubts and inferences, [15] **[**18]** "(w)hen a motion for summary judgment is made and supported as provided in (*Rule 56*), 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." [16] ***HN7***[] Summary judgment, when appropriately granted, has been upheld even in antitrust actions, [17] where summary procedures traditionally are "sparingly" used. [18]

In their effort to forestall final dismissal of their claims for treble damages, the supermarket plaintiffs are able to adduce only two sets of facts. First, they direct the Court's attention to the deposition of an officer of Shopping Cart, in which he stated that Shopping Cart acquires the bulk of its merchandise from its major supplier under a cost-plus arrangement. Second, the supermarket plaintiffs **[**19]** point out that Shopping Cart moved to compel defendants to answer interrogatories and to produce documents that were claimed to be necessary for Shopping Cart to establish that similar cost-plus **[*580]** arrangements existed at the other levels of distribution, [19] but that the district court dismissed the suits without deciding the motion.

However, in our view, the record amply demonstrates that there is no genuine issue regarding the material fact whether there are pre-existing, fixed-quantity, cost-plus **[**20]** contracts at each level of distribution. Shopping Cart, the only supermarket plaintiff that even purports to come within the cost-plus exception, conceded in a deposition of one of its officers that it does not have fixed-quantity contracts with its major supplier. Rather, it has only an informal oral arrangement, and its orders vary and are usually based on consumer demand during the prior week. [20] **[**21]** Indeed, the position taken by the supermarkets and admitted at oral argument is that it is sufficient for them to prove that there were pre-existing cost-plus arrangements, and that it is not necessary, nor are they prepared, to prove that any such arrangements were reduced to a formal contract or that they were for fixed quantities of goods. This stance is manifestly not in accordance with the dictate of Illinois Brick. [21] Under such circumstances, plaintiffs may not, consonant with the summary judgment procedure, insist upon taking a

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[14] *Fed.R.Civ.P. 56(c)*.

[15] *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*; 10 Wright & Miller, Federal Practice & Procedure § 2727 (1973).

[16] *Fed.R.Civ.P. 56(e)*. See also *First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; ***Sound Ship Building Corp. v. Bethlehem Steel Co. (Inc.), 533 F.2d 96, 99-100 (3d Cir. 1976)***; *Tunnell v. Wiley, 514 F.2d 971, 976 (3d Cir. 1975)*.

[17] See e. g., *First Nat'l Bank of Arizona, supra*; ***Sound Ship Building Corp., supra.***

[18] See *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*.

[19] Shopping Cart sought to compel the defendants to disclose the names and addresses of all direct purchasers of consumer bags since 1950. It maintains that this information is necessary for it to ascertain whether any of the direct purchasers sold to Shopping Cart's supplier under a "cost-plus arrangement", as well as whether any of the direct purchasers were owned or controlled by the defendants so as to "establish direct overcharges to the plaintiff which were unaffected by market forces." App. 558a.

[20] See App. 492a (Shopping Cart). The absence of fixed-quantity cost-plus contracts between the other supermarket plaintiffs and their suppliers is also apparent. See App. 254a (Murray's of Baederwood); 279a-280a, 302a, 307a-308a (C. G. Dairies); 325 (3 J's Farms); 391a-392a (86th Street).

[21] See note 9 and accompanying text Supra.

roundabout, lengthy, and costly discovery route before submitting to the inevitable conclusion that their actions for treble damages cannot prevail. [22]

B. Murray's of Baederwood

In addition to arguing that it comes within the cost-plus exception, [23] Murray advances the theory that it may sue for treble damages because of injuries it suffered as a direct purchaser of consumer bags from competitors of the defendants, [24] **[**23]** who allegedly were able to charge artificially inflated prices as a consequence of defendants' price-fixing. [25] Murray concedes that *State of Washington v. American Pipe and* ***[*581]*** *Construction Co., 280 F. Supp. 802 (W.D.Wash.1968)*, is the only case that supports this position. There, plaintiffs charged that "the alleged conspiracy raised the general price level in the market, and that non-conspirators sold their product under this umbrella **[**22]** at higher prices than would have prevailed absent the illegal activity." [26] The district court in State of Washington denied the defendant's motion to dismiss all claims based on transactions with non-conspirators for lack of standing to sue, holding that causation was a question to be resolved by the jury and that the alleged injury was not too remote to support recovery. Applying the "target area" test established by the Ninth Circuit for § 4 standing whether the injury occurred within the " "area (of economic activity) which it could reasonably be foreseen would be affected' by the anti-trust violation" [27] the district court concluded that the purpose and foreseeable

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[22] Cf. *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 556 (2d Cir. 1977)*; *Donofrio v. Camp, 152 U.S.App.D.C. 280, 283-84, 470 F.2d 428, 431-32 (1972)* (both cases indicating that plaintiffs have no right to continue discovery when suit is groundless).

[23] See Part IIIA Supra.

[24] Apparently Murray believes that Illinois Brick would preclude indirect purchasers from competitors of the defendants from suing. Although this is a possibility, it is by no means a foregone conclusion. The Hanover Shoe-Illinois Brick rule is predicated in part on the perceived need to concentrate the recovery in direct purchasers from the defendants so that there be one group with an incentive to sue and enforce the antitrust laws. See text at note 4 Supra. If ever confronted with the issue, the Supreme Court may well conclude that there is no reason to give an added incentive to sue to direct purchasers from competitors of the defendants, and consequently no reason to deviate from the general rule that a plaintiff may recover only for harm sustained by it. See also note 46 Infra.

[25] Murray's argument is premised upon the uncontroverted averment in the deposition of one of its officers that "it's possible" that one of its suppliers of consumer bags also manufactures the bags. See app. 231a. It may well be that this would be proven false after further discovery, and that consequently Murray is in fact not a direct purchaser from a competitor of the defendants. But defendants, upon whom the burden rests to show that no dispute exists as to a material fact, have not met their burden in this regard, and we therefore must accept the uncontroverted statement of Murray's officer as true for purposes of reviewing the district court's grant of summary judgment. See *Smith v. Pittsburgh Gage and Supply Co., 464 F.2d 870, 874 (3d Cir. 1972)*.

[26] *280 F. Supp. at 805*.

[27] *Id. at 807*, Quoting *Hoopes v. Union Oil Co. of Calif., 374 F.2d 480, 485 (9th Cir. 1967)* and other Ninth Circuit cases. Originally, the "target area" test was framed as encompassing plaintiffs who were within "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." See *Conference of Studio Unions v. Loew's Inc., 193 F.2d 51, 55 (9th Cir. 1951)*, Cert. denied, *342 U.S. 919, 72 S. Ct. 367, 96 L. Ed. 687 (1952)*. The injection of a foreseeability concept into the description of "target area" as occurred in State of Washington and some Ninth Circuit cases has been roundly criticized. Thus, for example, Professors Areeda and Turner have observed:

There is something to be said for excusing the defendant from damage liability for injuries that he neither intended nor could reasonably foresee. The law of torts often grants that excuse, and punitive treble damages create even more reason to do so. But query whether all reasonably foreseeable injuries should be recognized for antitrust purposes. What is foreseeable or even intended is not necessarily appropriate for antitrust protection.

2 P. Areeda & D. F. Turner, ***Antitrust Law*** P 334d at 165-66 (1978). See also Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 835 (1977); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits The Twenty-Third Annual Antitrust Review, 71 Colum.L.Rev. 1, 28-30 (1971).

consequence of the alleged conspiracy was to raise the market price of the commodity in question by eliminating competition among the conspirators.
[24]**

A literal reading of § 4 might arguably support Murray's contention, because it affords treble damage relief to "(a)ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws." As the Supreme Court has noted, however, notwithstanding the apparent breadth of this provision, the district and circuit "courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [28] In addition, it has been recognized that "antitrust violations admittedly create many foreseeable ripples of injury to individuals, but the law has not allowed all of those merely affected by the ripples to sue for treble damages." [29] Therefore, a § 4 standing doctrine has been forged so as to confine the availability of treble damages "to those individuals whose protection is the fundamental purpose of the antitrust laws." [30] **[**26]** Traditionally, such parties have been identified under the alternative techniques of measuring the directness of the **[*582]** injury and asking whether they fall within the "target area" of the **[**25]** violation. [31]

Judge Garth, in Cromar Co. v. Nuclear Materials and Equipment Corp., 543 F.2d 501 (3d Cir. 1973), carefully surveyed the development in this Court of the doctrine of standing to assert a claim for treble damages. He concluded that the cases previously decided "create no binding test that is determinative of standing." "Regardless of the name given to a particular test or standard," he continued, the precedents are to be understood as representing a functional analysis of the factual context presented in each case.

> so as to preserve the effectiveness of **[**27]** the treble damage remedy without overextending its availability. The plaintiffs' relationship to the alleged violator of the antitrust laws the directness or indirectness of the injury as well as the plaintiff's position in the area of the economy threatened by the alleged anticompetitive acts are among the factors to be considered in resolving standing. No single formula captures the many considerations involved in determining whether the plaintiff is one "whose protection is the fundamental purpose of the antitrust laws." *In re Multi-district Vehicle Air Pollution, supra (481 F.2d) at 125*. [32]

As Judge Gibbons observed on a later occasion, this approach "recognizes that § 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems." [33]

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[28] *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14, 92 S. Ct. 885, 891, 31 L. Ed. 2d 184 (1972)*. Interestingly enough, while approving the judicial creation of a treble damage standing doctrine, See id., the Supreme Court has for the most part abstained from participating in the formulation of its content, permitting the lower courts to struggle on their own with the difficult task of identifying the contours of such doctrine. See Berger & Bernstein, Supra note 27, at 841-42.

[29] *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499 (9th Cir. 1977)*. See also *Calderone Enterprises, Inc. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971)*, Cert. denied, ***406 U.S. 930, 92 S. Ct. 1776, 32 L. Ed. 2d 132 (1972)***.

[30] *Cromar v. Nuclear Materials and Equipment Corp., 543 F.2d 501, 505 (3d Cir. 1976)*, Quoting *In re Multidistrict Vehicle Air Pollution M. D. L. No. 31, 481 F.2d 122, 125 (9th Cir.)*, Cert. denied, ***414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973)***.

[31] See In re Multidistrict Vehicle Air Pollution Litigation M. D. L. No. 31, supra, *481 F.2d at 126-28* (collecting both direct injury and target area cases). Considering both tests to be too restrictive, the Sixth Circuit recently applied a "zone of interests" test, drawn from the administrative law context. See *Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975)*. For an historical summary and discussion of these tests, see generally, Berger & Bernstein, Supra note 27, at 813-35.

[32] *543 F.2d at 508-09*.

[28]**

Although it would not be feasible to make a comprehensive list of the factors that must be considered in evaluating each standing problem, a number may be identified, particularly when attention is focused upon a concrete factual configuration. Indeed, in applying a functional analysis to determine whether Murray has standing in its role as a purchaser from a competitor of the defendants, we may beneficially rely upon considerations emphasized by the Supreme Court when dealing with two other matters. These issues, the definition of antitrust injury [34] **[**29]** and the use of pass-on theories, [35] although "analytically distinct" from standing, [36] are nevertheless related in that they, too, implicate the enforcement of the antitrust laws. For standing, pass-on, and antitrust injury each address different aspects of the 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. Together, they constitute the judicial gloss upon the words of § 4 by which the courts have patrolled the portals to a treble damage action.

Underlying the precepts that guard access to § 4 is the recognition that the treble damage action represents a congressional **[*583]** choice 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. [37] Accordingly, whether the issue is the definition of injury in § 4, or the use of **[**30]** 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," [38] **[**31]** while at the same time furthering the overriding goal of the antitrust laws preserving competition. [39] Aside from these basic objectives of antitrust enforcement, which occasionally are at odds with one another, 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 [40] and whether resolution of the claim will unduly

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[33] *Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90, 99 (3d Cir. 1977)*, Cert. denied, ***434 U.S. 823, 98 S. Ct. 69, 54 L. Ed. 2d 80 (1978)***.

[34] See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

[35] See *Illinois Brick, supra*; *Hanover Shoe, supra.*

[36] See *Illinois Brick, 431 U.S. at 728 n.7, 97 S. Ct. 2061* (discussing pass-on and standing). See also Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term 1977, 77 Colum.L.Rev. 979, 994-97 (1977), who concludes his discussion of the interrelationship between these concepts and the implications that they may have for one another with the remark that, "while all three doctrines rest on similar common sense notions of what is practical and fair, it is nevertheless wise to apply each of them separately in terms of its own history, logic, and purpose."

[37] See *Hawaii v. Standard Oil Co., supra, 405 U.S. at 262, 92 S. Ct. 885*.

[38] See e. g., *Pfizer, Inc. v. Government of India, 434 U.S. 308, 314, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)*; *Illinois Brick, supra, 431 U.S. at 746, 97 S. Ct. 2061*; *Brunswick Corp. v. Bowl-O-Mat, Inc., supra, 429 U.S. at 485-86, 97 S. Ct. 690*. See also *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-39, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*.

[39] See, e. g., *Northern Pacific Ry. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *Standard Oil Co. v. FTC, 340 U.S. 231, 249, 71 S. Ct. 240, 95 L. Ed. 239 (1951)*.

[40] See, e. g., *Illinois Brick, supra, 431 U.S. at 730-31, 97 S. Ct. 2061*; *Hawaii v. Standard Oil Co., supra, 405 U.S. at 262-64, 92 S. Ct. 885*; *Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975)*; *Calderone Enterprises Corp., supra, 454 F.2d at 1295*.

complicate the trial by necessitating the pursuing of complex and conjectural economic lines of causation and effect. [41]

Turning now to the situation presented by Murray whether a direct purchaser from a competitor of the defendants "is one whose protection is the fundamental purpose of the antitrust laws" so as to have standing to sue it may be assumed arguendo that Murray has been harmed in some way **[**32]** by the Economic impact of defendants' price-fixing conspiracy. In the same vein, viewing Murray's position in the area of the economy threatened by defendants' alleged anticompetitive acts, it may be that Murray is within that level of the economy, consisting of purchasers of consumer bags, threatened by the price-fixing conspiracy. Both these points find support in Murray's theory that the defendants created an "umbrella" under which their competitors were able to charge higher prices than otherwise. Their significance is questionable, however, in light of the tenuous line of causation between defendants' price-fixing and the prices paid by Murray. Moreover, other factors indicate that Murray is not among those "whose protection is the fundamental purpose of the antitrust laws."

Murray is not in a direct or immediate relationship to the antitrust violators: The defendants secured no illegal benefit at Murray's expense; their tainted gains were reaped from those firms to which they actually sold their products; and Murray's added costs, if any, were pocketed by defendants' competitors, who presumably were free to charge a lower price if they so desired. In that "the law has not **[**33]** allowed all of those merely affected by the ripples to sue for treble damages," [42] we must inquire further whether Murray's injury should be held legally imputable to the defendants, and whether defendants should be required to pay damages for benefits derived by others and for an occurrence that did not advantage them.

[*584] The question whether Murray's injury should be legally attributable to the defendants depends in some measure on whether and how accurately [43] Murray's alleged injury is economically traceable to the defendants. That issue in turn parallels the pass-on issue raised in Illinois Brick because in both situations the plaintiff seeks to recover for higher prices set by, and paid by it to, parties other than the defendants. And the rationale underlying Illinois Brick that it would be almost impossible, and at the very least unwieldy, to attempt to trace the incidence of the anticompetitive effect of defendants' conduct bears even greater truth **[**34]** in the context of a purchaser from a competitor of the defendants. For, although the dissenting opinion apparently assumes otherwise, it cannot readily be said with any degree of economic certitude to what extent, if indeed at all, purchasers from a competitor of the price-fixers have been injured by the illegal overcharge.
[35]**

The outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural. As noted in Hanover Shoe, "(a) wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different . . ., he would have chosen a different price." [44] Insofar as cost of production is an element in arriving at a

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[41] See, e. g., *Illinois Brick, supra, 431 U.S. at 731-33, 97 S. Ct. 2061*; *Hanover Shoe, supra, 392 U.S. at 492-94, 88 S. Ct. 2224*. See generally Berger & Bernstein, supra note 27, at 845-58 (identifying policies relevant to antitrust standing).

[42] See text accompanying note 29 Supra.

[43] ***HN8***[] In order to recover treble damages, Murray must prove actual causation that it has been harmed by the defendants' infraction of the antitrust laws with "reasonable certainty." See *Pitchford v. Pepi, 531 F.2d 92, 104-05 (3d Cir.)*, Cert. denied, ***426 U.S. 935, 96 S. Ct. 2649, 49 L. Ed. 2d 387 (1976)***; *Rea v. Ford Motor Company, 497 F.2d 577, 589 (3d Cir.)*, Cert. denied, ***419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 106 (1974)***. Once Murray proves that it has been harmed, "the trier of fact may make a reasonable estimate of damages," Id., though there reaches a point at which it must be conceded that "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork." *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946)*. See also *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 160, 122-24, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. See generally, P. Areeda & D. F. Turner, Supra note 27, at P 335a; P 343.

price, each manufacturer operates at a different level of efficiency and sustains at least slightly varying expenses, thereby incurring different costs in creating the finished product. And in addition to actual cost, pricing decisions are based on various other considerations, such as marketing strategy and elasticity of demand. Although in selecting a price for its product a manufacturer must also take into account the market price for comparable items, to some extent its pricing decisions remain unaffected by the prices charged by others. This is so because of entry and exit conditions in the industry, the degree of interchangeability **[**36]** among the products, and time lags in adjusting to changes in output, price and demand in the market, to name just a few factors. Thus, the competitors of the price-fixers may well have charged the same price notwithstanding the conspiracy, and purchasers such as Murray would be hard pressed to prove otherwise. Indeed, given the fact that economists have difficulty explaining the patterns of interdependence in any oligopolistic industry, which itself is invariably a necessary condition for successful price-fixing, it cannot be said that the noncompetitive pricing behavior of any manufacturer would not have taken place absent the conspiracy. [45]

[37]**

[*585] Apart from its speculative nature, any attempt to determine the effect of defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that the Illinois Brick Court was desirous of avoiding if at all possible. [46] **[**39]** And as we read that decision, it is not only possible but imperative that such a transformation not occur in the present case. Illinois Brick represents in effect the proposition that when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge. [47] As explained in Illinois Brick, such an award not only deprives the violators of all the "fruits of their illegality" and deters further wrongdoing, it also compensates those victims who are most likely to assume the mantle of private attorneys general for the injuries they suffered. And by concentrating the entire award in the hands of the direct purchasers in all but unusual circumstances and thereby giving them an incentive **[**38]** to sue, effective and vigorous enforcement of the antitrust laws is, so far as the Supreme Court is concerned, for all practical purposes assured. [48] **[**40]** Once direct

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[44] *Hanover Shoe, supra, 392 U.S. at 492-93, 88 S. Ct. at 2231*.

[45] ***HN9***[] Admittedly, at least in an oligopolistic market, a price-fixing arrangement creates an umbrella under which a competitor may safely raise its prices without fear of a corresponding decrease in demand for its product. But in order to prevail, a purchaser from a competitor must prove more than the creation of an umbrella; it must also establish the more difficult proposition that its supplier would have sold to it at a lower price had the conspiracy not existed. On oligopolistic market structures, See generally L. Sullivan, Antitrust §§ 61, 115-17 (1977) and authorities cited therein; 2 P. Areeda & D. F. Turner, *Supra, note 27 at P 404*; Posner, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 Stan.L.Rev. 1562, 1571 (1969); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655 (1962).

[46] In addition, if a court were unwilling to extend the Hanover Shoe-Illinois Brick rule to the context of a suit by purchasers from competitors, See note 24 Supra, the complexities would be greatly multiplied, as plaintiffs would also be required to establish what portion of the alleged overcharge was absorbed by them.

[47] A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants. See, e. g., *Pitchford v. Pepi, supra, 531 F.2d at 107-09*.

[48] See *431 U.S. at 745-46, 97 S. Ct. 2061*. The Supreme Court noted that "direct purchasers sometimes may refrain from bringing a treble-damage suit for fear of disrupting relations with their suppliers," *Id. at 746, 97 S. Ct. at 2075*, but concluded that on balance this risk of non-enforcement does not warrant it to reconsider its conclusion that indirect purchasers are to be barred from suing. Given the fact that the Supreme Court evidently reached its decision without considering the possibility that purchasers from competitors could fill this gap in enforcement, we see no reason to expand upon the Supreme Court's

purchasers are singled out as the group " "whose protection is the fundamental purpose of the antitrust laws' " in such non-predatory price-fixing conspiracies and, through them, the objectives of the treble damage action are fulfilled, there appears to be little reason to expand the standing doctrine in a manner that would require complex and ultimately unrewarding economic analyses at trial, particularly where, as here, such analyses invariably are a prerequisite to establishing that the plaintiff has suffered compensable injury altogether. [49] **[**41]** In fact, given the result in Illinois **[*586]** Brick, it would be anomalous to permit purchasers from competitors of defendants who may not have been harmed at all to sue for the competitors' profits, when indirect purchasers, who always absorb part of defendants' overcharge, [50] may not sue the defendants.

Moreover, to permit a purchaser from a competitor of the defendants to sue for treble damages would appear to be incompatible with the antitrust goal of maintaining a competitive economy. Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits, because under the theory propounded by Murray, price fixers would be held accountable for higher prices that arguably ensued in the entire industry. [51] **[**43]**

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assessment of the issue by suggesting, as does the dissent, that granting standing to purchasers from competitors "is one way of preventing that risk of non-enforcement from becoming a reality." Infra at p. 596. For, as we now know, on the basis of studies conducted in the wake of Illinois Brick, this fear of non-enforcement is not supported by the evidence; direct purchasers do indeed sue their suppliers under the antitrust laws and are "the backbone of private antitrust enforcement." See Handler, Antitrust 1978, 78 Colum.L.Rev. 1363, 1425-26 (1978). And although we agree with the dissent that enforcement efforts might be enhanced by granting purchasers from competitors standing to sue, as indeed would be the result whenever any plaintiff is granted standing to sue, we conclude that this benefit is outweighed by the countervailing factors discussed in the text.

[49] We recognize that on rare occasions it may be unnecessary to engage in such economic analyses because the particular competitor of the defendants that supplied the plaintiff would be able and willing to testify that it raised its prices by a specific amount as a result of the wrongdoers' pricing decisions. Nevertheless, inasmuch as we are fashioning a rule of standing, we must consider the general situation and not the unusual exception. To do otherwise would be to make determinations regarding standing to sue contingent upon what evidence a plaintiff has mustered at the time the court rules on the standing issue. In addition, given the other factors discussed in the text, we cannot say that were these problems of proof not present, a purchaser from a competitor would have standing to sue for treble damages.

The dissent apparently concedes that complex economic analyses usually would be required in treble damage suits brought by purchasers from competitors of the defendants, but maintains that there is little reason to believe that proof of damages would be significantly more complex or speculative than in actions by direct purchasers. Both with respect to the defendants and with respect to their competitors, the dissent points out, the price actually charged is known or easily ascertainable, and the only difficulty is in determining the price that would have been charged had the anticompetitive conduct not occurred. Infra at p. 599. What the dissent seems to overlook, however, is the purpose for which the admittedly speculative economic data is to be used in each situation. The direct purchasers have clearly been harmed by the price-fixing conspiracy in that they have absorbed at least a portion of the illegal overcharge, and would introduce the economic data merely to establish the amount of the illegal overcharge. As we know, an antitrust plaintiff is not held to the same standard of proof as are plaintiffs in other types of actions, and the factfinder is allowed to make a reasonable estimate of the amount of damages suffered. See note 43 Supra. In contrast, a purchaser from a competitor, in addition to proving the amount of damages suffered, ordinarily must also establish the very fact that it was injured, which fact it must prove with "reasonable certainty." See id. It therefore appears that a different sort of economic analysis is called for in each situation: whereas to establish the amount of damages, the factfinder simply has to settle on some approximation of the price that would have been charged by the defendants and their competitors in a competitive market, to establish the fact of injury, or causation, the factfinder must ascribe specific reasons to a competitor's pricing decisions and determine that such decisions would not have been made had one of a number of variables been slightly different. As discussed in the text accompanying notes 44-45 Supra, this task is difficult to perform, and indeed may be impossible.

[50] Only under an economist's hypothetical model either of perfect elasticity of demand or of a direct purchaser that does not wish to maximize profits would no portion of the overcharge be absorbed by the indirect purchasers. See Schaefer, Supra note 9, at 887-97, 901-06.

[51] The dissent attempts to minimize the potentially ruinous effect of such open-ended liability by suggesting that

Only businesses with a substantial share of a market are likely, by fixing prices, to significantly affect the prices charged by competing businesses. Thus, it can reasonably be assumed that there will only be large recoveries against large companies or

Notwithstanding the seriousness **[*587]** of the Per se violation present in this case, the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust **[**42]** laws. In this regard, it should be noted that Congress has enacted relatively stiff criminal penalties to punish those who flout the antitrust laws, [52] that the Supreme Court has been especially reticent in sanctioning multiple treble damage recoveries for the same injury, [53] and that other courts have been wary of permitting "overkill" recoveries, [54] whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition.

For these reasons, we conclude that Murray, in its role as a purchaser of consumer bags from competitors of the defendants, has no standing to sue the defendants for treble damages allegedly resulting from such purchases. We recognize that an alternative approach to erecting a standing barrier would be to give an opportunity to purchasers from competitors of price fixers, who allege that they were harmed in some way by the antitrust violation, to attempt to prove such harm and to recover treble damages if they succeed. Implicit in the doctrine of standing, however, is the recognition that the benefits that would flow from such an alternative are outweighed by its **[**44]** practical consequences. Thus, the § 4 standing doctrine "acknowledges that while ***HN10***[] many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of (someone) who is an immediate victim of the violation," and that "if the flood-gates were opened to permit treble damage suits . . ., the lure of a treble recovery . . . would result in an overkill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." [55] These countervailing factors, which have prompted courts to close their doors to all but those "whose protection is the fundamental purpose of the antitrust laws," were emphasized by the Supreme Court though in a slightly different context in Illinois Brick, and we are not free to ignore the thrust of its decision. **[**45]**

C. Mid-West Paper Company

With respect to Mid-West, the district court order granted summary judgment on the ground that Mid-West "did not purchase consumer bags directly from the defendants . . . . See *Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (97 S. Ct. 2061, 52 L. Ed. 2d 707) (1977)*." On appeal, defendants urge that this order be upheld for two reasons.

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a large group of smaller companies who are best able to withstand such losses. . . . Thus, the operation of the market would tend to prevent recoveries in suits such as this from being of a ruinous or anticompetitive dimension.

Infra at p. 598. We are not persuaded by this statement. Although we agree with the premise that "only businesses with a substantial share of a market are likely, by fixing prices, to significantly affect the prices charged by competing businesses," See generally, L. Sullivan, Antitrust §§ 61, 115-17 (1977) we do not believe that the conclusion that large recoveries will be borne by those companies "who are best able to withstand such losses" follows from it. Noncompetitive pricing patterns can prevail under a variety of market conditions, See generally, Hay & Kelley, An Empirical Survey of Price Fixing Conspiracies, 17 J. Law & Econ. 12 (1974), and a firm may become an industry price leader with a remarkable small "substantial" share of the market, simply because it has a larger share than any other company and is perceived for one reason or another to be the industry pace-setter. Given this fact, merely because a company has become an industry price leader, whether advertently or inadvertently, it does not mean that it can withstand the burdens of a treble damage recovery that is based upon profits obtained by the rest of the industry.

[52] See *15 U.S.C. § 1 (1976)*.

[53] See e. g., *Illinois Brick, supra, 431 U.S. at 730-31, 97 S. Ct. 2061*; *Hawaii v. Standard Oil Co., supra, 405 U.S. at 262-64, 92 S. Ct. 885*.

[54] See, e. g. *Cromar, supra, 543 F.2d at 506*; *Jeffrey v. Southwestern Bell, supra, 518 F.2d at 1131*; *Calderone Enterprises Corp., supra, 454 F.2d at 1295*.

[55] *Calderone Enterprises, supra, 454 F.2d at 1295*.

First, they maintain that the bags purchased by Mid-West from Great Plains, a subsidiary of one of the defendants, and resold by Mid-West for packaging automobile and machine parts, are not consumer bags. In support of this position, defendants submit that Great Plains does not manufacture consumer bags, and that Mid-West's purchase orders from Great Plains demonstrate such fact in that they describe the bags that were ordered either as kraft or as plain paper bags. Defendants also argue that because Mid-West admits that it is relying on the government indictment, it is bound by that indictment as well as by the government's bill of particulars that elaborates upon the indictment. And, defendants point out, neither of these documents mention the packaging of machine **[*588]** parts as a use of consumer **[**46]** bags. [56] Defendants further contend that Mid-West has not controverted their affidavits attesting that the bags in question are not consumer bags, but instead has rested on the unsupported allegations of its complaint. Accordingly, they assert, Mid-West has not shown that a dispute exists concerning a material fact so as to preclude summary judgment.

Whether the bags purchased **[**47]** by Mid-West are consumer bags is of course a question of fact. But the district judge's order does not indicate whether his grant of summary judgment was based upon a determination that the bags were not consumer bags. Indeed, particularly when the portion of the order addressing Mid-West's claim is compared with other portions of the order, the inference is that the judge dismissed Mid-West's claim on a legal rather than on a factual ground. [57] In such circumstances, we have no alternative but to remand the case so that the district court may make a finding as to the nature of the bags in question. We do not deem the fact that Great Plains is a subsidiary of Continental Group and describes its product as a kraft or paper bag to be determinative of the issue. Obviously, a manufacturer may not insulate its activities from scrutiny by compartmentalizing its corporate organization and then giving different names to its product, depending on the division that fabricates it. Nor do we regard Mid-West as being bound by the government's framing of its criminal case in its bill of particulars. Rather, so long as Mid-West is prepared to prove its charges, independent factual determinations **[**48]** must be made whether the bags bought by Mid-West bear the same characteristics as the bags described in the government indictment [58] **[**49]** and whether a price-fixing conspiracy existed with respect to the marketing of such bags. [59] Finally, inasmuch as samples of the bags were presented for In camera inspection by the district court, it cannot be said that Mid-West rested on the allegations in its complaint and pleadings and did not controvert defendants' affidavits.

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[56] Paragraph 6 of the government indictment states:

Consumer bags are used for packaging a variety of products including, among others, pet foods, cookies, tea, coffee, kitty litter, chemicals, and agricultural products. Consumer bags also include air sickness bags.

In response to the defendant's request in the criminal suit for a more specific definition of the term "consumer bags," the government filed a "Voluntary Bill of Particulars" that relied upon the defendants' price lists to identify the bags. None of the price lists mention the packaging of automobile or machine parts as one of the uses for the product being offered for sale.

[57] The order treats Mid-West's claim together with the claims of the supermarket plaintiffs that are grouped in the first category, which clearly were dismissed on the legal ground that such plaintiffs were indirect purchasers. In contrast, in dismissing the claim of another plaintiff, Sambo's Restaurants, Inc., the next paragraph of the order states that the dismissal is based "on the ground that the paper bag (Sambo's) purchases is not a "consumer bag.' "

[58] We note in this regard that paragraph 6 of the indictment did not purport to give an exhaustive list of uses for consumer bags, which are described in paragraph 5 in the following manner:

Consumer bags, also known in the trade as "small bags," are made from one or more plies of paper and may be combined with other materials used as linings and/or coatings. Consumer bags are preformed by the manufacturer in many styles and sizes according to customer specifications. Most consumer bags have printed exterior designs as specified by the customer. Consumer bags are designed for capacities of less than twenty-five pounds. They are normally used to pre-package products which are then marketed in such bags.

[59] We do not at this time address the question whether and in what circumstances a successful government prosecution would obviate the necessity for Mid-West to prove a price-fixing conspiracy. See *15 U.S.C. § 16*.

Defendants' second line of argument is that even conceding that the bags bought by Mid-West are consumer bags, as a matter of law Mid-West may not sue for treble damages because it did not purchase the bags directly from any of the defendants. To the extent that Mid-West bases its claim upon purchases from competitors of the defendants, we agree that Mid-West has no standing to sue, for the reasons elaborated **[*589]** upon in our discussion of Murray's cause of action. But Mid-West also purchased bags from a subsidiary of one of the defendants, and the possibility therefore exists that it may be entitled to sue defendants for injuries that resulted from these purchases.

Superficially, Mid-West's situation seems analogous to that of the plaintiff in *In re Sugar Industry Antitrust Litigation (Stotter v. Amstar), 579 F.2d 13 (3d Cir. 1978).* **[**50]** In that case, the plaintiff, which was seeking treble damages from refiners of sugar that had engaged in a conspiracy to fix prices, purchased from a subsidiary of one of the defendants candy that incorporated such sugar. Mid-West maintains that it, too, may benefit from our conclusion in Stotter that "at least for this purpose and this context, the subsidiary should be treated as the alter ego of the parent." [60] However, a closer look at the problem presented in Stotter makes it apparent that no such inference may be made with respect to this case. For in Stotter we recognized that ***HN11***[] when a manufacturer sells its product to a subsidiary before making it available to the public, to bar the purchaser from the subsidiary from suing on the authority of Illinois Brick "would invite evasion (of the antitrust laws) by the simple expedient of inserting a subsidiary between the violator and the first noncontrolled purchaser." [61] In contrast, the manufacturer-price fixer in the present case would not be insulated from suit under the Illinois Brick rule, because Mid-West is a direct purchaser from **[**51]** Great Plains and may sue it if it participated in this or any other price-fixing conspiracy. Accordingly, the rationale that underlay our willingness to disregard the separate legal existence of the subsidiary in Stotter is not applicable here.

Nevertheless, ***HN12***[] under certain other circumstances, a court will regard a parent and subsidiary as one entity. This is so, for example, when the parent dominates and controls the subsidiary to such an extent that the subsidiary is deemed to be an agent of the parent. [62] If Mid-West can establish facts that warrant holding Continental Group legally accountable for Great Plains' activities in that as a consequence of Continental's domination the subsidiary's prices were determined in accordance with the general price-fixing conspiracy, Mid-West would be entitled to sue defendants for damages resulting from **[**52]** its purchases from Great Plains.

In sum, then, Mid-West's case must be remanded to the district court for further proceedings to determine whether the bags purchased by Mid-West are consumer bags and whether Continental is to be held accountable for Great Plains' alleged participation in the conspiracy.

IV. INJUNCTIVE RELIEF

Aside from seeking treble damages, the various plaintiffs requested the district court to enjoin the defendants from continuing to conspire to fix prices. This request was based on *section 16* of the Clayton Act, *15 U.S.C. § 26*, ***HN13***[] which states in part:

> Any person, firm, corporation, or association **[**53]** 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 . . . .

The district court granted summary judgment in favor of the defendants, thus implicitly holding that injunctive relief was not available to the plaintiffs. Two lines of argument are now set forth by defendants **[*590]** to support this result with respect to the supermarket plaintiffs. [63]

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[60] ***579 F.2d at 18-19***.

[61] ***Id. at 19***.

[62] See, e. g., ***P. F. Collier & Son Corp. v. FTC, 427 F.2d 261, 266-67*** (6 Cir.), Cert. denied, ***400 U.S. 926, 91 S. Ct. 188, 27 L. Ed. 2d 186 (1970)***. See generally, W. M. Fletcher, Cyclopedia of the Law of Private Corporations § 277 (rev. ed. 1969).

[54]**

Defendants place primary reliance upon Illinois Brick. They interpret that case as defining who sustains judicially cognizable injury under the antitrust laws, and contend that if an indirect purchaser is considered not to have suffered actual injury for purposes of § 4, it also must be deemed not to be "threatened" with injury under *§ 16*. Also, defendants assert that the requirement, found in both § 4 and *§ 16*, that the injury or damage be proximately caused by the antitrust violation [64] is identical in each section, and that consequently Illinois Brick's ostensible holding that any injury sustained by indirect purchasers is not proximately caused by the antitrust violation, is equally relevant with respect to injunctive relief. Essentially, then, defendants maintain that in light of Illinois Brick the supermarket plaintiffs lack standing to seek injunctive relief.

[55]**

For a secondary argument, defendants submit that the supermarket plaintiffs have not demonstrated the irreparable injury that defendants claim is necessary to sustain a grant of injunctive relief. In that a consumer bag is a relatively miniscule element of the product purchased by the supermarkets, defendants maintain that any damage to the supermarkets is too minute to warrant injunctive relief. Furthermore, they argue that the supermarkets will be adequately protected by the injunctive relief already being sought, though apparently not yet obtained, by direct purchasers and by the government.

As in our treatment of standing to sue for treble damages under § 4, we look to the policies underlying *§ 16* to determine whether a party has standing to sue for injunctive relief. A private action for relief under *§ 16* is one of the weapons, together with private treble damage actions and government criminal and civil suits, in the arsenal established by Congress for policing the antitrust laws [65] and for vindicating "the important public interest in free competition." [66] In addition, *§ 16* shares with § 4 the objective of providing private relief from anticompetitive conduct that **[**56]** is injurious, or that threatens to be injurious, to a plaintiff. [67] But ***HN14***[] in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses that the Supreme Court emphasized when limiting the availability of treble damages. [68]

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[63] Apparently, both the defendants and Mid-West are of the belief that Mid-West's entitlement to injunctive relief is completely dependent upon whether Mid-West may sue for treble damages. That assumption overlooks the possibility that Mid-West may be found to have purchased consumer bags but that it may not sue defendants for treble damages because Continental Group is not legally accountable for its subsidiary's sales. In that event the issue would arise whether Mid-West, as a direct purchaser of consumer bags from competitors of the defendants, has standing to sue for injunctive relief. Inasmuch as neither side briefed that issue and since it is presently premature for decision, we merely note its existence. A parallel issue exists with respect to Murray, but we need not decide it either, since we conclude that Murray has standing to sue for injunctive relief in its capacity as an indirect purchaser, and "100 injunctions are no more effective than one." *Hawaii v. Standard Oil Co., supra, 405 U.S. at 261, 92 S. Ct. at 891*.

[64] See *Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731* (10 Cir.), Cert. denied, ***411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 399 (1973)*** ("The aggrieved party must satisfy the "by reason of' and/or "by' requirements found in sections 4 and 16 of the Clayton Act, respectively. This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury.")

[65] See Zenith Radio Corp., supra, 395 U.S. at 130-31, 89 S. Ct. 1562; *United States v. Borden Co., 347 U.S. 514, 518, 74 S. Ct. 703, 98 L. Ed. 903 (1954)*.

[66] *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502, 89 S. Ct. 1252, 1258, 22 L. Ed. 2d 495 (1969)*.

[67] See Zenith Radio Corp., supra, 395 U.S. at 130-31, 89 S. Ct. 1562.

[68] See In re Multidistrict Vehicle Air Pollution M. D. L. No. 31, supra, *481 F.2d at 130*.

The difference between the two sections is reflected in their language as well as in **[*591]** their judicial construction. Thus, with respect to § 4, a body of law has developed that defines when a person is "injured . . . "by reason of anything forbidden in the antitrust laws,' " [69] and Illinois Brick is the latest major refinement of that definition. Similarly, other cases have expounded upon the requirement that the injury be to the "business or property" of the plaintiff. [70] And as already seen above, a complicated doctrine of standing, unique to § 4, has been applied to limit the availability of treble damage actions to those parties who further the policy goals of such remedy. **[**58]**

In contradistinction to § 4, *§ 16* does not ground injunctive relief upon a showing that "injury" has been already sustained, but instead makes it available "against Threatened loss or damage." Furthermore, *§ 16* does not state that the threat must be to the plaintiff's "business or property," and courts accordingly have held that noncommercial interests are also protected. [71] Most significantly, however, *§ 16* by its terms entitles a party to injunctive relief "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." Mindful of these distinctions, ***HN15***[] courts have held that for purposes of *§ 16* the complainant "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur," [72] **[**60]** and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. [73] **[**61]** Indeed, the test for standing under *§ 16* has been framed in terms of a proximate **[**59]** cause standard that is

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[69] See, e. g., *Brunswick Corp., supra*; *Hanover Shoe, supra*; *GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-59 (2d Cir. 1972)*, Cert. denied, ***413 U.S. 901, 93 S. Ct. 3058, 37 L. Ed. 2d 1045 (1973)***.

[70] See, e. g., *Hawaii v. Standard Oil Co., supra*; ***Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978)***, Cert. granted, -- - U.S. -- , ***99 S. Ct. 830, 59 L. Ed. 2d 30 (January 9, 1979)***; *Reibert, supra*; *Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973)*, *Modified, 494 F.2d 1353 (1974)*.

[71] See, e. g., *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*; In re Multidistrict Vehicle Air Pollution M. D. L. No. 31, supra, *481 F.2d at 130-31*. See also *Hawaii v. Standard Oil Co., supra, 405 U.S. at 259-62, 92 S. Ct. 885*.

[72] ***HN16***[] (F)or *§ 16* of the Clayton Act, *15 U.S.C. § 26*, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, See *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 54-55, 47 S. Ct. 522, 527, 71 L. Ed. 916 (1927)*; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See *Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 279, 49 L. Ed. 518 (1905)*; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., supra, 274 U.S. at 54, 47 S. Ct. at 527*; *United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S. Ct. 690, 696, 96 L. Ed. 978 (1952)*; *United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953)*.

Zenith Radio Corp., supra, 395 U.S. at 130, 89 S. Ct. at 1580 (footnote omitted).

[73] See, e. g., id. at 125-33, 89 S. Ct. 1562; In re Multidistrict Vehicle Air Pollution M. D. L. No. 31, supra, *481 F.2d at 125-31*. See also *Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277 (3d Cir. 1978)*, where we noted that ***HN17***[] *§ 16*

imposes a lower threshold standing requirement than § 4 of the Clayton Act. L. Sullivan, (Antitrust (1970)) *Supra at 772*. *Section 16* has been applied more expansively, both because its language is less restrictive than that of § 4, See *Hawaii v. Standard Oil Co., 405 U.S. 251, 260-61, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy, See *id. at 261-62, 92 S. Ct. 885*; *Zenith Corp. v. Hazeltine, 395 U.S. 100, 131, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. A party with standing under § 4 ordinarily will have standing under *§ 16*. ***Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976)***; P. Areeda & D. Turner, Supra, § 335e.

Id. at 288-89.

"less constrained" than that under § 4 [74] and which **[*592]** might in fact be no more rigorous than the general rule of standing. [75]

We begin our examination whether, for purposes of injunctive relief, the defendants' price-fixing conspiracy may have been the proximate cause of any damage or loss incurred **[**62]** by the indirect purchasers, [76] **[**63]** by observing that Illinois Brick does not control this inquiry. That case, which was explicitly decided on grounds other than standing [77] and in any event never mentions *§ 16*, was determined earlier [78] to be relevant to the question whether a direct purchaser from a competitor of the defendants has standing to sue for treble damages. This conclusion was reached, however, only because similar policy considerations underlie the respective issues of standing to sue for treble damages and the use of pass-on theories in treble damage actions.

But no such common basis exists between the use of the pass-on theory in treble-damage actions and standing to obtain injunctive relief. The concerns that motivated the Supreme Court to bar offensive use of pass-on centered on problems created by the treble damage recovery. Obviously, the risk of exposure to multiple liability, the difficulty in tracing the allocation of the overcharge among different levels of purchasers, and the general desirability of symmetrical application of the pass-on theory to plaintiffs and defendants are wholly unrelated 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*. The Court in Illinois Brick concluded that the effectiveness of the treble damage action would be impaired by allocating the recovery among all those who paid the illegal overcharge **[**64]** rather than by concentrating the recovery in the hands of the direct purchasers for in that event no one group would have a sufficient incentive to sue. [79] With respect to injunctive relief, however, the entitlement of one group to sue does not diminish the incentive of another group to sue. In fact, enforcement of the antitrust laws is augmented by allowing any individual threatened by the anticompetitive activity to challenge it. In view of the markedly different policies upon which § 4 and *§ 16* are based, then, we cannot subscribe to defendants' broad assertion that Illinois Brick defined injury and proximate causation for purposes of both sections.

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[74] *Jeffrey v. Southwestern Bell, supra, 518 F.2d at 1132* ***HN18***[] ("Courts take a less constrained view of standing in suits involving injunctive relief than in those demanding treble damages. . . . To achieve standing under *§ 16* the petitioner must demonstrate that he is threatened with loss or injury proximately resulting from the antitrust violation.").

[75] See, e. g., ***Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976)*** (footnotes omitted):

HN19[] It is apparent from the language of *§ 16* that the applicable standing rules in suits to enjoin antitrust violations are the general rules of standing. The plaintiff need show only that he is threatened by injury proximately caused by the defendant.

[76] The question whether the damage sustained by indirect purchasers has been proximately caused by the antitrust violators for purposes of standing to sue for treble damages has, of course, been mooted by Illinois Brick's holding that as a matter of law indirect purchasers may not sue for treble damages. Prior to Illinois Brick there existed a split among the various courts of appeals on this issue. Compare, e. g., *Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 483-85 (S.D.N.Y.1973) And Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 30 (E.D.Pa.1970)*, Aff'd per curiam sub nom. *Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971)*, *With Illinois v. Ampress Brick Co., 536 F.2d 1163, 1166-67* (7 Cir. 1976), Rev'd sub nom. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* *And In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973)*, Cert. denied, *Standard Oil Co. of Cal. v. Alaska, 415 U.S. 919, 94 S. Ct. 1419, 39 L. Ed. 2d 474 (1974)*. Needless to say, in view of the different policy considerations reflected in § 4 and *§ 16* concepts of standing, these cases are not controlling here.

[77] *431 U.S. at 728 n.7, 97 S. Ct. 2061*.

[78] See Part IIIB Supra.

[79] See *431 U.S. at 745-46, 97 S. Ct. 2061*.

It should be noted that the element of causation is not at issue in resolving the question whether indirect purchasers have standing to obtain injunctive relief. As recognized by Illinois Brick, "in elevating **[*593]** direct purchasers to a preferred position as private attorneys general, the Hanover **[**65]** Shoe rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." [80] Rather, the question is whether the line for proximate causation should be drawn at the same place as it was drawn for purposes of treble damage actions or not.

We have already seen that the reasons for adopting a constricted position with respect to proximate causation in the context of treble damage actions are inapposite in the context of injunctive relief and that at least one court has stated that a party may sue under *§ 16* so long as it satisfies the standing requirements generally applicable in the federal courts. We need not, however, measure the outer range of standing to sue under *§ 16* in order to decide this appeal. For unlike other potential plaintiffs, who may be only remotely affected by the ripples caused by the conspirators' tampering with the supply and demand curve, indirect purchasers can state unequivocally that under **[**66]** all circumstances prevalent in the real economic world, [81] money is passing from their hands into the pockets of the price fixers as a result of the conspiracy, and that no rational pricing decisions by any intermediary will erase this fact. [82]

[67]**

Moreover, the rule of standing urged by the defendants, which would completely bar indirect purchasers from seeking injunctive relief, would leave a serious gap in the antitrust enforcement scheme, as the fate of these injured parties, and of the competitive economy in an entire industry, would be made dependent upon the willingness of the government and the direct purchasers to assume the burdens of a lengthy lawsuit. Such a result would be inconsistent with the policies of assuring vigorous enforcement of the antitrust laws, preserving competition, and providing relief for those injured by anticompetitive conduct. Yet in contrast to treble damage suits, it would appear that no countervailing interests would be served [83] by placing all indirect purchasers **[*594]** in a straightjacket, so

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[80] *Id. at 746, 97 S. Ct. at 2075*.

[81] As mentioned earlier, only in a hypothetical economic model would no portion of the illegal overcharge be absorbed by the indirect purchaser, and then only if the indirect purchaser's demand for the product was perfectly elastic or if the middleman did not wish to maximize its profits and therefore absorbed the entire overcharge on its own. See note 50 Supra.

[82] In this critical respect, the indirect purchaser is to be distinguished from those parties that have been denied standing to sue for injunctive relief by other courts. E. g., *Jeffrey v. Southwestern Bell, supra*; (residential telephone subscribers have no standing to seek to enjoin higher rates allegedly sought from, and approved by, public utility commission to recoup losses from illegal predatory pricing of telephone equipment); *Nassau County Ass'n of Insurance Agents, Inc. v. Aetna Life & Casualty Co., 497 F.2d 1151 (2d Cir.)*, Cert. denied, ***419 U.S. 968, 95 S. Ct. 232, 42 L. Ed. 2d 184 (1974)*** (unincorporated insurance associations have no standing under *§ 16* to prevent insurance companies from terminating contracts of insurance agents that are members of plaintiff associations, where only loss alleged is decrease in membership and dues); *Conference of Studio Unions v. Loew's Inc., supra* ; (unions, association of unions, and individual members may not sue major motion picture companies for allegedly destroying independent companies and thereby causing loss of wages to members, dues to association, and expenditures by unions to secure new employment for members). The district court in Parkview Markets, Inc. v. Kroger Co., -- - F. Supp. -- , 1978 CCH Trade Cases P 62,373 (S.D.Ohio 1978) relied on these factually dissimilar cases to deny standing under *§ 16* to an indirect purchaser.

[83] True, as the defendants' argument suggests, once the antitrust violation is being actively contested by other parties, the interest of the judicial system in economizing its own efforts comes into play. Similarly, if a defendant is already enjoined from engaging in the illegal activities, it would be wasteful to require it to defend another suit seeking to enjoin the same activities once again, particularly since attorneys fees may now be awarded to successful plaintiffs under *§ 16*. See *15 U.S.C.A. § 26 (1978 Supp.)*. In our view, however, these considerations do not bear upon the problem of determining proximate causation for purposes of *§ 16*. The "private and public actions were designed to be cumulative, not mutually exclusive. . . . They may proceed simultaneously or in disregard of each other." *United States v. Borden, supra, 347 U.S. at 518-19, 74 S. Ct. at 706*. And it would be odd if Congress' recent authorization of attorneys fees under *§ 16*, which was intended to enhance the effectiveness of private injunctive suits, See H.Rep.No.94-499, 94th Cong. 2d Sess. 18-20 (1975), U.S.Code Cong. & Admin.News 1976, p.

to speak, and preventing them from taking any legal action to protect themselves from injury, inasmuch as the equity principles that are to be considered under § 16 can effectively screen out those claimants that are undeserving of injunctive relief.
[68]**

In determining that indirect purchasers have standing to sue for injunctive relief under § 16 but that each plaintiff must establish its entitlement to such equitable relief, we have endeavored to chart an approach that preserves the flexibility of that provision by making the relief it affords available when necessary to further antitrust policies, yet inaccessible to those who should not benefit from injunctive relief. Because when dealing with the Sherman Act we are expounding one of the fundamental laws governing the American economic system and because Congress has not evinced an intent that its goal of free competition be treated in an niggardly fashion by the judiciary, such flexibility appears salutary. Indeed, we believe these efforts to steer a middle ground in interpreting § 16 are in keeping with the Supreme Court's own attitude regarding the provision:

> Section 16 should be construed and applied with this purpose (of enforcing the antitrust laws) in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between **[**69]** competing private claims." *Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S. Ct. 587, 592, 88 L. Ed. 754 (1944)*. Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect." *Id., at 330, 64 S. Ct., at 592*. [84]

We conclude therefore that for purposes of § 16, the damages if any sustained by the supermarket plaintiffs, as indirect purchasers, are proximately caused by the price-fixers' violations. But although we hold that Illinois Brick does not preclude indirect purchasers from suing for injunctive relief and that they have standing to sue under § 16, they still must establish, as the statute requires, that equity principles entitle them to injunctive relief. Because the district court has not yet had occasion to determine whether the supermarket plaintiffs in the present case are entitled to injunctive relief under principles of equity, we shall remand the case for such a determination in the first instance by that court. [85] **[**70]**
[71]**

[*595] V.

The judgment of the district court with respect to the supermarket plaintiffs will be affirmed insofar as it denies them treble damages, but reversed and remanded insofar as it precludes them from obtaining injunctive relief. With

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2572, resulted in a circumscription of the parties eligible to sue. Instead, it would appear that these concerns are properly to be considered by the court when it exercises its equity powers to decide whether an injunction is appropriate under the circumstances.

[84] 84. Zenith Radio Corp., supra, 395 U.S. at 131, 89 S. Ct. 1562.

[85] We disagree with the defendants' argument that a remand is unnecessary because, they claim, it is evident that the plaintiffs are not entitled to injunctive relief. First, contrary to defendants' assertions that plaintiffs must prove irreparable injury, the proper standard is that articulated in *Zenith Radio Corp., supra*. Second, we do not regard the plaintiffs to be necessarily foreclosed from injunctive relief by the mere pendency of the government and direct purchaser suits for similar remedies. Generally, "they may proceed simultaneously or in disregard of each other," *United States v. Borden Co., supra, 347 U.S. at 519, 74 S. Ct. at 706*, and should be permitted to do so if, considering all the circumstances (including the present status of the government and direct purchaser suits), the plaintiffs are still able to establish a "significant threat of injury" under general equity principles. In this regard we note, however, that the district court may wish to consider whether any meaningful difference exists in the present case "with respect to the parties capable of enforcing" the injunction, or whether the reality here is that "one injunction is as effective as 100, and concomitantly, that 100 injunctions are no more effective than one. . . ." See *Hawaii v. Standard Oil Co., supra, 405 U.S. at 261, 92 S. Ct. 885, 891*. Also, in view of the fact that the natural litmus test for determining whether a party is sufficiently injured to obtain injunctive relief whether it was willing to bear the burden of litigation has been swept away by the recent congressional award of attorneys fees under § 16, and in view of the consequent potential for unnecessary litigation costs to defendants, the district court may wish to consider the feasibility of consolidating the various suits for injunctive relief.

respect to Mid-West Paper Products Company, the judgment will be vacated and the case remanded for further proceedings consistent with this opinion.

Dissent by: HIGGINBOTHAM, Jr.(In part)

Dissent

A. LEON HIGGINBOTHAM, Jr., Circuit Judge, dissenting in part.

The majority would deny standing to Murray's of Baederwood and Mid-West Paper Products Co. insofar as they seek to sue defendants for allegedly excessive prices paid to defendants' competitors as a result of defendants' price-fixing. The question of how to properly limit antitrust standing has been a troubling one for courts and commentators alike. Although it has been suggested that the issue is really not one of "standing" at all, [1] the appellation is appropriate at least in that the question has produced an amount of confusion and uncertainty in the law commensurate with that produced by traditional standing questions. It is generally conceded that the decisions on antitrust **[**72]** standing are, in the words of one commentator, "discordant, with inconsistent rationales and no common premise." [2] This court has wisely chosen not to rely on any one test or formula to answer the question posed here. I agree with the majority that considerations of compensation for antitrust victims and deterrence of antitrust violators must be central to our analysis. [3] I agree also that we must not lose sight of the ultimate purpose of the antitrust laws preserving competition. I disagree, however, that denying standing to those who suffer injury as a result of their purchases from competitors of price-fixers will best serve these related goals of just compensation, vigorous enforcement and free competition. Therefore, I respectfully dissent as to this issue. In all other respects I join in the majority opinion. Although few courts or commentators have analyzed this exact problem, those that I have found who have addressed the issue have agreed that recovery of this sort should be permitted. See *State of Washington v. American Pipe and Construction Co., 280 F. Supp. 802 (W.D.Wash.1968)*; Berger and Bernstein, An Analytical Framework for Antitrust Standing, **[**73]** 86 Yale L.J. 809, 879 (1977); Note, 82 Harv.L.Rev. 1374 (1969).

[74]** Since the determination of whether Murray's and Mid-West have standing must be arrived at pursuant to a balancing of factors, I will first discuss those factors that I believe weigh in favor of granting standing here and then analyze why I believe the factors potentially tilting the balance the other way are either not present or are outweighed. The first factor to be considered is that the injuries alleged here will go uncompensated if standing is denied. In other words, there is allegedly injury in fact. Also any recovery obtained would not be duplicative of any other recovery which might be obtained. Actual injury, of course, is only the starting place for standing analysis. It must not be forgotten, however, that the primary purpose of antitrust damage remedies is remedial rather than punitive. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Therefore, **[*596]** we must not lightly deny standing where actual injury is alleged.

Allowing standing would also encourage enforcement, and thereby deter violation, of the antitrust laws. In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977),* **[**75]** the Court held that plaintiffs who

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[1] See *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 447 n. 6 (3d Cir. 1977)*, Cert. denied, ***434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)***.

[2] Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits The Twenty-Third Annual Antitrust Review, 71 Colum.L.Rev. 1, 24 (1971). The variety of approaches which the different circuits have taken to this problem was described in *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 n. 6*-8 (9th Cir.), Cert. denied, ***Morgan v. Automobile Mfgrs. Assn., 414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973)***.

[3] I take mild exception to the majority's description of how antitrust violators are to be deterred: "by depriving them threefold of the "fruits of their illegality.' " *Supra, at p. 583*. As will be discussed later, not all antitrust remedies are based on a calculation of the defendant's ill-gotten profits.

purchased indirectly from antitrust violators could not sue for their resulting injury. [4] The primary basis for this holding was that allowing multiple suits would dilute the recovery that any one plaintiff could receive and would inject complex issues that would make this diluted recovery more expensive to obtain. [5] Thus the court determined that the antitrust laws would be most effectively enforced if one party, the direct purchaser, were able to sue for the full amount of damages incurred by those in the defendants' chain of distribution. [6] Here, however, there is no question of apportionment. If these plaintiffs cannot sue for these damages, no one can. Also the Court recognized that, once recovery was concentrated in the hands of the direct purchaser, there is a risk that those purchasers will be unwilling to sue because they can avoid actual injury to themselves by passing on the added costs to their purchasers and, by suing, they will endanger their source of supply. *431 U.S. at 746, 97 S. Ct. 2061*. Allowing recovery here is one way of preventing that risk of non-enforcement from becoming a reality. A plaintiff might well **[**76]** sue the competitor of his supplier where he would not risk suing his own supplier. Thus this situation is much different from that in Illinois Brick since allowing recovery here would not reduce the incentive for private parties to enforce the antitrust laws, and, moreover, would serve to encourage enforcement in situations where such enforcement is especially needed.

[77]** In deciding whether to allow standing in antitrust cases, courts have attempted to analyze the directness of the injury to the plaintiff. In its most restrictive form, this is essentially a privity test. [7] Such a narrow conception of directness has been generally rejected. [8] **[**78]** Instead, courts have utilized a proximate causation analysis. Indeed, on at least two occasions, this court has described the standing issue as one of proximate causation. [9] Although "proximate cause" is not much more definite in its meaning than **[*597]** "direct cause" or "standing" itself, one important indication of whether an injury is proximately caused by an act is whether its occurrence as a result of that act is reasonably foreseeable. [10] The injury here certainly meets this test. It is foreseeable if not inevitable that,

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4 As the majority recognizes, Illinois Brick was not, itself, a standing case. I agree with the majority, however, that the reasoning utilized in that opinion has implications for standing analysis.

5 The Court, in Illinois Brick, stated:

(W)e understand Hanover Shoe as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

431 U.S. at 734-35, 97 S. Ct. at 2069.

6 I believe the majority is seriously mistaken when it states:

Illinois Brick represents in effect the proposition that when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge.

Supra, at p. 585 (footnote omitted). Neither the language nor logic of Illinois Brick justifies the conclusion that Only direct purchasers from price-fixers can ever recover when prices are fixed at above the market rate. Rather the conclusion is that, among direct and indirect purchasers from the defendant price-fixers, only the direct purchasers can recover and they can recover the entire amount of damages sustained by that whole chain. This limitation is designed to enhance enforcement of the antitrust laws. See n. 5, Supra. As is discussed in the text accompanying this note, denying standing here would not further that end.

7 See, e. g., *City and County of Denver v. American Oil Co., 53 F.R.D. 620, 631 (D.Colo.1971)*.

8 See, e. g., *Cromar Co. v. Nuclear Materials and Equipment Corp., 543 F.2d 501 (3d Cir. 1976)* (rejecting any single test of standing).

9 See *Bogus v. American Speech & Hearing Association, 582 F.2d 277 at 284 (3d Cir. 1978)* ("The doctrine of standing as applied to antitrust cases limits the apparent breadth of this provision by elaborating a concept of proximate causation between defendant's unlawful act and plaintiff's out-of-pocket losses."); *Bogosian v. Gulf Oil Corp., 561 F.2d at 447 n. 6*.

when those with a substantial share of the market fix prices, their competitors will also raise prices under the anti-competitive umbrella established by the price-fixers.

[79]** Another factor to be considered is "the plaintiff's position in the area of the economy threatened by the alleged anticompetitive acts." See *Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d at 508*. This is essentially a phrasing of the "target area" test of standing. Thus, although the "target area" formulation is not the controlling test of antitrust standing in this circuit, it is to be considered in reaching a decision on this issue. As just mentioned, where prices are fixed in an oligopolistic market, the result is likely to be that non-price-fixing competitors will also raise their prices. Murray's and Mid-West as purchasers from these competitors are, therefore, well within the area of economy threatened by defendants' price-fixing activities. [11]

[80]** Finally, the seriousness of the violation should also be considered in determining the extent of the violator's liability. [12] In *U. S. v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 2875, 57 L. Ed. 2d 854 (1978)*, the Supreme Court recognized that "the behavior proscribed by the (antitrust laws) is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." The Court noted that some "conduct regarded as Per se illegal" is not difficult to distinguish from legal business behavior "because of its unquestionably anticompetitive effects." Id. The Court cited, on this point, *U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*, which held that price-fixing agreements are Per se violations of the Sherman Act. Because it is often difficult to determine exactly what conduct violates the antitrust laws, the Court in Gypsum held that a person cannot be subjected to criminal liability for such violations without an inquiry into the intent with which the unlawful actions were taken.

[81]** I believe that a similar concern for those who may unwittingly violate the antitrust laws makes it proper for courts to consider this factor in determining to whom the antitrust defendant will be held liable. Thus where businesses engage in practices that might reasonably be considered not to violate the antitrust laws, it would seem proper for courts, as a matter of fairness, to be most cautious in extending the scope of their liability once a violation is found. Where, as here, however, defendants have fixed prices probably the clearest violation of the antitrust laws and the one most obnoxious to the underlying policy of free competition considerations of punishment and deterrence warrant the imposition of broad liability.

Among the factors that have led courts to deny standing are the possibility of duplicative, derivative or windfall recovery. Allowing **[*598]** standing here, however, would not result in any such recovery. The recovery sought here would not be duplicative since, as mentioned above, no other party could seek damages for part or all of the injury claimed here. [13] The recovery would not be derivative since the parties are not related to some other entity **[**82]** at which the illegal practices are most directly aimed and which could sue in its own right. [14] The

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[10] See generally, Prosser, Law of Torts (4th ed.) § 43. The majority criticizes "the injection of a foreseeability concept" into the determination of standing, at least with respect to the "target area" test. *Supra, at p. 581 n. 27*. I believe, however, that foreseeability is one of the relevant factors that must be considered as long as directness of injury is one of the criteria of standing. Although the majority cites Handler, supra note 2, as criticizing foreseeability analysis in the context of the "target area" test, that article concludes by listing the "reasonable foreseeability of injury" as a "significant element" in determining whether a plaintiff has standing to sue. Handler at 30. I believe it is a wise inclusion.

[11] One formulation of the target area test requires that the plaintiff not only be in the area, but that he be aimed at. See, e. g., *Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1296 (2d Cir. 1971)*, Cert. denied, ***406 U.S. 930, 92 S. Ct. 1776, 32 L. Ed. 2d 132 (1972)***. Plaintiffs admittedly would not have standing under such an analysis. This test, however, has not been adopted by this court, is unduly restrictive and inadequately serves the purposes of compensation and deterrence.

[12] See Handler, supra note 2 at 30.

[13] Although the majority expresses some doubt, I believe it is clear that the logic of Illinois Brick requires that any recovery by those in the chain of distribution beginning with defendants' competitors be concentrated in the hands of those that purchase directly from the competitors.

recovery could not be properly characterized as "windfall" since the plaintiffs are complaining of actual out-of-pocket losses.

[83]** The majority contends that the recoveries even if not duplicative, derivative or windfall, may well be ruinous, I. e., that allowing treble damages to purchasers from competitors of antitrust violators might drive the violators out of business thereby injuring rather than protecting competition. I agree that this is a concern to be taken most seriously. Because undue reliance on this factor might seriously undercut enforcement of the antitrust laws, however, I do not believe that the standing decision should turn on this factor unless there is a very persuasive basis from which to conclude that competition would actually be hurt by the allowance of standing. Otherwise courts might unnecessarily prevent enforcement of the antitrust laws in the guise of protecting competition. I believe further that there is a strong basis on which to believe that competition would Not be injured by allowing standing in cases such as this. Only businesses with a substantial share of a market are likely, by fixing prices, to significantly affect the prices charged by competing businesses. Thus, it can reasonably be assumed that there will only be large recoveries against large companies or a large **[**84]** group of smaller companies who are best able to withstand such losses. Where companies with a small market share fix prices, the effect on their competitors would be small and the likelihood of a ruinous damages assessment would be correspondingly minimal. Thus, the operation of the market would tend to prevent recoveries in suits such as this from being of a ruinous or anticompetitive dimension. The majority also indicates that the fact that the defendants did not directly profit from the plaintiffs injuries here is a factor to be considered in denying standing. It is clear from the very nature of the treble damage remedy, however, that recoveries in antitrust cases, as in many other areas of the law, are not intended solely to force the disgorgement of tainted profits. [15] Therefore, I would accord little if any weight to this factor.

[85]** Finally, the majority adverts to the complexity of proving damages in this type of case and, closely related to this, the speculative nature of the inquiry into the amount of such damages. Complexity and speculativeness, however, are endemic to antitrust litigation. The length of many antitrust cases is ample indication of their complexity. It is also well established that damages in antitrust action need not be proved with the degree of certainty required in most **[*599]** other areas of the law. See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

The majority relies on Illinois Brick, however, to establish the importance of these factors to our decision today. Although the Court in Illinois Brick certainly focussed much of its attention on the added complexity that would result from allowing recovery to indirect purchasers, it is crucial to note the context of that discussion. The Court in Illinois Brick was concerned with allowing the injection of complex issues into antitrust actions because the injection of such complexity would increase the cost of litigation and thereby discourage the enforcement **[**86]** of the antitrust laws. Thus the Court states:

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damage suits and Seriously undermine their effectiveness.

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[14] Creditors, shareholders and officers of corporations injured by antitrust violations have frequently been denied standing because their claims are derivative. See, e. g., *Pitchford v. Pepi, 531 F.2d 92 (3d Cir.)*, Cert. denied, ***426 U.S. 935, 96 S. Ct. 2649, 49 L. Ed. 2d 387 (1976)***. See also Von Kalinowski, 11 Antitrust Laws and Trade Regulation, § 81.02(2) and cases cited therein. Lessors have also been denied standing on this basis. See e. g., ***Melrose Realty Co. v. Loew's, Inc., 234 F.2d 518 (3d Cir.)***, Cert. denied, ***352 U.S. 890, 77 S. Ct. 128, 1 L. Ed. 2d 85 (1956)*** (per curiam).

[15] For example, in *Pitchford v. Pepi, supra*, this court approved measures of damages from illegal territorial restrictions and the termination of a dealership which looked to the amounts lost by the plaintiff without regard to whether there was a corresponding profit to the defendant. The Supreme Court has recognized that "the treble damage provision (of Section 4 of the Clayton Act) which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 485-86, 97 S. Ct. at 696*.

431 U.S. at 737, 97 S. Ct. at 2070. (emphasis supplied).

As already discussed, allowing suits such as those here will encourage rather than undermine the effective enforcement of the antitrust laws. Where added complexity does not result in a disincentive to the enforcement of the antitrust laws, its potency as an argument against standing is seriously diminished.

Moreover, there is little reason to believe that proof of damages here will be significantly more complex or speculative than in a suit by a direct purchaser against a price-fixing defendant. In each case, the price actually charged is known. In each case, damages can only be **[**87]** assessed by determining what the market price would have been "but for" the price-fix. Of course in both cases, it is possible that the seller would have sold at a price above that of the market even without the price-fix and presumably the defendant would have an opportunity to present evidence of this. The only discernible difference is that the defendant is likely to have better access to proof regarding its own pricing policies than those of its competitors. This tactical problem of the defendants does not, however, persuade me that standing should be denied here.

Thus I am left with the conclusion that the antitrust policies of compensation and enforcement would be appreciably advanced by allowing recovery for the injuries alleged here. I am unconvinced that such recovery would drive antitrust violators out of the market and thus injure competition. I believe, therefore, that the balance here is properly struck in favor of granting standing to these appellants. [16]

[88]**

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[16] The majority, on four occasions, refers to those " "whose protection is the fundamental purpose of the antitrust laws.' " I do not believe that the invocation of this phrase advances our analysis here. To the extent that the majority intends this phrase to do more than identify those who are properly allowed standing after consideration of the criteria referred to throughout this opinion, I believe it is pursuing a most misguided course. If Congress' purpose was to protect certain individuals through the treble damage remedy, it is irrelevant that the protection of such individuals was not the "fundamental" purpose of the antitrust laws. Thus we are left with the problem of defining exactly who Congress intended to be able to sue under Section 4. I have already discussed the factors to be considered in making such determinations. The ambiguity of the term "fundamental purpose" makes it ill-suited for service as an additional factor to be analyzed in resolving antitrust standing issues or as a substitute for the factors already discussed. I fear that overemphasizing this term may lead to a narrowing of antitrust standing unsupported by law or logic.

Elida, Inc. v. Harmor Realty Corp.

Supreme Court of Connecticut

December 13, 1978, Argued ; April 3, 1979, Decided

No Number in Original

Reporter

177 Conn. 218 *; 413 A.2d 1226 **; 1979 Conn. LEXIS 731 ***; 1979-1 Trade Cas. (CCH) P62,545

Elida, Inc. v. Harmor Realty Corporation et al.

Prior History: [*1]** Action for an injunction enjoining (1) the defendant The Gourmet Shoppe, Inc., from engaging in the retail sale of bakery products for off-premises consumption, and (2) the named defendant from failing to perform its contractual obligations to the plaintiff, and for other relief, brought to the Superior Court in New Haven County and tried to the court, *Hadden, J.;* judgment for the defendants, from which the plaintiff appealed to this court.

Disposition: *Error; new trial*.

Core Terms

antitrust, lease, restrictive covenant, shopping center, products, tenant, present case, bakery, lease provision, Cases, rule of reason, injunctions, provisions, covenant, shopping

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

Conn. Gen. Stat. § 35-26 provides that any contract in restraint of trade or commerce is unlawful. The fact that a contract may have been executed before the statute took effect is immaterial if it is in existence thereafter. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an ex post facto character about the act.

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

Governments > Police Powers

Constitutional Law > Substantive Due Process > Scope

HN2[] **Congressional Duties & Powers, Contracts Clause**

It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community and that all contract and property rights are held subject to its fair exercise.

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

Governments > Local Governments > Police Power

Governments > Police Powers

HN3[] **Congressional Duties & Powers, Contracts Clause**

Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority. Consequently, the state, pursuant to its lawful exercise of the police power, may rightfully prohibit the continuance in the future of those things already in existence which are deemed injurious to the rights and interests of its citizens so as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not.

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

Governments > Local Governments > Police Power

HN4[] **Congressional Duties & Powers, Contracts Clause**

The right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

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

HN5[] **Public Enforcement, State Civil Actions**

Under the common law, the well-settled rule is that an anticompetitive covenant ancillary to a lawful contract is enforceable if the restraint upon trade is reasonable.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN6[] **Public Enforcement, State Civil Actions**

To satisfy the requirement of reasonableness, the court has stated that the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest.

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

Business & Corporate Compliance > ... > Trusts > Trust Administration > Modification & Termination

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Estate, Gift & Trust Law > Trusts > General Overview

HN7[] **Per Se Rule & Rule of Reason, Per Se Violations**

The Connecticut Anti-Trust Act, Conn. Gen. Stat. §§ 35-224 to 35-44, incorporates, in modified form, various provisions of the federal antitrust laws, especially the Sherman Act, *15 U.S.C.S. § 1 et seq.* In such a situation, the judicial interpretation of the federal act is particularly pertinent in the construction of the state statute. *Conn. Gen. Stat. § 35-28(d)* has no specific counterpart in the federal antitrust laws, but rather, it is considered to be a codification of what have come to be known as "per se" violations of the Sherman Act, *15 U.S.C.S. § 1*.

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

Antitrust & Trade Law > 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

HN8[] **Practices Governed by Per Se Rule, Boycotts**

The following are recognized as "per se" violations of the federal act: (1) price fixing; (2) agreements among competitors to divide markets or allocate customers; (3) certain tying arrangements; and (4) group boycotts.

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

Real Property Law > Encumbrances > Restrictive Covenants > Subdivisions

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical territorial restrictions are now subject to a "reasonableness" test under federal law.

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 Sherman Act, *15 U.S.C.S. § 1 et seq.*, "rule of reason" is intended to be the prevailing standard to be applied for the purpose of determining whether a particular act had or had not brought about the wrong against which the statute provided in a given case.

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

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

"Per se" rules of illegality should be applied only to conduct which is shown to be manifestly anticompetitive. Consequently, the actual impact of particular arrangements on competition must be examined to determine whether they 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

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

The "rule of reason," by which 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 is the appropriate standard for the trial court to apply.

Counsel: *Robert S. Reger,* for the appellant (plaintiff).

Stephen B. Alderman, with whom were *Raymond Parlatto,* and, on the brief, *Robert A. Ginsburg* and *Dana E. Friedman,* for the appellees (defendants The Gourmet Shoppe, Inc., et al.).

John R. Lacey, assistant attorney general, with whom, on the brief, were *Carl R. Ajello,* attorney general and *Gerard J. Dowling,* assistant attorney general, for the appellee (defendant state of Connecticut).

Judges: Cotter, C. J., Loiselle, Bogdanski, Longo and Peters, Js.

Opinion by: COTTER

Opinion

[*220] [1227]** In this appeal by the plaintiff, we are required to determine the applicability of the Connecticut Anti-Trust Act [1] to a restrictive covenant **[***2]** contained in a commercial lease between the plaintiff and the named defendant.

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[1] *General Statutes §§ 35-24 to 35-44*.

The defendant Harmor Realty Corporation is the owner, landlord and lessor of premises in the Amity Shopping Center, a shopping complex located in New Haven and comprised of approximately twenty-five tenants. The plaintiff, a family-owned corporation doing business as Westville Home Bakery, entered into an agreement on October 28, 1970, with the defendant Harmor Realty Corporation wherein the plaintiff leased 2000 square feet of space located in the shopping center for the purpose of engaging in the production and retail sale of freshly baked goods. The lease continued from October 15, 1970, until November 14, 1976; and a contemporaneously-executed addendum to the lease gave the plaintiff the option to extend the term of the lease for an additional four-year period to November 14, 1980, which the plaintiff duly exercised. The lease addendum further provided that the plaintiff would have, subject **[***3]** to certain exceptions, "the exclusive right to sell products normally sold by a bakery shop," and that the defendant lessor would not "rent any other space in the shopping center for the purpose of baking on the premises." [2]

[*221] On or about December 28, 1976, the Harmor Realty Corporation leased other space in its shopping complex to the defendant The Gourmet Shoppe, Inc., a business engaged in the sale of products normally sold by a bakery shop. Although Harmor **[***4]** Realty Corporation knew, or should have known, that The Gourmet Shoppe, Inc., would engage in the sale of bakery products, [3] it failed to take any action to prohibit the sale of such products despite the plaintiff's repeated demands. Both defendant corporations, **[**1228]** and their respective presidents, had actual and constructive notice of the restrictive covenant contained in the plaintiff's lease.

The plaintiff brought the present action in the Superior Court seeking (1) a temporary and permanent injunction enjoining the defendant The Gourmet Shoppe, Inc., from engaging in the retail sale of bakery products for off-premises consumption; (2) a temporary and permanent injunction enjoining the defendant Harmor Realty Corporation from failing to perform its contractual obligations **[***5]** to the plaintiff "and/or from failing to otherwise act so as to cause the defendant The Gourmet Shoppe, Inc. . . . to cease and desist from the retail sale, for off-premises consumption," of bakery products; and (3) money damages and attorney's fees and costs. Following the entry of the trial court's order granting the temporary injunctions requested by the plaintiff pending a final hearing, the defendants filed special defenses alleging that the lease provision upon which the plaintiff based its claim for relief constituted an unlawful **[*222]** restraint of trade in violation of the state antitrust act and was, therefore, unenforceable. Pursuant to *General Statutes § 35-32 (b)*, the state of Connecticut was permitted to intervene as a party to this action with the status of defendant-intervenor. In a bifurcated trial for the purpose of which the defendants admitted the essential allegations of the first count of the plaintiff's amended complaint alleging irreparable injury as a result of a breach of the restrictive covenant in its lease, it was agreed that the sole issue to be decided by the court was whether the state antitrust act should be construed so as to prohibit the **[***6]** enforcement of the restrictive covenant and thus prohibit the issuance of the permanent injunctions sought by the plaintiff.

The trial court concluded that the restrictive covenant sought to be enforced by the plaintiff was intended to prevent competition with the plaintiff and will have that effect if enforced; and that the covenant in question was "per se" unreasonable and contrary to the express language of *General Statutes § 35-28 (d)*. Judgment was rendered in favor of all defendants on the first count of the plaintiff's amended complaint and the requests for permanent injunctions were denied. [4] The plaintiff appealed to this court from the judgment rendered.

I

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[2] "Article XIX, *Section 1*. It is agreed that the Tenant will have the exclusive right to sell products normally sold by a bakery shop, but this exclusive right will not apply to nor prevent the sale of such products by chain tenants such as the super food markets, the Jr. Department store or the Variety store and the Drug store. The Landlord agrees not to rent any other space in the shopping center for the purpose of baking on the premises, with the exception of the Chains, however, the Landlord agrees not to rent any space to a bakery chain."

[3] The Gourmet Shoppe, Inc. is a corporation engaged in the general business of a restauranteur and retail sales of delicatessens, including baked goods, such as those which the plaintiff produces and sells at the Amity Shopping Center.

[4] The previously issued temporary injunctions were dissolved by the court.

At the outset, we consider the threshold question raised by the plaintiff whether the state antitrust act should be construed so as to apply to a claimed vested right it has in a restrictive covenant in a contract originally entered into prior to the effective **[*223]** **[***7]** date of the act. The plaintiff claims that such an interpretation would be contrary to well-settled principles regarding the retrospective application of statutes; violative of the plaintiff's right of redress for injuries guaranteed by article first, § 10 of the state constitution; in conflict with the contract clause of the federal constitution; and would amount to a denial of due process. In view of the accepted interpretation of the applicability of such legislation, we are not persuaded by the plaintiff's arguments in this regard.

General Statutes § 35-26 ***HN1***[] provides that any contract in restraint of trade or commerce is unlawful. The fact that a contract may have been executed before the statute took effect is immaterial if it is in existence thereafter. The prohibition is not directed at the formation and existence of the contract prior to the effective date of the act, but in the persistence of the parties in it after it has become unlawful. "The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act." **[***8]** *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 342, 17 S. Ct. 540, 41 L. Ed. 1007*; see *State v. Missouri, Kansas & Texas Ry. Co. of Texas, 99 Tex. 516, 527, 91 S.W. 214*; *54 Am. Jur. 2d, Monopolies § 454*.

[1229]** ***HN2***[] "[I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . and that all contract and property rights are held subject to its **[*224]** fair exercise." *Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721*; *Ansonia v. Ansonia Water Co., 101 Conn. 151, 157, 125 A. 474*. ***HN3***[] "'[C]ontracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.' [*Knox v. Lee, 79 U.S. (12 Wall.) 457, 551]*." *Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 482, 31 S. Ct. 265, 55 L. Ed. 297*. Consequently, the state, pursuant **[***9]** to its lawful exercise of the police power, may rightfully prohibit the continuance in the future of those things already in existence which are deemed injurious to the rights and interests of its citizens so as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. See *Ansonia v. Ansonia Water Co., supra, 156-58*. ***HN4***[] The right of private contract, therefore, "must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State." *Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U.S. 372, 377, 39 S. Ct. 117, 63 L. Ed. 309*.

Our conclusion that the legislation in question may constitutionally apply to the contract entered into prior to the act's passage, which included the option to extend for an additional term, is in accord with the decisions of the United States Supreme Court regarding the applicability of federal antitrust provisions. See *United States v. Southern Pacific Co., 259 U.S. 214, 234-35, 42 S. Ct. 496, 66 L. Ed. 907*; *Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234, 20 S. Ct. 96, 44 L. Ed. 136*; *United* **[***10]** *States v. Trans-Missouri Freight Assn., supra.* In view of the position we take on this issue, **[*225]** we need not consider whether the renewal of the plaintiff's lease for an additional four-year term after the Connecticut Anti-Trust Act was enacted might be considered the creation of a new lease as of the date of the renewal.

II

The plaintiff's principal claim of error in this appeal is directed at the trial court's determination that the restrictive covenant contained in the plaintiff's lease was "per se" unreasonable and contrary to the express langauge of *§ 35-28 (d) of the General Statutes.* [5] The plaintiff argues that the so-called "Rule of Reason" which is utilized, in certain cases, by federal courts construing the Sherman Antitrust Act (26 Stat. 209, as amended, *15 U.S.C. §§ 1-7*) was the appropriate standard for the trial court to apply in the present case. See, generally, Bork, "The Rule of Reason

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[5] "[*General Statutes] Sec. 35-28*. ACTS UNLAWFUL WHEN PURPOSE OR EFFECT IS RESTRAINT OF TRADE OR COMMERCE. Without limiting *section 35-26*, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: . . . (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person."

and the Per Se Concept," part 1, 74 Yale L.J. 775 (1965); Bork, "The Rule of Reason and the Per Se Concept," part 2, 75 Yale L.J. 373 (1966).

[*11]** ***HN5***[] Under the common law, the well-settled rule is that an anticompetitive covenant ancillary to a lawful contract is enforceable if the restraint upon trade is reasonable. *Scott v. General Iron & Welding Co., 171 Conn. 132, 137, 368 A.2d 111*; *Domurat v. Mazzaccoli, 138 Conn. 327, 330, 84 A.2d 271*; *Mattis v. Lally, 138 Conn. 51, 54, 82 A.2d 155*; *Dick v. Sears-Roebuck & Co., 115 Conn. 122, 126, 160 A. 432*; *Samuel Stores, Inc. v. Abrams, 94 Conn. 248, 252,* ***[*226]*** *108 A. 541*; *54 Am. Jur. 2d, Monopolies § 511*; see note, "Restrictive Covenants in Shopping Center Leases," 34 N.Y.U. L. Rev. 940 (1959). **[**1230]** ***HN6***[] To satisfy this requirement of reasonableness, we have stated that "the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest. [Citations omitted.]" *Mattis v. Lally, supra, 54*. A prohibition against the conduct of a rival business contained in a deed, for example, has been held not to violate public policy where the restriction upon the conduct **[***12]** of a certain business is limited to the particular piece of land transferred, for a reasonable purpose and for a reasonable period of time. *Dick v. Sears-Roebuck & Co., supra.*

Mindful of the foregoing principles and authorities, we review the trial court's conclusion that the express language of *General Statutes § 35-28 (d)* renders the restrictive covenant in question per se unreasonable without resort to an examination of the "reasonableness" of that covenant under all the circumstances.

There is no dispute between the parties that ***HN7***[] the Connecticut Anti-Trust Act incorporates, in modified form, and with notable exceptions, various provisions of the federal antitrust laws, especially the Sherman Act, 26 Stat. 209, *15 U.S.C. §§ 1 et seq.* See *Mazzola v. Southern New England Telephone Co., 169 Conn. 344, 347-48, 363 A.2d 170*; Brodigan, "The Connecticut Antitrust Act," 47 Conn. B.J. 12, 16 (1973). In such a situation, the judicial interpretation of the federal act is particularly pertinent in our construction of the state statute. *United* ***[*227]*** *Aircraft Corporation v. International Assn. of Machinists, 161 Conn. 79, 85, 285 A.2d 330*, cert. denied, *404* ***[***13]*** *U.S. 1016, 92 S. Ct. 675, 30 L. Ed. 2d 663*; *Windsor v. Windsor Police Department Employees Assn., Inc., 154 Conn. 530, 536, 227 A.2d 65*. *Section 35-28 (d)* has no specific counterpart in the federal antitrust laws, but rather, it is considered to be a codification of what have come to be known as "per se" violations of the Sherman Act, notably *§ 1*. Brodigan, supra, 24.

In *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545*, the court, while recognizing that there were some agreements whose validity depended on the surrounding circumstances, observed (p. 5): "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Since the area of per se violations is carefully limited; [6] *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corporation, 382 U.S. 172, 178, 86 S. Ct.* ***[*228]*** *347, 15 L. Ed. 2d 247*; it can be stated generally that ***HN8***[] the following are recognized as "per se" **[***14]** violations of the federal act: (1) price fixing; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129*, reh. denied, *310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421*; (2) agreements among competitors to divide markets or allocate customers; *Continental Ore Co. v. Union Carbide & Carbon Corporation, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777*; *Timkin Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199*; (3) certain tying arrangements; *Fortner Enterprises, Inc. v. United States Steel Corporation,*

[6] An example of the reluctance to apply the "per se" rule in an overly broad fashion might best be found in the recent United States Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, wherein the court overruled *United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249*, which held that a per se violation results when a manufacturer sells products to his distributor subject to territorial restrictions on resale. Although the court left unanswered the possibility that some vertical restrictions might justify per se prohibition, it concluded that a return to the "rule of reason" which governed vertical restrictions prior to *Schwinn* was warranted. *Continental T.V., Inc. v. GTE Sylvania, Inc., supra, 58-59*. The court noted that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than -- as in *Schwinn* -- upon formalistic line drawing." Id.

394 U.S. 495, 89 S. Ct. 1252, 22 [**1231] L. Ed. 2d 495; and (4) group boycotts. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741.

[*15]** In the present case, the defendants argue that the prohibition of § 35-28 (d) of our state act may be construed with reference to federal cases dealing with group boycotts or concerted refusals to deal which have been held to be per se illegal. See United States v. General Motors Corporation, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415; Klor's, Inc. v. Broadway-Hale Stores, Inc., supra. The restrictive covenant in the present case, however, is clearly distinguishable from "collective boycott" cases which involve horizontal restraints. Klor's, Inc. v. Broadway-Hale Stores, Inc., supra (agreement between suppliers); Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457, 668, 61 S. Ct. 703, 85 L. Ed. 949 (agreement between merchants); see note, "The Antitrust Implications of Restrictive Covenants in Shopping Center Leases," 86 Harv. L. Rev. 1201, 1212-18 (1973); Eagle, "Shopping Center Control: The Developer Besieged," 51 Jour. Urb. Law, 586, **[*229]** 605-608 (1974). Moreover, it is interesting to note that ***HN9***[] vertical territorial restrictions are now subject to a "reasonableness" test under federal law. See Continental [***16] T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568.

The defendants nonetheless argue that the covenant contained in the plaintiff's lease is a "naked restraint of trade" which should be declared per se illegal under the provisions of our state antitrust act. While there is a general paucity of reported decisions specifically addressed to the type of restrictive covenant involved in the present case, our review of the relevant authorities leads us to reject the application of the "per se" rule urged by the defendants under the facts of this case.

In a recent case construing a state antitrust act which, not unlike our act, is similar to the federal act, the Kentucky Court of Appeals concluded that a restrictive covenant in a shopping center lease with a medium-size store which granted that store the exclusive right to sell men's and boys' clothing [7] was not unreasonable per se. *Mendell* v. *Golden-Farley of Hopkinsville, Inc.,* 1978-1 Trade Cases para. 61,814, p. 73,390 (Ky. Ct. App.). Applying the appropriate antitrust analysis set forth by the United States Supreme Court with regard to federal provisions, the Kentucky court concluded that **[***17]** its state's antitrust provisions did not effect a material change in the common law of Kentucky respecting the validity of restrictive covenants in leases. Id., **[*230]** p. 73,392. Similarly, a shopping center lease provision restraining a tenant from operating a similar sporting goods store within three miles of the center was held to be prima facie reasonable under Florida ***antitrust law***. *Pensacola Associates v. Biggs Sporting Goods Co., 353 So. 2d 944* (Fla. Dist. Ct. App.).

In Borman's Inc. v. Great Scott Super Markets, Inc., 433 F. Sup. 343 (D. E.D. Mich.), the court rejected (p. 349) the claim that a **[***18]** shopping center lease provision which granted a tenant a "partial exclusive" at the center constituted a per se violation of the antitrust laws. The court noted: "[S]uch a rule would disregard important distinctions between and among the types of shopping centers involved, the type of store involved and the type of restraint involved. Since very real distinctions should be made depending on the facts, any per se rule of illegality, or legality, should not be formulated." Id., 349. Likewise, another federal court has recently indicated that the federal antitrust implications of a restrictive lease provision granting exclusive rights to a shopping center tenant would be determined by examining all the surrounding circumstances to see if the particular lease provisions unreasonably restrain trade. *Dart Drug Corporation* v. *Peoples Drug Stores, Inc.,* 1977-1 Trade Cases para. 61,281, pp. 70,887-88 (D. D.C.); see *Pay Less Drug Stores Northwest, Inc.* v. **[**1232]** *City Products Corporation,* 1975-2 Trade Cases para. 60,385, p. 66,676 (D. Ore.).

We find the above ratiocination persuasive in the circumstances of the present case. As under ***HN10***[] the Sherman Act, the "rule **[***19]** of reason" was intended to be the prevailing standard to be applied for the purpose of determining whether a particular act had **[*231]** or had not brought about the wrong against which the statute provided in a given case. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59-61, 31 S. Ct. 502, 55 L.

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[7] Like the provision in the instant case, the clause in the *Mendell* lease did not apply to the major chains. (See footnote 2 of this opinion). That clause also made exception for other tenants whose sale of such clothing is incidental to their main line of business. *Mendell* v. *Golden-Farley of Hopkinsville, Inc.,* 1978-1 Trade Cases para. 61,814, p. 73,390 (Ky. Ct. App.).

Ed. 619. **HN11**[] "Per se" rules of illegality should be applied only to conduct which is shown to be "manifestly anticompetitive." Continental T.V., Inc. v. GTE Sylvania, Inc., supra, 49-50. Consequently, the actual impact of particular arrangements on competition must be examined to determine whether they have a "pernicious effect on competition and lack . . . any redeeming virtue." Northern Pacific Ry. Co. v. United States, supra, 5. The restrictive covenant in the present case cannot be so characterized. [8]

[*20]** Hence, we conclude that the trial court was in error in determining that the plaintiff's lease provision was "per se" illegal. **HN12**[] The "rule of reason," by which 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., supra, 49; was the appropriate standard for the trial court to apply. Since additional evidence may be necessary for a determination of the reasonableness of the covenant in the present case, a new trial must be ordered. We note, in this regard, that the facts which may be relevant upon remand include, but are not limited to, the following: The plaintiff's store was physically small in size, 20 feet by 100 feet, and located in **[*232]** a shopping complex consisting of approximately twenty-five tenants; its "exclusive right" to sell bakery products in the shopping center specifically did "not apply to nor prevent the sale of such products by chain tenants such as the super food markets, the Jr. Department store or the Variety store and the Drug store" (see footnote 2 of this opinion); and the plaintiff **[***21]** was not a major or anchor tenant, but a small business which was compelled to compete with the so-called chain stores or larger anchor tenants.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

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[8] "It is well known that the success of a shopping center depends upon the gathering together in one area of a variety of enterprises which are able to serve the needs of the general public and that this end can often best be accomplished by offering to the individual merchants the exclusive right to sell in the center the kind of merchandise he handles." Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir.).

Mannington Mills, Inc. v. Congoleum Corp.

United States Court of Appeals for the Third Circuit

January 15, 1979, Argued ; April 3, 1979, Decided

No. 78-1845

Reporter

595 F.2d 1287 *; 1979 U.S. App. LEXIS 15692 **; 202 U.S.P.Q. (BNA) 321 ***; 1979-1 Trade Cas. (CCH) P62,547

MANNINGTON MILLS, INC., Appellant v. CONGOLEUM CORPORATION, Appellee

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civ. No. 78-294)

Core Terms

patent, antitrust, courts, foreign patent, Sherman Act, district court, anti trust law, foreign nation, foreign country, monopolization, treaties, sovereign, invalid, commerce, act of state doctrine, extraterritorial, abroad, rights, foreign law, foreign government, foreign commerce, comity, fraudulent, licensing, territory, damages, parties, infringement, compulsion, domestic

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Trade Law > General Overview

Transportation Law > Commercial Vehicles > Foreign Commerce

HN1[] **Interstate Commerce, Restraints of Trade**

Foreign commerce applies to importing, exporting, and other commercial transactions, as well as transportation and communication between the United States and a foreign country. Acts and agreements occurring outside the territorial boundaries of the United States that adversely and materially affect American trade are not necessarily immune from United States antitrust laws.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] International Aspects, International Application of US Law

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not reach conduct having no effect in the United States, but it does reach conduct having consequences within this country even where the parties concerned have no allegiance to the United States if the conduct is intended to and actually does have an effect upon United States imports or exports.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] International Aspects, Commerce With Foreign Nations

Practices of an American citizen abroad having a substantial effect on American foreign commerce are subject to the Sherman Act.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

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

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

HN4[] International Aspects, International Application of US Law

When two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one, a federal court does have subject matter jurisdiction.

International Law > Dispute Resolution > Act of State Doctrine

HN5[] Dispute Resolution, Act of State Doctrine

The act of state doctrine requires American courts to reject private claims based on the contention that the damaging act of another nation violates either American or international law. To determine whether the act of state doctrine applies in a given factual context, the court must analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role.

Criminal Law & Procedure > Defenses > Coercion & Duress

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN6[] **Defenses, Coercion & Duress**

Where the governmental action rises no higher than mere approval, the compulsion defense will not be recognized. It is necessary that foreign law must have coerced the defendant into violating American ***antitrust law***. The foreign compulsion defense is not available if the defendant could have legally refused to accede to the foreign power's wishes.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Dispute Resolution > Act of State Doctrine

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > General Overview

HN7[] **International Aspects, International Application of US Law**

The court is unable to accept the proposition that the mere issuance of patents by a foreign power constitutes either an act of state, as that term has developed under case law, or an example of governments' compulsion.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

HN8[] **International Aspects, International Application of US Law**

By issuance of the patents per se, the foreign governments did not force the defendant to exclude the plaintiff from the foreign markets and the defense of compulsion is not available.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Dispute Resolution > Act of State Doctrine

HN9[] **International Aspects, International Application of US Law**

The granting of patents per se, in substance ministerial activity, is not the kind of governmental action contemplated by the act of state doctrine or its correlative, foreign compulsion.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

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

Patent Law > Remedies > Damages > Increased Damages

HN10[] **Remedies, Damages**

A patent provides an exception to the general rule against monopolies but proof of knowing and wilful misrepresentation of facts to the patent office strips the patentee of its exemption. In that event, if the plaintiff can prove the other elements of a Sherman Act *§ 2*, *15 U.S.C.S. § 2*, violation in addition to invalidity of the patent, then it is entitled to recover treble damages.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Trade Law > General Overview

HN11[] **International Aspects, International Application of US Law**

The United States antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; it should avoid unnecessary interference with the sovereign interests of foreign nations.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

International Trade Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

International Law > Dispute Resolution > Comity Doctrine > General Overview

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Jurisdiction

HN12[] **Jurisdiction, Jurisdictional Sources**

In determining whether extraterritorial jurisdiction should be exercised by an American court the following factors are considered: Degree of conflict with foreign law or policy; nationality of the parties; relative importance of the alleged violation of conduct here compared to that abroad; availability of a remedy abroad and the pendency of litigation there; existence of intent to harm or affect American commerce and its foreseeability; possible effect upon foreign relations if the court exercises jurisdiction and grants relief; if relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; whether the court can make its order effective; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; whether a treaty with the affected nations has addressed the issue.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Dispute Resolution > Conflict of Law > General Overview

HN13[] **International Aspects, International Application of US Law**

Unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action.

Counsel: John N. Bain, Jeffrey L. Miller, Carella, Bain, Gilfillan & Rhodes, Newark, N. J., for appellant.

Frederick W. Rose, Young, Rose & Millspaugh, Newark, N. J., Michael M. Maney, Michael Winger, Robert M. Hayes, New York City, Sullivan & Cromwell, New York City, of counsel, Richard T. Laughlin, Kearney, N. J., for Appellee Congoleum Corp.

Judges: Before ADAMS and WEIS, Circuit Judges and WEINER, * District Judge.

Opinion by: WEIS

Opinion

[*322] [*1290]** OPINION OF THE COURT

Alleging that foreign patents were secured by fraud, which if perpetrated in securing a domestic patent would lead to antitrust liability, plaintiff seeks treble damages and injunctive relief. The district court dismissed the complaint, relying primarily upon the act of state doctrine. We conclude that in this instance that ground does not bar consideration of plaintiff's claim. Because we determine, however, that in deciding whether jurisdiction should be exercised the **[**2]** district court should weigh the enforcement of the antitrust laws against the interests of comity and international relations, we remand for the development of an adequate record.

Congoleum Corporation holds American patents for the manufacture of chemically embossed vinyl floor covering and owns corresponding patents in some 26 foreign countries. Mannington Mills, Inc., too, is in the business of manufacturing flooring and is licensed to use the Congoleum patents in this country. Although Mannington claimed to have similar rights under the foreign patents, that contention was decided adversely in companion litigation, Mannington Mills, Inc. v. Congoleum Industries, Inc., 197 U.S.Pat.Q. 145 (D.N.J.1977), and Congoleum has instituted infringement suits against Mannington in New Zealand, Canada, Australia, and Japan.

In 1974, Mannington filed suit in the district court of New Jersey alleging, Inter alia, that Congoleum's licensing practices in the overseas markets violated *§ 2* of the Sherman Antitrust Act, *15 U.S.C. § 2*. Summary judgment on the antitrust claim was entered in favor of the defendant and the case is presently on appeal. Mannington **[**3]** had sought to amend its complaint in that suit by adding allegations of Congoleum's fraud in securing its foreign patents. The district court denied leave to amend the complaint as to this specific contention. Thereafter, Mannington filed the present action based on essentially the same grounds. The district court dismissed the complaint for failure to state a claim and also declined to exercise jurisdiction in a pendent state unfair competition count.

* Honorable Charles R. Weiner, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Mannington's complaint alleges that Congoleum made fraudulent representations to various foreign patent offices in the following general categories:

1. False statements about the reactions and performance of some of the chemical components of the vinyl flooring;
2. Misrepresentation of test data;
3. Suppression of information critical to the practice of the invention;
4. Misleading statements about the status and contents of the United States patent applications.

The complaint charges that Congoleum enforced the foreign patents by bringing and threatening the institution of infringements suits in foreign countries. This activity allegedly restrained the export trade of the United States by restricting **[**4]** the foreign business of Mannington and other American competitors in addition to demonstrating an intent to monopolize. Mannington asserts further that Congoleum's false claims of priority dates were in violation of the Paris Convention of March 20, 1883, As amended, (1962) 13 U.S.T. 1, and the Pan-American Convention of August 20, 1910, 38 Stat. 1811.

[*323]** The district court held that since no private right of action was set out in the treaties no relief could be granted. The antitrust count was dismissed on the grounds that the validity of the foreign patents was to be determined by the courts of the respective issuing nations and there was no necessity for American firms to apply for foreign patents in any way other than as established by the respective nations. The court stated that to enjoin Congoleum from enforcing its foreign patents in other nations against Mannington would violate the act of state doctrine.

Mannington emphasizes that it is not challenging the right of a foreign government to confer patents under its own requirements and indeed does not seek to have the patents at issue adjudged invalid. **[*1291]** Rather, its claims are said to arise out of **[**5]** breach of standards imposed by American law and thus are properly determinable in the district court. Mannington argues that use of the United States courts to resolve antitrust claims stemming from fraud in the procurement of patents abroad is consistent with the extraterritorial jurisdiction of the Sherman Act, and litigation in a single forum furthers judicial efficiency. Congoleum contends, however, that Mannington's theory for antitrust relief is barred by the act of state doctrine, and subjecting a putative patentee to United States standards for foreign patent procurement is an unwarranted extension of the antitrust laws.

I

JURISDICTION

We turn first to the question of jurisdiction. Both parties are subject to service of process in New Jersey and in personam jurisdiction is concededly present. What is at issue, however, is subject matter jurisdiction.

The challenge here is to conduct by an American corporation in a foreign country, arguably legal there, and the issue is whether that activity is answerable in the courts of the United States under the Sherman Act's broad and potentially far-reaching language. The extraterritorial application of the Act to "trade or commerce **[**6]** . . . with foreign nations" has been and continues to be the subject of lively controversy. See, e.g., Kintner & Griffin, Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act, 18 B.C.Ind. & Com.L.Rev. 199 (1977). Neither the Act nor its legislative history gives any clear indication of the scope of the extraterritorial jurisdiction conferred, leaving such determination to the courts. Id. at 200-19; See Ongman, "Be No Longer a Chaos:" Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw. U.L. Rev. 733, 735-41 (1977).

Justice Holmes's opinion in *American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909)*, cast doubt on the intent of Congress to extend the Sherman Act to action perpetrated beyond United States territory. Since then, however, the Supreme Court has made it clear that ***HN1***[] "foreign commerce" applies to importing, exporting, and other commercial transactions, as well as transportation and communication between the

United States and a foreign **[**7]** country. [1] Acts and agreements occurring outside the territorial boundaries of the United States that adversely and materially affect American trade are not necessarily immune from United States antitrust laws. *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*; *United States v. National Lead Co., 332 U.S. 319, 67 S. Ct. 1634, 91 L. Ed. 2077 (1947)*; *United States v. Sisal Sales Corp., 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927)*; *Thomsen v. Cayser, 243 U.S. 66, 37 S. Ct. 353, 61 L. Ed. 597 (1917)*; *United States v. Pacific & Arctic Railway & Navigation Co., 228 U.S. 87, 33 S. Ct. 443, 57 L. Ed. 742 (1913)*.

[8]** In oft-quoted language, Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443-45 (2d Cir. 1945)*, concluded that although Congress did not intend ***HN2***[] the Sherman Act to prohibit conduct having no effect in the United States, it did intend the Act to reach conduct having consequences within this country even where the parties concerned had no allegiance to the United States if the conduct is intended to and actually does **[*1292]** have an effect upon United States imports or exports. This wide-reaching "intended effects" test has been cited with approval by the Supreme Court. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. **[***324]** 690, 705, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*. See also Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965).

It can no longer be doubted that ***HN3***[] practices of an American citizen abroad having a substantial effect on American foreign commerce are subject to the **[**9]** Sherman Act. As was observed in *Steele v. Bulova Watch Co., 344 U.S. 280, 282, 73 S. Ct. 252, 254, 97 L. Ed. 319 (1952)*, a case involving trademark infringement under the Lanham Trade-Mark Act of 1946, *15 U.S.C. §§ 1051-1127*, "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States." This view has been criticized because its failure to abide by the basic tenet that a nation's legislation is valid only in the territory it governs leads to unnecessary international friction. [2] Nevertheless, ***HN4***[] when two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one, a federal court does have subject matter jurisdiction. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. Therefore, we are satisfied that the district court did have jurisdiction in this case.

[10]** II

ACT OF STATE

The defendant relies heavily upon the act of state doctrine but we conclude that it does not preclude adjudication of Mannington's claims. The doctrine is a policy of judicial abstention from inquiry into the validity of an act by a foreign government. The premise upon which it rests is that an act by the sovereign power of a foreign state or by its authorized agent in its own territory and within the scope and authority of the office cannot be questioned or made the subject of legal proceedings in our courts. Similar to, and thought to be derived from the concept of sovereign immunity, the act of state doctrine has a distinguishing characteristic in that it can be invoked as a defense by a private litigant.

In one of the earliest expressions of this doctrine, Chief Justice Fuller in *Underhill v. Hernandez, 168 U.S. 250, 252, 18 S. Ct. 83, 84, 42 L. Ed. 456 (1897)* said: **[**11]**

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[1] For commentary on the implications and erosion of the American Banana view of jurisdiction, See Fortenberry, Jurisdiction Over Extraterritorial Antitrust Violations Paths Through the Great Grimpen Mire, 32 Ohio St.L.J. 519, 523-31 (1971); Fugate, Antitrust Jurisdiction and Foreign Sovereignty, 49 Va.L.Rev. 925, 926-35 (1963); Kintner & Griffin, Supra at 204-12; Raymond, The Exercise of Concurrent Jurisdiction: "Move with Circumspection Appropriate," 8 B.C.Ind. & Com.L.Rev. 673, 683-89 (1967); Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247, 1249-50 & n. 12 (1977); Comment, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, 70 Yale L.J. 259, 260-64 (1960).

[2] See Fortenberry, Paths Through the Great Grimpen Mire, Supra at 531-38; Raymond, "Move with Circumspection Appropriate," *Supra at 683-89*; Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, Supra at 1250 & nn.14-15; Comment, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, Supra at 259-64.

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

In later years, there was a shift in focus from the notions of sovereignty and the dignity of independent nations recognized in Underhill and in *American Banana Co. v. United Fruit Co., supra*, to concerns for preserving the "basic relationships between branches of government in a system of separation of powers," and not hindering the executive's conduct of foreign policy by judicial review or oversight of foreign acts. *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 84 S. Ct. 923, 938, 11 L. Ed. 2d 804 (1964)*. Another more recent view is that the doctrine is based on notions of comity and a conflict of laws theory that foreign law is to be accepted as the rule of decision in passing upon acts occurring within the foreign power's jurisdiction. Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247, 1255 & n.36 (1977).

But whatever its theoretical foundation, by precluding **[**12]** inquiry into the validity of a foreign sovereign's ***HN5***[] act, the doctrine requires American courts to reject private claims based on the contention that the **[*1293]** damaging act of another nation violates either American or international law. [3] That preclusion is not lightly to be imposed and to determine whether the act of state doctrine applies in a given factual context, the court must analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role. See Restatement (Second) of Foreign Relations Law, Supra § 41, Comment d.

[13]** Cases involving confiscatory measures taken by foreign sovereigns provided the first opportunities to apply the doctrine and until recent years courts seldom referred to the subject in antitrust litigation. Timberg, Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion, 55 Texas L.Rev. 1 (1976); See also Note, 69 Mich.L.Rev. 888 (1971). In the typical confiscation situation based on a foreign state's expropriation of property rights or its repudiation of contractual **[***325]** obligations, only private rights are sought to be vindicated. In antitrust litigation, however, in addition to claims of private injury, there is a public interest in clearing monopolistic activities from the channels of American commerce.

Similar in effect but somewhat conceptually distinct is the defense of foreign compulsion which shields from antitrust liability the acts of parties carried out in obedience to the mandate of a foreign government. The sovereign **[**14]** compulsion defense is not principally concerned with the validity or legality of the foreign government's order, but rather with whether it compelled the American business to violate American ***antitrust law***. Thus, in *Interamerican Refining Corp. v. Texas Maracaibo, Inc., 307 F. Supp. 1291 (D.Del.1970)*, the defendant was held not responsible for a boycott forced upon it by the Venezuelan government. See Michigan Note, Supra ; Note, Export Policy, Antitrust and the Arab Boycott, 51 N.Y.U.L.Rev. 94, 125-31 (1976). See also Fugate, Antitrust Jurisdiction and Sovereign Immunity, 49 Va.L.Rev. 925, 934-37 (1963); Antitrust Division, U.S. Dept. of Justice, Antitrust Guide for International Operations (Jan. 26, 1977) (Antitrust Guide). One asserting the defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct. In *United States v. Sisal Sales Corp., supra*, for example, the Court concluded that Mexican legislation solicited **[**15]** by American banks to facilitate the establishment of a cartel that monopolized United States imports was not a sufficiently coercive act by a foreign government to justify the banks' Sherman Act violations. In that instance, foreign governmental activity was in reality involvement arranged by the defendants rather than independently conceived legislation directed toward an essential part of the violations.

HN6[] Where the governmental action rises no higher than mere approval, the compulsion defense will not be recognized. It is necessary that foreign law must have coerced the defendant into violating American ***antitrust law***. *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*; *Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)*. The defense is not available if the defendant could have legally refused to accede to the foreign power's wishes, *United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cases (CCH) P*

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[3] See generally Golbert & Bradford, The Act of State Doctrine: Dunhill and Other Sabbatino Progeny, 9 Sw.L.Rev. 1 (1977); Zander, The Act of State Doctrine, 53 Am.J.Int'l L. 826 (1959); Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, Supra.

70,600 (S.D.N.Y.1962), Order modified, *1965 Trade Cases (CCH) P 71,352 (S.D.N.Y.1965)*. **[**16]** See W. Fugate, Foreign Commerce and the Antitrust Laws 75-82 (rev. ed. 1973).

The defendant here contends that, whether valid or invalid, the grants of foreign patents could be accomplished only by affirmative governmental actions and therefore are acts of state which American courts are not free to examine. ***HN7***[] We are unable to accept the proposition that the mere issuance of patents by a foreign power **[*1294]** constitutes either an act of state, as that term has developed under case law, or an example of governments' compulsion.

There is no allegation of collusion with foreign governments in securing the patents, nor was the defendant compelled to refuse a license to the plaintiff. See, e. g., *Continental Ore Co. v. Union Carbide & Carbon Corp., supra, 370 U.S. at 706, 82 S. Ct. 1404*; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D.Cal.1971)*, Aff'd per curiam, *461 F.2d 1261* (9th Cir.), Cert. denied, *409 U.S. 950, 93 S. Ct. 272, 34 L. Ed. 2d 221 (1972)*. Thus, ***HN8***[] by issuance of the patents per se, the foreign governments did not force the defendant to exclude the plaintiff from the foreign markets and **[**17]** the defense of compulsion is not available.

The case Sub judice also fails to fall within the more traditional applications of the act of state doctrine. The grant of a patent is quite different from an act of expropriation by a government. See *Banco Nacional de Cuba v. Sabbatino, supra*; *American Banana Co. v. United Fruit Co., supra*; *Hunt v. Mobil Oil Corp., 550 F.2d 68* (2d Cir.), Cert. denied, *434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977)*. In those instances, moreover, the crucial acts occurred as a result of a considered policy determination by a government to give effect to its political and public interests matters that would have significant impact on American foreign relations. See Restatement (Second) of Foreign Relations Law, Supra § 41. Those situations may be distinguished from the failure to pay an ordinary commercial debt, *Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-97, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976)* (plurality opinion) or the determination of a security interest in litigation between private parties in a foreign nation's court. *Timberlane Lumber Co. v. Bank of America, supra at 605-08*. **[**18]** In each of the foregoing instances, an act of state defense was denied. [4] See also *United States **[***326]** v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y.1951)* (patent rights).

[19]** The grant of patents for floor coverings is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs. Although enforcement of a decree in the present litigation may possibly present problems of international relations, as will be discussed Infra, ***HN9***[] the granting of the patents per se, in substance ministerial activity, is not the kind of governmental action contemplated by the act of state doctrine or its correlative, foreign compulsion. We conclude, therefore, that the asserted act of state defense does not support dismissal of plaintiff's complaint and it does not apply to the patents issued in the foreign countries.

III

COMITY, ABSTENTION AND INTERNATIONAL REPERCUSSIONS

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[4] The Foreign Sovereign Immunities Act of 1976, *28 U.S.C. §§ 1602-1611*, distinguishes between public acts and commercial dealings of foreign nations and excludes the latter from the scope of sovereign immunity in American courts. See also Kintner & Griffin, Supra at 237; Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, Supra at 1253-58; Comment, Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach, Supra at 270-72. The legislation effectively narrows the scope of sovereign immunity, a step which was unable to command a majority of the court as to the act of state doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba, supra.* Congressional opposition to the Sabbatino opinion, however, led to the adoption of the Hickenlooper amendment to the Foreign Assistance Act of 1964, *22 U.S.C. § 2370(e)(2)*, which severely restricts application of the doctrine Inter alia in the case of a foreign confiscation or taking after January 1, 1959 and in violation of the principles of international law, unless the President determines that the doctrine's application is required in a particular case and so indicates. See Golbert & Bradford, The Act of State Doctrine: Dunhill and Other Sabbatino Progeny, Supra at 27-33.

Having concluded that the act of state doctrine is not applicable in these circumstances and that there is subject matter jurisdiction, the question remains whether jurisdiction should be exercised. Cf. *SEC v. Kasser, 548 F.2d 109* (3d Cir.), Cert. denied, *431 U.S. 938, 97 S. Ct. 2649, 53 L. Ed. 2d 255* ***[*1295]*** *(1977)*; *Straub v. Vaisman & Co., 540 F.2d 591 (3d Cir. 1976)*. See also Beausang, **[**20]** The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187 (1966); Ongman, "Be No Longer A Chaos," supra.

Some analysis of the plaintiff's position is helpful in identifying the considerations bearing on this issue. Essentially, the plaintiff seeks to extend the doctrine of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, a case alleging a domestic patent antitrust violation, to an international setting. In Walker, the Supreme Court held that a company which had engaged in monopolistic activity was subject to Sherman Act liability when the conduct had been carried on under the shield of a patent obtained from the United States Patent Office by intentional fraud. The Court observed that ***HN10***[] a patent provides an exception to the general rule against monopolies but proof of knowing and wilful misrepresentation of facts to the patent office strips the patentee of its exemption. In that event, if the plaintiff can prove the other elements of a Sherman Act *§ 2* violation in addition **[**21]** to invalidity of the patent, then it is entitled to recover treble damages.

Mannington seeks to apply the same rationale here, although it is not attacking Congoleum's American patents but only its corresponding ones abroad. Mannington asserts that it need not prove the invalidity of the foreign patents under the issuing countries' laws. It argues that they were obtained by conduct considered fraudulent under American law and would expose Congoleum to antitrust liability in this country if domestic patents were at issue. Therefore, says Mannington, it is not necessary to examine the patent law of 26 foreign countries to determine if the Congoleum patents are valid there.

Walker, of course, did not go so far. It held only that a patent invalid under American law because of fraud may expose the defendant to American antitrust penalties. [5] Mannington urges that a patent, even **[***327]** though valid under the law of a foreign nation, cannot act as an exemption for antitrust liability if procured by conduct unacceptable by American standards. Mannington would hold Congoleum liable for its activity **[**22]** abroad that impaired plaintiff's foreign business or barred it from competition in a nation altogether. In short, Mannington presses us to apply the same reach to the Sherman Act as did the Court to the Lanham Act in *Steele v. Bulova Watch Co., supra.* In that case, an American company sued an American citizen in a United States court alleging that the use of a trademark registered in Mexico and imprinted there on articles, some of which found their way to the United States, violated United States law. Before the case reached the Supreme Court, however, the Mexican government nullified its registration. As the Court acknowledged:

[23]**

> "(T)here is thus no conflict which might afford petitioner a pretext that such relief would impugn foreign law. The question, therefore, whether a valid foreign registration would affect either the power to enjoin or the propriety of its exercise is not before us. Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it **[*1296]** to cease or perform acts outside its territorial jurisdiction." *Id. at 289, 73 S. Ct. at 257*.

If it be assumed that the foreign patents are invalid under the issuing countries' laws because of intentional fraud, then it would seem proper to extend Walker to cover the situation, at least in the absence of antitrust legislation in

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[5] One commentator has suggested that a different approach may be appropriate in considering foreign statutes.

"Prevention of fraudulent acquisition of patent rights may be more important under United States law than under foreign law, because once the right is established we generally do not police profits, and we generally do not require licensing . . . . Since we do neither of those things, and thus essentially allow a monopoly return to the inventor of a product of commercial significance, it becomes very important to determine whether the patent was valid in the first place. Because of this, we have additional engraftings on the element of validity. One enlargement . . . is the doctrine that fraudulently obtaining a patent is an antitrust violation a monopolization or an attempt to monopolize." Davidow, United States Antitrust Laws and International Transfers of Technology The Government View, 43 Fordham L. Rev. 733, 735 (1975).

the foreign nation. But Mannington's position requires that we take as a premise that patents are enforceable in the foreign countries and that the fraud, perhaps because of irrelevance to foreign patent requirements or of inability to satisfy a "but for" test, See e.g., *Corning Glass Works v. Anchor Hocking Glass Corp., 253 F. Supp. 461 (D.Del.1966)*, Rev'd on other grounds, *374 F.2d 473* **[**24]** (3d Cir.), Cert. denied, *389 U.S. 826, 88 S. Ct. 65, 19 L. Ed. 2d 80 (1967)*, is insufficient under foreign law to constitute grounds for invalidity.

In addition to treble damages, Mannington asks that Congoleum be enjoined from enforcing these hypothetically valid patents in the foreign jurisdictions. Obviously, some potential for conflict with the policy of foreign nations is present in both forms of relief.

A judgment against Congoleum in this country would have direct and ripple effects abroad. It is not unusual for other nations to condition the issuance of patents upon certain requirements, E.g., that the article be manufactured in that country; that it be actively "worked"; or that licenses be restricted in various ways, or at the other extreme, be compulsory. It may be also that some nations might require that the patent be enforced. Nationals may be preferred over foreigners or patent laws may have been designed to develop the technical know-how of an underdeveloped country. See Wayman, Patent Protection in International Business Transactions, 45 Den. L.J. 64 (1968). Many of these policies could be frustrated by a decree of an American court **[**25]** which, in effect, declares the foreign patent invalid both by American standards and as it may affect American commerce.

This may, indeed, be a situation where the consequences to the American economy and policy permit no alternative to firm judicial action enforcing our antitrust laws abroad. But before that step is taken, there should be a weighing of competing interests.

The antitrust statutes enacted by Congress commit this country to the free enterprise system and the exercise of open competition. If an American company is excluded from competition in a foreign country by fraudulent conduct on the part of another American company, then our national interests are adversely affected. In a purely domestic situation, the right to a remedy would be clear. When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction. [6]

[26]** Some decisions of American courts have been criticized for failure to adequately **[***328]** assess these concerns. In *United States v. Imperial Chemical Industries, Ltd., 105 F. Supp. 215 (S.D.N.Y.1952)*, the court obtained personal jurisdiction over a British defendant, I.C.I., in an antitrust case. As part of the remedy, the court ordered I.C.I. to divest itself of certain patents which it had received from an American defendant, DuPont Company. However, I.C.I. was already under contract to grant exclusive licenses for these patents to another British company, British Nylon Spinners, Ltd., which was not before the American court. **[*1297]** The contract being legal and enforceable in England, a court there prohibited I.C.I. from parting with the patents and required it to keep its agreement with British Nylon Spinners, Ltd. In the course of its opinion, the British court commented pointedly:

> "Applied conversely, I conceive that the American courts would likewise be slow (to say the least) to recognise an assertion on the part of the British courts of jurisdiction extending, in effect, to the business affairs of persons and corporations in the United States." British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., (1953) 1 Ch. 19, 24 **[**27]** (C.A.), Made permanent, (1955) 1 Ch. 37.

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[6] The Antitrust Guide, Supra, takes the position that:

"(C)onsiderations of jurisdiction, enforcement policy, and comity often, but not always, lead to the same conclusion: ***HN11***[] the United States antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations." Antitrust Guide, Supra at 6-7, Quoted in Fugate, The Department of Justice's Antitrust Guide for International Operations, 17 Va.J.Int'l L. 645, 653 (1977).

In other cases, orders by American courts directed to foreign countries to produce their records in this country have provoked protest and specific prohibitory legislation from those nations. See *In re Grand Jury Subpoena Duces Tecum Addressed to the Canadian International Paper Co., 72 F. Supp. 1013 (S.D.N.Y.1947)*; Raymond, "Move with Circumspection Appropriate," supra; Cf. *Societe Internationale v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)*; *Ohio v. Arthur Andersen & Co., 570 F.2d 1370* (10th Cir.), Cert. denied, *439 U.S. 833, 99 S. Ct. 114, 58 L. Ed. 2d 129 (1978)*; Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 Yale L.J. 612 (1979).

The decision in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, caused serious misgivings in Canada. See Comment, American Antitrust Laws and Canadian Patent Rights, 118 U.Pa.L.Rev. 983 (1970).

Some courts have exhibited a greater sensitivity to principles of international comity. For example, in *United States v. General Electric Co., 82 F. Supp. 753 (D.N.J.1949)*, **[**28]** Opinion on remedies, *115 F. Supp. 835 (D.N.J.1953)*, then District Judge Forman inserted a savings clause in his order so as not to place the defendant in violation of laws in foreign countries where it carried on business. Cf. *Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633* (2d Cir.), Cert. denied, *352 U.S. 871, 77 S. Ct. 96, 1 L. Ed. 2d 76 (1956)* (court interpreted *Steele v. Bulova Watch Co., supra*, as applying to conduct of its citizens in foreign countries when the rights of other nations or their nationals are not infringed).

In eschewing a provincial approach, these latter cases, in our view, best reflect the realities of international commerce. Courts should not shrink from their duty because of an inability by the affected parties to reach a consensus. Enough has been said, however, to demonstrate the appropriateness of a recent commentary made in another context: "Perhaps the one point that deserves to be stressed for the future is that the substantive antitrust analysis must not be applied mechanically where foreign contacts are involved not even in the so called per se area. More subtlety is required . . . ." I P. Areeda **[**29]** & D. Turner, ***Antitrust Law*** § 240 at 278 (1978).

In *Timberlane Lumber Co. v. Bank of America, supra at 614-15*, the Court of Appeals for the Ninth Circuit adopted a balancing process ***HN12***[] in determining whether extraterritorial jurisdiction should be exercised, an approach with which we find ourselves in substantial agreement. The factors we believe should be considered include:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; [7]

[30]**

[*1298] 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

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[7] **[***329]** We note the suggestion in the concurring opinion that problems regarding the formulation of relief can be dealt with at a subsequent stage of the litigation. That may be possible in some cases. Once the trial court has had an opportunity to evaluate the effects of possibly countervailing interests and policies based on a record presented with a view toward addressing these issues, it may well determine that exercise of jurisdiction is appropriate and that a remedy tailored to meet incidental enforcement problems can be designed. But in our view, the record on this 12(b)(6) dismissal is inadequate to allow a reasoned decision on that issue as well as the others we have enumerated.

The record in this case is not adequate to allow a reasoned decision on these highly complex issues even if only one foreign nation were involved rather than 26. Moreover, we do not believe that the extensive inquiry required must yield the same answer in each instance. The legislation and policy of each nation is not likely to be the same, nor is it probable that the effect upon commerce in each instance will be as substantial as others. Although the plaintiff would prefer to have the matter resolved as a unitary one, that cannot be done when the individual interests and policies of each of the foreign nations differ and must be balanced against our nation's legitimate interest in regulating anticompetitive **[**31]** activity.

We conclude, therefore, that it was error to dismiss the plaintiff's complaint without preparation of a record which will allow an evaluation of the factors counseling for or against the exercise of jurisdiction.

IV

TREATY COUNT

In the third count of its complaint, the plaintiff alleges that treaties to which the United States is a party, the Paris Convention of March 20, 1883, as amended, and the Pan-American Convention of August 20, 1910, were violated by the defendant. Mannington asserts that it is a "person" enjoying rights under the treaties and has been harmed by the defendant's use of false claims of priority dates in prosecuting patents. The district court dismissed this count of the complaint on the ground that the treaties do not provide a private right of action.

A treaty of the United States is a contract with another nation which becomes the law of this country. *U.S.Const. art. VI, cl. 2*; *Dreyfus v. Von Finck, 534 F.2d 24, 29* (2d Cir.), Cert. denied, *429 U.S. 835, 97 S. Ct. 102, 50 L. Ed. 2d 101 (1976)*. Like private rights under **[**32]** law, a treaty may confer rights capable of enforcement. *Z. & F. Assets Realization Corp. v. Hull, 72 App.D.C. 234, 240, 114 F.2d 464, 470*, (D.C. Cir.) Aff'd on other grounds, *311 U.S. 470, 61 S. Ct. 351, 85 L. Ed. 288 (1941)*, but this is not the general rule. As the Court explained in Head Money Cases (Edye v. Robertson), *112 U.S. 580, 598-99, 5 S. Ct. 247, 254, 28 L. Ed. 798 (1884)*:

> "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."

Thus, ***HN13***[] unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action. *Diggs v. Richardson, 180 U.S.App.D.C. 376, 555 F.2d 848 (D.C. Cir. 1976)*; *Dreyfus v. Von Finck, supra.*

Mannington has pointed to neither self-executing provisions of the treaty nor implementing legislation. On examining Article 17 of the Paris Convention, however, we find an expression contrary to the concept of a private **[**33]** right of action. It reads:

> "Every country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention."
>
> **[*1299]** "It is understood that at the time an instrument of ratification or accession is deposited on behalf of a country, such country will be in a position under its domestic law to give effect to the provisions of this Convention." (1962) 13 U.S.T. 1, 41.

Similarly, Article IX of the Pan-American Convention states:

> "Persons who incur civil or criminal liabilities, because of injuries or damages to the rights of inventors, shall be prosecuted and punished, in accordance with the laws of the countries wherein the offense has been committed or the damage occasioned." 38 Stat. 1815.

Both treaties, therefore, are at odds with a contention that they are self-executing. Finding no indication that a private right of action was conferred by the treaties, we conclude that the district court did not err in dismissing Count III of the complaint.

Inasmuch **[**34]** as the state unfair competition claim was dismissed because no federal causes of action were found to exist, the district court should be free to reconsider that count if it decides it should exercise jurisdiction under the antitrust claims. Accordingly, **[***330]** the unfair competition count will also be remanded.

The judgment of the district court dismissing Count III of the complaint will be affirmed. The judgment dismissing Counts I and II will be vacated and the matter remanded to the district court for further proceedings consistent with this opinion. Both parties to bear their own costs.

Concur by: ADAMS

Concur

ADAMS, Circuit Judge, concurring.

I join in Parts II and IV of the majority opinion, which hold, respectively, that the act of state doctrine does not preclude adjudication of Mannington's antitrust claim and that the treaties of 1883 and 1910 do not provide Mannington a private right of action. The approach I take to Mannington's antitrust claim diverges substantially, however, from that taken by the majority and I therefore write separately on that matter.

My differences with the majority regarding Mannington's basic claim are threefold. First, I believe that the rationale **[**35]** of Walker Process is applicable to the fraudulent procurement of foreign patents and that therefore Mannington's complaint has set forth a claim upon which relief can be granted. Second, I do not agree that a court may conclude that it is invested with subject-matter jurisdiction under the Sherman Act but may nonetheless abstain from exercising such jurisdiction in deference to considerations of international comity; rather, it seems that those considerations are properly to be weighed at the outset when the court determines whether jurisdiction vel non exists, or in fashioning the decree. Third, it appears evident that notwithstanding the foreign elements involved, jurisdiction exists in the present case, and that possible repercussions abroad should be examined by the court when and if it formulates a remedy.

Apart from my disagreement on specific points, it appears that the majority is influenced to some extent by Congoleum's contention that this claim is really a conglomeration of twenty-six distinct, foreign patent fraud suits and that therefore Mannington should be relegated to the courts of the various foreign countries for vindication of its rights. Admittedly, Mannington's **[**36]** complaint presents a complex and novel problem regarding the proper accommodation between American antitrust and foreign patent laws as they relate to the fraudulent procurement of foreign patents. Conceivably Mannington could have sued in the courts of each country to invalidate Congoleum's patents, but it chose not to do so. Mannington does not denominate this lawsuit as one for patent fraud, nor does it seek to have any of the foreign patents declared invalid. Instead, its claim is grounded on an alleged infraction of *§ 2* of the Sherman Act, and it must therefore be treated as such.

Accordingly, Mannington's complaint should be analyzed, as I view it, by engaging in a dual inquiry into first, whether the challenged conduct affects "commerce . . . with foreign nations" so as to be within the **[*1300]** jurisdictional scope of the Sherman Act, and second, whether there is a monopolization or attempted monopolization of trade or commerce so as to be violative of the Act. Although these are separate questions, courts have generally recognized, albeit in other contexts, that a final determination as to the existence of subject-matter jurisdiction must often await some clarification **[**37]** of the substantive offense. [1] This interrelationship between the jurisdictional and substantive issues seems to be borne out in the present case, where an understanding of the substantive offense sheds light on whether jurisdiction exists.

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[1] See, e. g., *Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 890-98 (3d Cir. 1977)* (dismissal of suit charging violation *§ 1* of the Sherman Act for want of subject-matter jurisdiction was held to be premature because same facts are relevant for ascertaining jurisdiction as well as the substantive offense). See also Ongman, "Be No Longer a Chaos": Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope, 71 Nw.U.L.Rev. 733, 733-735 (1977).

In essence, Mannington alleges that Congoleum set out to monopolize the foreign trade relating to chemically embossed vinyl floor covering by fraudulently securing patents in twenty-six foreign countries, thereby giving Congoleum the power to prevent **[**38]** American competitors from shipping such material to purchasers in those countries. That Mannington's allegation states a claim under *§ 2* of the Sherman Act is, I believe, a necessary inference from *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. There, the Supreme Court addressed one facet of the tension that exists between the Sherman Act, which outlaws monopolies, and United States patent law, which creates "an exception to the general rule against monopolies and to the right to access to a free and open market." [2] Seeking to reconcile the differing **[***331]** policies of the patent and antitrust laws, the Court held that a patentee is stripped of its exemption from the antitrust laws when it obtains its patent by knowingly and willfully misrepresenting facts to the patent office. As explained by Justice Harlan in his concurring opinion,

> **[**39]** To hold, as we do, that private suits may be instituted under § 4 of the Clayton Act To recover damages for Sherman Act monopolization knowingly practiced under the guise of a patent procured by deliberate fraud, cannot well be thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure. Hence, As to this class of improper patent monopolies, antitrust remedies should be allowed room for full play. [3]

Thus, the Supreme Court has declared that the fraudulent procurement of a patent may properly be viewed from the vantage point of antitrust regulation as well as from the perspective of possible patent invalidity, and that monopolistic conduct is not sheltered from the purview of the antitrust laws merely because it involves the fraudulent procurement of patent rights. This underlying rationale of Walker Process appears to be just as applicable to monopolization through the fraudulent acquisition of foreign patents as it is to monopolization through the fraudulent acquisition of **[**40]** United States patents. And, in the words of Justice Harlan, "as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play." [4]

[41] [*1301]** With this understanding of the substantive offense charged, we may now turn to the question whether there is a monopolization of "trade or commerce . . . with foreign nations" so as to invest the federal courts with subject-matter jurisdiction. Although the test for subject-matter jurisdiction has traditionally been framed in terms of whether there is an actual or intended effect upon foreign commerce, [5] it has also been recognized that

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[2] *Walker Process, supra, 382 U.S. at 177, 86 S. Ct. 347*, Quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 816, 65 S. Ct. 993, 89 L. Ed. 1381 (1945)*.

[3] *382 U.S. at 179-80, 86 S. Ct. at 351*. (emphasis added).

[4] Id. Concededly, it may be that unlike fraudulently procured American patents, a number of foreign patents will remain valid under foreign law notwithstanding their fraudulent procurement. But that does not appear relevant to the question whether the holder of such a foreign patent has monopolized trade in violation of the Sherman Act. However, as discussed in the text Infra, the continued validity of a foreign patent may have some bearing on the formulation of an antitrust remedy.

The majority opinion appears to sidestep the question whether Walker Process applies to the fraudulent procurement of a foreign patent, but cites one commentator who suggests that Walker Process should be limited to situations involving United States patents. *Supra at pp. 1295-1296* & n. 5. The reason advanced for such a limitation is that American patents are unique in that it is very important to determine at the outset whether an American patent is valid, because we do not police profits or require licensing, thereby making it necessary to have "additional engraftings on the elements of validity," including "the doctrine that fraudulently obtaining a patent is an antitrust violation." Such an "engrafting" is unnecessary, it is asserted, with respect to foreign patents. It would seem, however, that this argument is flawed in that it subordinates the Sherman Act to patent law policies; it implies that Walker Process was a special enlargement of the antitrust laws designed to deal with the problem of identifying invalid patents, instead of recognizing that Walker Process merely removed the limited patent exception to the antitrust laws in those circumstances where a patent has been obtained by deliberate fraud.

"anything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States." [6] Thus, Judge Learned Hand, when first formulating the "effects" test, observed:

> **[**42]** (W)e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequence within the United States. [7]

A "jurisdictional rule of reason," [8] incorporating concepts from conflicts of laws, has therefore emerged, though admittedly this approach has not always been given explicit recognition in the cases. The appropriate approach has been articulated most precisely in *Timberlane **[***332]** Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597 (9th Cir. 1972)*:

> **[**43]** A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be Some effect actual or intended on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil Violation of antitrust laws. *Occidental Petroleum, 331 F. Supp. at 102-03*; Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, 191 (1966). Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority. [9]

[44]** **[*1302]** The third leg of the jurisdictional test reflects, of course, the principle expressed in the Restatement (Second) of Foreign Relations Law of the United States § 40:

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[5] See generally *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 609-12 (9th Cir. 1976)*; Kintner & Griffin, Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act, 18 B.C.Ind. & Comm.L.Rev. 199 (1977).

[6] *Timberlane, supra, 549 F.2d at 611*, Quoting Katzenbach, Conflicts on an Unruly Horse, 65 Yale L.J. 1087, 1150 (1956).

[7] *United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)*.

[8] See K. Brewster, Antitrust and American Business Abroad 446 (1958).

[9] *549 F.2d at 613*. See also *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 131 U.S.App.D.C. 226, 236-37, 404 F.2d 804, 814-15 (1968)*, Cert. denied, *393 U.S. 1093, 89 S. Ct. 872, 21 L. Ed. 2d 784 (1969)*. The majority apparently is of the view that the existence of jurisdiction is to be determined solely under an "effects" standard, but that a court may then decline to exercise jurisdiction because of considerations of international comity. As I understand it, however, a court may not abstain where jurisdiction properly lies unless abstention is warranted under a recognized abstention doctrine. See, e. g., *McClellan v. Carland, 217 U.S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762 (1910)*; *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821)* ("It is most true, that this court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction, if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.") See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System, 1258-59 (2d ed. 1973). And to my knowledge no abstention doctrine exists with respect to considerations of international comity. Rather, as Timberlane and Pacific Seafarers demonstrate, such considerations have been incorporated into an expanded jurisdictional test.

> 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 (various factors) . . . .

It is important to note, however, that this concern for international comity does not require that the Sherman Act, or any other statute, not be enforced extraterritorially whenever a party's conduct is also subject to regulation by a foreign government. It is only when foreign law requires conduct Inconsistent with that mandated by the Sherman Act that problems of international comity become significant. And even in such circumstances, it is recognized that extraterritorial jurisdiction may be asserted if the relevant factors, some of which are enumerated in the majority opinion, weigh in favor of the exercise of jurisdiction.

Relating this jurisdictional **[**45]** test to the present case, it is manifest that jurisdiction exists because there is no indication that Congoleum was conforming to a rule of conduct prescribed by foreign law when it allegedly undertook a scheme to monopolize trade with purchasers in twenty-six foreign nations by fraudulently procuring patents in those nations. Nor has it been suggested that Congoleum was compelled by foreign law to make materially false representations in connection with its patent applications. The dictate of the Sherman Act that Congoleum refrain from monopolizing foreign commerce is thus not at variance in this regard with the commands of any foreign nation. [10] In addition, Congoleum is an American company and is alleged to have masterminded and directed its monopolization scheme from its headquarters in Kearney, New Jersey, with the intention of affecting its American competitors' export markets. Given these alleged facts, there appears to be no reason why Congoleum should not be **[***333]** held accountable in the courts of the United States for monopolizing trade with foreign nations.

[46]** Problems may, of course, arise regarding the formulation of relief, but they do not appear to constitute a threshold jurisdictional barrier. Instead, they are matters that can be dealt with, if need be, at a subsequent stage of the litigation. Indeed, it would appear that there would not be any interference with the policies of foreign nations if relief were limited to treble damages, and the public interest in enforcing the antitrust laws, as well as the private interest of Mannington in obtaining a remedy, may be satisfied in large measure through such an award.

[*1303] Injunctive relief may also be utilized effectively if the district court deems such a remedy to be appropriate. Where, as here, the district court has personal jurisdiction over the defendant, there might well be no problem in ensuring compliance with its order, whether it prohibits Congoleum from prosecuting infringement suits or requires the licensing of competitors. Moreover, it is improbable that such an order would place Congoleum in the position of being forced to perform an act that is illegal in foreign countries, since patent rights primarily benefit the patent holder rather than the foreign **[**47]** government. At most, the omission to prosecute patent infringers or the unauthorized licensing of others may subject Congoleum to loss of its patent right, which in any event may well be invalid under foreign law because of its fraudulent procurement.

Thus, it is likely that the policies of most foreign nations will not be adversely affected by granting injunctive relief to Mannington. And if, for some reason, the patent laws and policies of one or two countries would be seriously affected a proposition that incidentally is nowhere suggested in the record the court can take these specific circumstances into account when fashioning its remedy, as other courts have done in the past. [11]

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[10] In this respect, this case presents a less problematical situation for application of the Sherman Act than was presented in *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*, which was criticized in Note, American ***Antitrust Law*** and Canadian Patent Rights, 118 U.Pa.L.Rev. 983 (1970), for ignoring the fact that Canadian law apparently required the restrictive patent licensing policy that was under attack in that case. The present case is also readily distinguishable from those situations, referred to by the majority, where a litigant who has been ordered by an American court to produce records maintained in a foreign country would be in violation of foreign law if it complied with the American court order.

[11] See, e. g., *United States v. General Electric Co., 115 F. Supp. 835 (D.N.J.1953)*; *United States v. Imperial Chemical Industries, 105 F. Supp. 215 (S.D.N.Y.1952)* (in each case, savings clause included in order so as not to place defendant in violation of foreign laws). See generally Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, 194-95 (1966).

[48]** In sum, then, I would conclude that subject-matter jurisdiction exists over Mannington's antitrust cause of action and that Mannington has stated a claim upon which relief can be granted. Accordingly, I would remand the case to the district court for proceedings on the merits, at which time Mannington would be obligated to establish, as required under Walker Process, both that Congoleum procured the foreign patents through knowing and willful fraud and that such conduct constituted monopolization of a relevant market of the foreign trade of the United States.

Fradette v. American Service Corp.

United States District Court for the Southern District of Florida.

April 5, 1979, Filed

Case No. 76-6373-Civ-CA; Case No. 76-1894-Civ-CA.

Reporter

1979 U.S. Dist. LEXIS 13220 *; 1979-1 Trade Cas. (CCH) P62,556

Rejean Fradette, et al. v. American Service Corp., et al.; A & P Bakery Supply & Equipment Co. v. American Service Corp. et al.

Subsequent History: Partial summary judgment denied by, Petition denied by, Motion granted by, Motion denied by, Stay denied by *Paquet v. Am. Serv. Corp., 1979 U.S. Dist. LEXIS 15409 (S.D. Fla., Aug. 29, 1979)*

Prior History: *United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1978 U.S. App. LEXIS 12393 (5th Cir. Fla., Feb. 28, 1978)*

Core Terms

conspiracy, certification, predominate, antitrust

LexisNexis® Headnotes

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

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN1[] **Class Members, Named Members**

To maintain a class action, a plaintiff must demonstrate numerosity of class members, commonality of questions of law or fact, typicality of the representatives' claims or defenses, adequacy of the representation provided by the named plaintiffs, and, in this case, that the common questions predominate and that the class method of adjudication is superior to other available methods. *Fed. R. Civ. P. 23*.

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

HN2[] **Class Actions, Prerequisites for Class Action**

Thousands of users is more than sufficient numbers to satisfy the numerosity requirement.

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN3[] **Private Actions, Standing**

In a private antitrust action plaintiff must demonstrate (1) a violation of the ***antitrust law***, (2) damages, (3) a causal link between the violation and the damages. Customer allocation agreements are per se violations of the antitrust laws. Thus, in this type of action, individual issues of law or fact will not arise in the proof of the antitrust violation.

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

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

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

HN4[] **Regulated Practices, Price Fixing & Restraints of Trade**

The impact rule does not, as a matter of law, defeat class certification. In some instances of price-fixing, certainty of impact may be proven by showing only proof of purchase.

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**

There are no sound distinctions in the treatment of price-fixing and customer allocation cases, as is evidenced by the application of the per se rule to both types of cases.

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

HN6[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Proof of the conspiracy and resulting supra-competitive prices renders a failure to change suppliers, when prices are a "few cents less," irrelevant to a plaintiff's cause of action. A conspiracy to allocate customers artificially changes supply and demand. The fact that the change in benefits may be so small as to not cause the recipient to alter its source in no way lessens the fact of damage. That is, the availability of lower priced products, even if they are identical, does not reduce or defeat the recovery of damages when the difference is small, because the damage still exists.

Counsel: **[*1]** For plaintiffs: Berger and Montague, P.C., David Berger, H. Laddie Montague, Jr., Stanley R. Wolfe, Alan Kessler, Howard Langer, and Donald Pevsner, Miami, Fla., for Fradette and Paquet. For defendants: Kenny, Nachwalter & Seymour, Miami, Fla., Herskowitz & Grossman, P.A., Miami, Fla., for American Service Corp., and Everglades Laundry Inc. d/b/a Mechanics Uniform Service; Fenton, Nederlander, Dodge, Ritchie, P.C., Detroit, Mich., Heller and Kaplan, Miami, Fla., for Cadillac Overall Supply Co. and Uniforms for Industry, Inc., Paul & Thompson, Miami, Fla., for Neway Towel Supply of Florida, Inc.

Opinion by: ATKINS

Opinion

Order on Motions to Certify Class and Order Setting Trial

ATKINS, D.J.: This cause is before the Court on motions of Plaintiffs for class certification in an antitrust action alleging a customer allocation conspiracy. These two cases have been consolidated because they allege the same conspiracy, though Plaintiffs Fradette and Paquet (Fradette) seek certification for a smaller geographic area than Plaintiff A & P Bakery Supply and Equipment Company (A & P). The Court will treat the certification motions separately.

Fradette

HN1[] To maintain a class action, Plaintiff **[*2]** must demonstrate numerosity of class members, commonality of questions of law or fact, typicality of the representatives' claims or defenses, adequacy of the representation provided by the named Plaintiffs, and, in this case, that the common questions predominate and that the class method of adjudication is superior to other available methods. *Fed. R. Civ. P. 23*.

I. Numerosity

Fradette's class allegedly contains thousands of users. ***HN2***[] This is more than sufficient numbers to satisfy the numerosity requirement. See 3B Moore's Fed. Practice § 23.05 (1978).

II. Commonality & Predominance

This Court will consider the commonality of issues of law and fact and the predominance of common issues simultaneously. ***HN3***[] In a private antitrust action plaintiff must demonstrate (1) a violation of the ***antitrust law***, (2) damages, (3) a causal link between the violation and the damages. *Windham v. American Brands, Inc., 565 F. 2d 59, 65 (4th Cir. 1977)*. Customer allocation agreements are per se violations of the antitrust laws. *United States v. Topco Associates, 405 U.S. 596 (1972)*. Thus, in this action, individual issues of law or fact will not arise in the proof of the antitrust violation.

[*3] Defendants argue that because proof of causation (impact) is necessary, it must be proven as to each individual, and, therefore, common issues do not predominate. Defendants cite *Alabama v. Blue Bird Body Co., Inc., 573 F. 2d 309 (5th Cir. 1978)*. It is clear that Blue Bird denied nationwide certification only because of a lack of facts to demonstrate classwide proof. The case made it equally clear that ***HN4***[] the impact rule does not, as a matter of law, defeat class certification. *573 F. 2d at 328*. The existence of a conspiracy, the scope of the conspiracy and other facts of this case have been developed and presented in the criminal action on this conspiracy. See *United States v. Cadillac Overall Supply Co., 568 F. 2d 1078 (5th Cir. 1978)*.

The Blue Bird court stated that in some instances of price-fixing, certainty of impact may be proven by showing only proof of purchase. *573 F. 2d at 309, n. 34*. This action does not involve allegations of price-fixing, but ***HN5***[] there are no sound distinctions in the treatment of price-fixing and customer allocation cases, as is evidenced by the application of the per se rule to both types of cases. See L. Sullivan, Antitrust 224-29 (1977). Upon **[*4]** analysis of the facts of this case, as stated in the companion criminal action and as alleged in the complaint in this action, this Court concludes that, while it may be necessary to prove more than purchase, such additional proof will be very little and the common issues of violation and those common portions of causation predominate over uncommon issues. Damages may be shown to be proportional to purchases, and purchases can be proven through existing records or a form interrogatory to each class member. Because of the peculiar facts of this case, it may not be necessary to bifurcate this action, though the Court reserves this issue until the progress of the trial demonstrates the most sound course.

The remaining issues are irrelevant to the cause, or are insignificant or can be resolved through a form request, and therefore do not predominate. In light of these conclusions, the class form is the superior method of resolving this case.

III. Typicality

Defendants argue that named Plaintiffs Fradette and Pacquet are not representative because some supplier of the products in question approached Fradette and Pacquet with an offer to provide the service for a few pennies **[*5]** less. There is no evidence that this offer came from someone other than another Defendant. Moreover, the Court concludes as a matter of law that ***HN6***[] proof of the conspiracy and resulting supra-competitive prices renders a failure to change suppliers, when prices are a "few cents less," irrelevant to Fradette's cause of action. A conspiracy to allocate customers artificially changes supply and demand. The fact that the change in benefits may be so small as to not cause the recipient to alter its source in no way lessens the fact of damage. That is, the availability of lower priced products, even if they are identical, does not reduce or defeat the recovery of damages when the difference is small, because the damage still exists.

Plaintiffs Fradette and Pacquet assert claims typical of the class.

IV. Adequacy

The Court has reviewed the pleadings and memoranda filed by attorneys for Fradette and concludes that the capabilities, interest and resources are more than adequate.

For the above reasons the following class, with Fradette and Pacquet as named Plaintiffs, is certified:

All private users who have rented industrial garments and/or who have purchased industrial garment **[*6]** maintenance service from Defendants and/or their unnamed co-conspirators, in Monroe, Dade, Broward, Palm Beach and St. Lucie Counties, during the period of the combinations and conspiracies alleged in the amended complaint, (1960 -- September 1974).

The Plaintiffs shall submit to the Court by April 27, 1979, the proposed notice to the class, and Defendants shall respond, if desired, by May 4, 1979. The Court will issue an order setting a preliminary pretrial conference. This case is set for trial the two-week period beginning September 24, 1979, pretrial conference to be held on Wednesday, September 12, 1979, at 9:00 a.m., and calendar call to be held on Thursday, September 20, 1979. The parties shall comply with the requirements set forth in the enclosed form notice of trial.

A & P Bakery Supply & Equipment Co.

The Court notes that there are serious questions of standing raised by A & P's action. It is unnecessary to resolve those questions at this time because the Court concludes that A & P's counsel would not adequately represent the class it seeks to have certified. A & P's counsel has failed to answer interrogatories, has failed to obey a court order requiring A & **[*7]** P to answer interrogatories, and has failed to appear for a hearing on the certification issue. The motion to certify is denied. A & P's counsel will notify the Court within ten (10) days of this Order if he desires to continue to prosecute the action, and will confer with Fradette's counsel to see if some employees of A & P, or A & P itself, are members of Fradette's class. Both Plaintiffs' counsel shall file a status report by April 16, 1979, preferably a joint statement, advising the Court on how the attorneys desire to handle this facet of the case.

If questions of standing remain they may be raised at any time by any interest party.

End of Document

[Mason City Center Associates v. Mason City]

United States District Court for the Northern District of Iowa, Cedar Rapids Division

April 5, 1979

No. C 78-106

Reporter

468 F. Supp. 737 *; 1979 U.S. Dist. LEXIS 13222 **; 1979-1 Trade Cas. (CCH) P62,628

MASON CITY CENTER ASSOCIATES and Beaver Farms, Inc., Plaintiffs, v. The CITY OF MASON CITY, IOWA, Kenneth Kew, Virgil DeVary, Dr. Stanley Romans, Marlys Shima, Roger Pedelty, Larry Jarvill, Harlan Johnson, Holmen Development Company and the Ericson Development Co., Inc., Defendants

Core Terms

zoning, anticompetitive, anti trust law, exemption, state action, Sherman Act, municipalities, allegations, west side, zoning power, defendants', rezoning, counts, shopping center, Associates, antitrust, sovereign, Downtown

LexisNexis® Headnotes

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss for failure to state a claim is the proper method for testing the legal sufficiency of a complaint. The motion should not be granted unless it appears beyond doubt that the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. In ruling on the motion, the court must construe the complaint liberally, taking the alleged facts as true and entitling the plaintiffs to all reasonable inferences in their favor that may be drawn from the alleged facts.

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

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

A state cannot give immunity to those who violate the Sherman Act, *15 U.S.C.S. § 1 et seq.*, by authorizing them to violate it, or by declaring that their action is lawful.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

A state's subdivisions and agencies are not automatically exempt from application of the federal antitrust laws. This is not to say, however, that municipalities may not at any time avail themselves, as agents of the state, of the state action exemption set forth in Parker. They may do so when their anticompetitive conduct is engaged in pursuant to state policy to displace competition with regulation or monopoly public service and merely reflects such state policy. In addressing this more-limited state policy consideration, however, the United States Supreme Court makes it clear that the threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act, *15 U.S.C.S. § 1 et seq.*, was not meant to proscribe is whether the activity is required by the state acting as sovereign. It is not enough that anticompetitive conduct is prompted by state action; rather, anticompetitive activities must be compelled by direction of the state acting as a sovereign.

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

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

Other considerations of special significance in Parker state action cases are whether or not the state policy requiring the anticompetitive restraint is specifically part of a comprehensive regulatory system and is clearly articulated, affirmatively expressed and actively supervised by the state as the policymaker.

Real Property Law > Zoning > Judicial Review

Real Property Law > Zoning > General Overview

HN5[] **Zoning, Judicial Review**

Although zoning statutes assuredly sometimes have anticompetitive effects, it is somewhat fatuous to contend that they inevitably reflect a state's clear and affirmative intent to displace competition with regulation or monopoly public service.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Legislation > Interpretation

Real Property Law > Zoning > General Overview

HN6[] Zoning, Ordinances

The zoning statutes must be strictly construed.

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

Governments > State & Territorial Governments > Claims By & Against

HN7[] Exemptions & Immunities, Parker State Action Doctrine

Where the law and policy of a state as sovereign are not in express or implied conflict with the federal antitrust laws, the need to consider the applicability of the Parker exemption for that state's political subdivisions becomes in a sense moot.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

No violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, can be predicated upon mere attempts to influence the passage or enforcement of laws, even when such attempts arise from anticompetitive motives and purposes. In reaching this decision, the court made a point of distinguishing agreements jointly to seek legislation or law enforcement from those combinations normally held violative of the Sherman Act characterized by an express or implied agreement or understanding that the participants will help one another to take away the trade freedom of others through the use of such devices as boycotts, market-division agreements, and other similar arrangements.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN9[] Defenses, Demurrers & Objections, Motions to Dismiss

In antitrust cases, where proof is largely in the hands of the alleged conspirators, dismissals prior to giving plaintiffs ample opportunity for discovery should be granted sparingly.

Counsel: [1]** Stephen J. Holtman, Simmons, Perrine, Albright & Ellwood, Cedar Rapids, Iowa, George F. Karch, Jr., Thomas J. Collin, Thompson, Hine & Flory, Cleveland, Ohio, for plaintiffs.

B. Michael Dunn, Mason City, Iowa, Stuart L. Finney, Minneapolis, Minn., for defendants; H. Richard Smith, Paul F. Ahlers, Edward W. Remsburg, James E. Cooney, Des Moines, Iowa, of counsel.

Opinion by: McMANUS

Opinion

[*739] ORDER

This matter is before the court on defendants' resisted joint motion to dismiss for failure to state a claim, filed January 15, 1979. Denied.

This action for injunctive relief and damages is predicated upon alleged antitrust violations. [1.] Plaintiffs are Mason City Center Associates (Center Associates), an Ohio limited partnership engaged in the organization and planning of a regional shopping center on the west side of Mason City, Cerro Gordo County, Iowa (West Side Center); and Beaver Farms, Inc. (Beaver Farms), an Iowa corporation owning title to the land upon which Center Associates plans to construct the aforementioned West Side Center. Defendants are the City of Mason City, a municipal corporation existing under the laws of the State of Iowa; Kew, DeVary, Romans, Shima, **[**2]** Pedelty, Jarvill, and Johnson each members of the Mason City City Council (Council); Holmen Development Co. (Holmen) and The Ericson Development Co., Inc. (Ericson), both Minnesota corporations engaged in the organization and planning of a regional shopping center in downtown Mason City (Downtown Center).

HN1[] A motion to dismiss for failure to state a claim is the proper method for testing the legal sufficiency of a complaint. 2A **[*740]** Moore's Federal Practice, P 12.08 at 2265-66 (2d ed. 1975). The motion should not be granted unless it appears beyond doubt that the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. *Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)*; *Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*; **[**3]** *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1260 (8th Cir. 1978)*; *Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)*. In ruling on the motion the court must construe the complaint liberally, taking the alleged facts as true and entitling the plaintiffs to all reasonable inferences in their favor that may be drawn from the alleged facts. *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc., supra.*

Plaintiffs' complaint alleges the following specifically relevant facts. Holmen and Ericson have entered into an agreement with the City to organize and plan the Downtown Center upon the express condition that the City prevent any person or firm from planning or constructing a regional shopping center that would compete with the Downtown Center. Plaintiff Center Associates seeks to construct its West Side Center on a 35-acre tract located on the west side and within the limits of Mason City. This tract is owned by Beaver Farms and is presently zoned "A-Agriculture and Mining."

The West Side Center development **[**4]** cannot be undertaken unless the Beaver Farms tract is rezoned to "G-Business." Beaver Farms applied for such a rezoning, which was denied by the Mason City Planning and Zoning Commission. The rezoning denial was affirmed by the City Council. Plaintiffs further allege that the Council members denied the rezoning pursuant to and in furtherance of their agreement with Holmen and Ericson to exclude competitive shopping center developments from Mason City, and that the agreement has effectively granted Holmen and Ericson "a perpetual veto power over all applications for rezoning of property in Mason City . . . intended to be used for a regional shopping center . . . in competition with the Downtown Center." As a result of these actions plaintiffs have been effectively prevented from pursuing their plan to build the West Side Center. Upon these and other allegations, [2.] **[**5]** plaintiffs base their contentions that defendants have violated federal and state antitrust statutes, and the Iowa common law relating to zoning. [3.]

[1.] Jurisdiction is premised upon sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15* and *26*; *section 1337* of the Judiciary Code, *28 U.S.C. § 1337*; and the doctrine of pendent jurisdiction.

[2.] The other allegations are the usual ones generally necessary to state a claim under the federal antitrust laws; See generally *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc., 430 F. Supp. 1234, 1238, 1242-1243 (N.D.Iowa 1977)*, Rev'd in part on other grounds, *578 F.2d 1256, 1259, 1262 (8th Cir. 1978)*; but are not directly material to the legal issues raised by defendants' motion to dismiss.

[3.] The complaint alleges a combination and conspiracy unreasonably restraining trade in the relevant market, a rule of reason violation of *section 1* of the Sherman Act, *15 U.S.C. § 1* (count 1); a group boycott, in per se violation of *section 1* (count 2); an unlawful attempt to monopolize the relevant market, in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2* (count 3); a conspiracy to unlawfully monopolize the relevant market, also in violation of *section 2* (count 4); and violation of sections 4 and 5 of the Iowa Competition Law, *Iowa Code §§ 553.4, -.5* (1978) (count 5), and the Iowa zoning laws, See Iowa Code ch. 414 (1978) (count 6).

In moving for **[**6]** dismissal for failure to state a claim, defendants contend that their action in refusing to rezone is protected as a matter of law by the "state action" exemption to the federal antitrust laws, which the United States Supreme Court delineated in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* and its progeny. Additionally, they contend that to the extent the **[*741]** complaint alleges concerted efforts to induce governmental action resulting in a restraint of trade or in a monopoly, it nonetheless fails to state an actionable violation of the antitrust laws because of the "Noerr-Pennington" political-speech immunity doctrine. See, *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. Finally, defendants seek dismissal of the pendent state law counts on grounds that the Iowa Competition Law must be construed in harmony with the federal antitrust laws and that the court should exercise its discretion under pendent jurisdiction and dismiss counts 5 and 6, Citing *United Mine Workers v. Gibbs, 383 U.S. 715, **[**7]** 725-26, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* in support.

The court may assume for present purposes that defendants' actions as alleged would be sufficient to support a claimed violation of the antitrust laws if they were done by virtue of an agreement, combination or conspiracy involving Solely private parties. [4.] See, *Parker v. Brown, 317 U.S. 341, 350, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. Thus, the issue to be decided on defendants' motion is the legal one whether defendants are exempted or immune from any antitrust liability by virtue of the Parker "state action" doctrine or the Noerr-Pennington political activity doctrine. Upon the facts alleged the court finds that they are not and the motion will therefore be denied.

[8]** State Action

Parker v. Brown involved the validity of a California statute specifically authorizing the establishment of agricultural marketing programs expressly restricting competition among raisin growers and fixing the prices at which the growers could sell their product. The stated purpose of the statute was to conserve California's agricultural wealth and prevent economic waste in marketing the state's agricultural goods. See, *Parker v. Brown, 317 U.S., at 341, 63 S. Ct. 307, 87 L. Ed. 315* .

The United States Supreme Court assumed that the program would violate the Sherman Act if it had been the product of Private agreement. *Id., at 350, 63 S. Ct. 307*. In upholding the statute, and thereby delineating the so-called "state action" exemption to the Sherman Act, the Court stressed the fact that the program had been established under state legislation and was administered and supervised by a Commission, appointed by the governor and confirmed by the state senate, and of which a state official the Director of Agriculture was an ex-officio member. *Id., at 346, 63 S. Ct. 307*. Thus, the State of California directly involved itself As sovereign in what the Court construed was the **[**9]** state's legitimate sphere of regulation. See *id., at 350-52, 63 S. Ct. 307*. Indeed, the Court emphasized that it was not faced with a question "of the state or its municipality Becoming a participant in a private agreement or combination by others for restraint of trade." *Id., at 351-52, 63 S. Ct., at 314* (emphasis added). [5.]

As one United States Circuit Court of Appeals noted about the Parker decision, "the (Supreme) Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official

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There is no question that the defendants, including the City of Mason City, are "persons" within the meaning of the federal antitrust laws. E.g., *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-97, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*; *Monell v. Dept. of Social Services, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611* (majority opinion), 707 n.3, *98 S. Ct. at 2044 n.3*. (Powell, J., concurring) (1978).

4. See notes 2 and 3 Supra. The court emphasizes that it construes the complaint to be claiming that the City's affirmative agreement to exclude all competing developers violates the antitrust laws. Thus, it is not the City's decision to deny Beaver Farm's zoning request, as such and without more, that is the allegedly offensive activity.

5. Thus, ***HN2***[] a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *317 U.S., at 351, 63 S. Ct., at 314*.

automatically confers exemption." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30* (1st Cir.), Cert. denied, *400 U.S. 850, 91 S. Ct. 54, 27 L. Ed. 2d 88 (1970)*. This point that ***HN3***[] a state's subdivisions and agencies are not Automatically exempt from application **[**10]** of the federal antitrust laws seems to have **[*742]** been seconded in subsequent Supreme Court opinions interpreting Parker. See *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408, 411-13* & n.41, *98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*. Compare *Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)* With *Bates v. State Bar of Arizona, 433 U.S. 350, 359-62, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*.

This is not to say, however, that municipalities may not at any time avail themselves, as agents of the state, of the "state action" exemption set forth in Parker. They may do so when their anticompetitive conduct is engaged in "pursuant to state policy to displace competition with regulation or monopoly public service" and merely reflects such state policy. *City of Lafayette v. Louisiana Power & Light Co., supra, 435 U.S., at 413, 98 S. Ct. 1123*. In addressing this more-limited "state policy" consideration, however, the Supreme Court cases make it clear that:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required **[**11]** by the State acting as sovereign. . . . It is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Goldfarb v. Virginia State Bar, supra, 421 U.S., at 790-91, 95 S. Ct., at 2015. Accord *City of Lafayette v. Louisiana Power & Light Co., supra, 435 U.S. at 409-10, 98 S. Ct. 1123* (plurality opinion), 417, *98 S. Ct. at 1139, 55 L. Ed. 2d 364* (Marshall, J., concurring), 418, *98 S. Ct. at 1139* (Burger, C. J., concurring).

Additionally, ***HN4***[] other considerations of special significance are whether or not the state policy requiring the anticompetitive restraint is specifically part of a Comprehensive regulatory system ; and is Clearly articulated, affirmatively expressed and Actively supervised by the state as the policymaker. *City of Lafayette, supra, at 410, 98 S. Ct. 1123*. Compare *Bates v. State Bar of Arizona, 433 U.S., at 350 at 359-60, 362, 97 S. Ct. 2691, 53 L. Ed. 2d 810*, With *Cantor v. Detroit Edison Co., 428 U.S. 579, 591 n.24, 594* & n.32, *96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)* And *Goldfarb v. Virginia State Bar, 421 U.S., at 773 at 790-91, 95 S. **[**12]** Ct. 2004, 44 L. Ed. 2d 572*.

In moving for dismissal, it is defendants' contention that the Iowa zoning law, Iowa Code ch. 414 (1978), constitutes or incorporates such a policy. The court disagrees. ***HN5***[] Although zoning statutes assuredly sometimes have anticompetitive effects, it is somewhat fatuous to contend that they inevitably reflect a state's clear and affirmative intent to displace competition with regulation or monopoly public service. See, e.g., *Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082, 1089 (Fla.1978)*; *Smith v. Zoning Board of Review, 103 R.I. 328, 237 A.2d 551, 554 (1968)*; *Glen Rock Realty Co. v. Board of Adjustment, 80 N.J.Super. 79, 192 A.2d 865, 871 (1963)*; *Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659, 670-72 (1962)*; *Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill.2d 548, 185 N.E.2d 665, 666-67 (1962)*; *In re Lieb's Appeal, 179 Pa.Super. 318, 116 A.2d 860, 865 (1955)*. Nor can it be said with any assurance that the Iowa zoning statute clearly and affirmatively reflects such an intent or policy. [6.]

[13]** ***HN6***[] The zoning statute must be strictly construed. E.g., *Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969)*. With this standard of strict construction in mind, it is the court's interpretation of the statute that it does not clearly and affirmatively intend displacement of competition with the kind of regulation and monopoly service contemplated by the Supreme Court under the "state-action" doctrine.

[*743] In the first place, the Iowa zoning statute does not even require municipalities to set up zoning mechanisms. It merely permits and empowers them to do so should they choose to. *Iowa Code § 414.1* (1978). Second, where a municipality does elect to zone, the Iowa statute does not require or compel it to make zoning

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6. The court's research of the relevant Iowa authorities does not indicate any interpretation of the Iowa zoning statute supporting the view that the Iowa legislature's intent and policy in enacting ch. 414 were anticompetitive in nature. Nor have the defendants referred the court to any.

decisions for the express or even implied purpose of excluding, restraining or otherwise limiting competition. Finally, the state statute does not set up any distinct agency or mechanism for active supervision of the cities' zoning procedures By the state as sovereign policymaker.

Nor can the court find as a further matter that in enacting its zoning statute the Iowa legislature even contemplated, much less mandated, that its municipalities would **[**14]** enter into anticompetitive agreements with private developers in connection with exercise of their zoning powers. See, *City of Lafayette, 435 U.S., at 415, 98 S. Ct. 1123* (plurality opinion), 425 n.6, *98 S. Ct. at 1143* (Burger, C. J., concurring); Cantor, 428 U.S., at 579 at 596-97, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 . At best, the Iowa zoning law is totally neutral on the question whether the municipalities should or should not enter into such agreements, and then use their zoning powers in furtherance thereof, so as to exclude competitive elements from the relevant market. Indeed, the more probable view is that the State would intend its municipalities to exercise their zoning powers in a manner consistent with the bounds imposed by the federal antitrust laws and the strong national policy favoring competition those laws embody. Compare, *City of Lafayette, supra, at 398, 400, 403* & n.24, 405 n.31, 405-08 & n.38, *98 S. Ct. 1123* (majority opinion). Accord, *Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977)*. See generally 1 P. Areeda & D. Turner, ***Antitrust Law***, P 214 (1978); The Supreme Court, 1977 Term, 92 Harv.L.Rev. 57, 282-83 (1978).

As a threshold matter, therefore, it is **[**15]** the court's conclusion that the Iowa zoning law does not even conflict with the federal antitrust laws because it does not compel or contemplate anticompetitive agreements on the part of Iowa municipalities. [7] And ***HN7***[] where the law and policy of a state as sovereign are not in express or implied conflict with the federal antitrust laws, the need to consider the applicability of the Parker exemption for that state's political subdivisions becomes in a sense moot. See, *City of Lafayette, 435 U.S., at 413, 98 S. Ct. 1123* (plurality opinion), 425, *98 S. Ct. at 1135* (Berger, C. J., concurring); *Goldfarb, 421 U.S., at 790, 95 S. Ct. 2004*.

[16]** Even if it could fairly be concluded that the Iowa zoning statute and its underlying policy Conflict with the Sherman Act because they compelled or possibly contemplated defendants' anticompetitive activities alleged here, the court would further have to find that the grant of a Parker "state action" exemption in favor of these defendants Is necessary in order to make the state's zoning statute work, and even then Only to the minimum extent necessary. See, *City of Lafayette, supra, at 425-26* & n.6, *98 S. Ct. 1123* (Burger, C. J., concurring); *Cantor, 428 U.S., at 579* & n.37, *96 S. Ct. 3110, 49 L. Ed. 2d 1141* . The court cannot so find upon the allegations set forth here. Clearly, the City of Mason City could adequately and effectively exercise its legislatively delegated zoning powers without entering beforehand into anticompetitive agreements with private entities. Denying the defendants any "state action" exemption to the Sherman Act under the circumstances alleged in **[*744]** this case will not extirpate the Iowa zoning statute.

In sum, to the extent defendants allegedly entered into an anticompetitive agreement, they cannot rely upon the Iowa zoning statute to exempt them **[**17]** from liability under the federal antitrust laws. The point is not that Mason City is subject to the Sherman Act simply because its zoning decisions have some anticompetitive effect. Rather, it is that the city is not necessarily and automatically exempt simply because it is exercising its state delegated zoning powers, especially when it is alleged that those zoning powers were exercised in furtherance of an unlawful anticompetitive agreement with private developers. See, *Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977)*, Vacated and remanded sub nom. *City of Impact v. Whitworth, 435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81 (1978)*, Opinion reinstated and case remanded per curiam sub nom. *Whitworth v. Perkins, 576 F.2d 696 (5th Cir. 1978)*, Cert. denied, *440 U.S. 911, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979)*. Accord, *City of Fairfax v. Fairfax Hospital Ass'n, 562 F.2d 280 (4th Cir. 1977)*, Vacated and remanded, *435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81*

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[7] To say that the Iowa legislature may have foreseen that the zoning statute, when otherwise properly applied by the municipalities, might result in anticompetitive Effects is not to say that it therefore also affirmatively contemplated and approved direct anticompetitive Activity violative of the federal antitrust laws. See, e.g., *Goldfarb, 421 U.S., at 790-91, 95 S. Ct., at 2015* (". . . Although the (Virginia) Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions."). Accord, Cantor, 428 U.S., at 579 at 595-96, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 .

(1978), Concurring opinion of Widener, J. adopted on remand, Unpublished Order, No. 76-1775 (4th Cir. June 13, 1978) *Kurek v. Pleasure Driveway & Park District, 557 F.2d 580 (7th Cir. 1977)*, Vacated and remanded, *435 U.S. 992, 98* ***[**18]*** *S. Ct. 1642, 56 L. Ed. 2d 81 (1978)*, Reinstated on remand, *583 F.2d 378 (7th Cir. 1978)*, Cert. denied *439 U.S. 1090, 99 S. Ct. 873, 59 L. Ed. 2d 57 (1979)*; *Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975)*. Thus, the court's decision here intends no diminution of Mason City's otherwise legitimate authority with respect to zoning. See, *City of Lafayette, 435 U.S., at 416-17, 98 S. Ct. 1123*; *Goldfarb, 421 U.S., at 773 at 792-93, 95 S. Ct. 2004, 44 L. Ed. 2d 572* . [8.] See generally The Supreme Court, 1977 Term, 92 Harv.L.Rev. 57, 277-88 (1978).

Noerr-Pennington

Noerr involved a suit by a group of trucking companies and their trade associations under the antitrust laws against a group of railroads, a railroad **[**19]** association and a public relations firm. The plaintiffs alleged that the railroads had engaged the public relations firm to conduct a publicity campaign designed to influence legislation injurious to competition from the trucking industry. They further alleged the sole motive for the publicity campaign was the railroads' desire to destroy truckers as competitors in the long-distance freight business. There were no allegations or evidence that any governmental entity had entered into any agreement with the private parties in restraint of trade, or had otherwise cooperated or become involved with the publicity campaign, although evidence did exist that some governmental action had been taken in political response to the campaign. *365 U.S. 127 at 129-35, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464*.

In reversing the lower courts' judgments for the plaintiff truckers, the Supreme Court held that ***HN8***[] no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws, even when such attempts arise from anticompetitive motives and purposes. *365 U.S., at 138, 139-40, 81 S. Ct. 523, 5 L. Ed. 2d 464*. In reaching this decision the court made a point **[**20]** of distinguishing "agreement(s) jointly to seek legislation or law enforcement" from those "combinations normally held violative of the Sherman Act . . . characterized by an express or implied agreement or understanding that the participants will . . . help one another to take away the trade freedom of others through the use of such devices as . . . boycotts, market-division agreements, and other similar arrangements." *365 U.S., at 136, 81 S. Ct., at 529*.

The Noerr holding was essentially reiterated in the Pennington decision. [9.] *381 U.S.* ***[*745]*** *657, 669-72, 85 S. Ct. 1585, 14 L. Ed. 2d 626*. Again, there were no allegations or evidence that any governmental entity had specifically entered into the anticompetitive agreement with the private parties, although some governmental action was secured as a result of the private parties' activities. Indeed, in considering one issue in the case that damages could not be collected under the Sherman Act for injury resulting directly and only from the governmental actions of the Secretary of Labor the Court specifically noted that "the (governmental) action taken to set a minimum wage for government purchases of coal was the act of a **[**21]** public official Who is not claimed to be a coconspirator . . . ." *381 U.S., at 671, 85 S. Ct., at 1594* (emphasis added). [10.]

[8.] The same analysis would apply with respect to the Iowa Home Rule Statute, Ch. 364, Iowa Code (1978); which defendants intimate would possibly be pertinent here. See, Defendants' Brief in Resistance at p. 6, n.5, filed January 15, 1979. Cf., *City of Des Moines v. Lohner, 168 N.W.2d 779, 782 (Iowa 1969)*.

[9.] Pennington specifically involved an agreement between a union and large coal operator/employers that was in part intended to secure uniform labor standards throughout the coal industry. The Court held that to the extent the agreement had anticompetitive effects on segments of the industry outside the particular bargaining unit it was restricted by national antitrust policy. The Clayton and Norris LaGuardia labor exemptions to the Sherman Act would not apply. *381 U.S., at 661-668, 85 S. Ct. 1585, 14 L. Ed. 2d 626*. However, to the extent evidence adduced an agreement between private entities involving concerted effort merely to influence action by the Secretary of Labor, the agreement would not be in violation of the Sherman Act. *Id., at 669-72, 85 S. Ct. 1585*.

[10.] In California Motor Transport Co. v. Trucking Unlimited, 404 U.S., at 508 at 510-11, 92 S. Ct. 609, 30 L. Ed. 2d 642, the Supreme Court extended the Noerr-Pennington rule to attempts to influence administrative and judicial proceedings in addition to the legislative and executive actions specifically at issue in Noerr and Pennington. The Court, furthermore, clarified the Noerr-Pennington delineation of a "mere sham" exception. See, California Transport, id., at 511-12, 92 S. Ct. 609.

[22]** Thus, to the extent this case presents allegations that the private developers entered into an anticompetitive agreement With the City of Mason City and its Council permanently to exclude competing developers from the relevant market, it raises at least one important factual issue relating to defendants' possible intent or purpose to deprive plaintiffs of any meaningful access to the City's zoning mechanisms and procedures. See, e.g., *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. On that basis alone this case is distinguishable from Noerr and Pennington. See, *California Motor, supra.*

The court holds, therefore, that a more complete factual record needs to be developed before it can be ascertained whether Noerr-Pennington political-speech immunity to Sherman-Act liability is applicable. The court simply cannot at this time conclude as a matter of law that plaintiffs have failed to state a claim under any conceivable set of facts that could be proved. *Harman v. Valley National Bank of Arizona, 339 F.2d 564, 566 (9th Cir. 1964)* ("(T)he complaint alleges that the acts of the (Arizona) Attorney General were those of **[**23]** a participating conspirator."). Accord *Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 290 n.4, 292 n.12, 293 n.15, 296-97 (8th Cir. 1978)*. [11] See *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642* ("Conspiracy With a licensing authority to eliminate a competitor may also result in an antitrust transgression." (emphasis added)), 515-16, *92 S. Ct. at 613 (1972)*; *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-08, 82 S. Ct. 1404, 1414, 8 L. Ed. 2d 777 (1962)*; *Duke & Co. v.* **[*746]** *Foerster, 521 F.2d 1277, 1281 (3d Cir. 1975)*; *Israel v. Baxter Laboratories, Inc., 151 U.S.App.D.C. 101, 104-09, 466 F.2d 272, 275-80 (1972)*. Cf. *Kurek v. Pleasure Driveway & Park Dist., 557 F.2d, at 593-94*; *Metro Cable Co. v. CATV of Rockford, 516 F.2d 220, 222-24, 229-30* ("This is not a case in which the Agency of government Itself is alleged to be a part of the conspiracy . . . ." (emphasis added)) (7th Cir. 1975).

[24]** ***HN9***[] In antitrust cases, where proof is largely in the hands of the alleged conspirators, dismissals prior to giving plaintiffs ample opportunity for discovery should be granted sparingly. E.g., *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *Seasongood v. K & K Insurance Agency, 548 F.2d 729, 733 (8th Cir. 1977)*. Accord, *Mark Aero, 580 F.2d, at 296* & n.30.

Pendent State Law Counts

The court views counts 5 and 6 of the complaint as plaintiffs' alternative state law Theories in support of their one Claim. They are based upon the same allegations that undergird counts 1 through 4. The case as a whole involves a common group of operative facts. Counts 5 and 6, therefore, are properly before the court pursuant to the doctrine of pendent jurisdiction [12] and should not at this stage of the litigation be dismissed. See, e.g., *United Mine Workers v. Gibbs, 383 U.S. 715, 721-29, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*.

[25]** It is therefore

ORDERED

Denied.

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[11] A specific holding in Mark Aero, see *580 F.2d, at 297*, was that the allegations of the complaint did not come within the "mere sham" exception to Noerr-Pennington immunity the exception the Supreme Court delineated in its California Motor decision. There were no allegations in Mark Aero, as there are here, that the governmental entity was a partner in the anticompetitive agreement or conspiracy. Such allegations are sufficient to raise the reasonable inference that any meaningful access to Mason City's zoning procedures on plaintiffs' part was totally and permanently foreclosed. Unlike the Mark Aero case, the allegations here are sufficient to interject the "mere sham" exception as an issue requiring further factual elaboration. See, e.g., *Mark Aero, 580 F.2d, at 295* & n.28, 296 ("The fundamental question presented in each case involving the "sham' exception, whether argued in a nonadjudicative or an adjudicative setting, is the question of intent.").

[12] One plaintiff and some defendants are Iowa citizens. Federal diversity jurisdiction, therefore, is unavailing because complete diversity is lacking.

End of Document

Consolidated Express, Inc. v. New York Shipping Asso.

United States Court of Appeals for the Third Circuit

November 14, 1978, Argued ; April 16, 1979, Decided

Nos. 78-1529, 78-1530

Reporter

602 F.2d 494 *; 1979 U.S. App. LEXIS 15416 **; 100 L.R.R.M. 3170; 86 Lab. Cas. (CCH) P11,280; 1979-1 Trade Cas. (CCH) P62,589

CONSOLIDATED EXPRESS, INC. Appellant, v. NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICES, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. McGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP. (D.C. CIVIL No. 76-1645); TWIN EXPRESS, INC., Appellant v. NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO; INC.; JOHN M. McGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP. (D.C. CIVIL No. 77-156)

Subsequent History: **[**1]** As Amended May 18, 1979.

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Core Terms

exemption, antitrust, containers, district court, consolidators, parties, shipping, collective bargaining, anti trust law, Sherman Act, stevedores, boycott, unfair labor practice, bargaining, secondary, collective bargaining agreement, nonstatutory, damages, cases, summary judgment, illegality, estoppel, vessel owner, Clayton Act, anticompetitive, competitors, mandatory, remedies, cargo, rule of reason

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

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

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[] **Appeals, Standards of Review**

Considerations of judicial economy suggest that when a 28 U.S.C.S. § 1292(b) appeal is taken from the denial of summary judgment an appellate court should ordinarily consider all issues "properly put in dispute" bearing upon whether entry of judgment was appropriate.

Civil Procedure > Appeals > Standards of Review > General Overview

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

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

HN2[] **Appeals, Standards of Review**

The reviewing court will consider all grounds advanced in support of a grant of summary judgment and all grounds suggested for sustaining its denial.

Civil Procedure > Remedies > Damages > Monetary Damages

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN3[] **Damages, Monetary Damages**

Under § 303(a) of the National Labor Relations Act, *29 U.S.C.S. § 187(a)*, it is unlawful for a labor organization to engage in any activity or conduct defined as an unfair labor practice in § 8(b)(4) of the Act. Persons injured in their business or property by such a violation may bring suit for money damages against the labor organization that committed it.

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Jurisdiction

Administrative Law > Judicial Review > Reviewability > Questions of Law

Civil Procedure > Trials > Bench Trials

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

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

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

HN4[] **Separation of Powers, Primary Jurisdiction**

The National Labor Relations Board (NLRB) has been designated by Congress as the tribunal of choice for the adjudication of unfair labor practices, and the doctrine of primary jurisdiction is a judicial recognition of the importance of that designation. Board decisions are subject to judicial review on all issues of law. Factual issues are reviewed by a substantial evidence standard, one at least as rigorous as that applied in reviewing non-jury judicial determinations, *Fed. R. Civ. P. 52(a)*, and a good deal more rigorous than is applied to jury verdicts. When a NLRB decision subject to such judicial review has become final it is not readily apparent that it should have any less issue preclusion effect than would judgments resulting from non-jury or jury trials.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN5[] **Estoppel, Collateral Estoppel**

Issue preclusion applies both as to issues of fact and as to issues of law, so long as the same transactions and legal principles are involved and there has been no subsequent change in the governing law. A prior determination of a mixed question of fact and law precludes relitigation of that issue, provided that the party to be estopped has "a full and fair opportunity" to present his claim in the prior litigation.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Administrative Law > Agency Adjudication > Decisions > Res Judicata

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Reviewability > Questions of Law

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN6[] **Standards of Review, Deference to Agency Statutory Interpretation**

It is a settled principle of administrative law that the courts give considerable deference to the construction of statutes by those agencies charged with the primary responsibility for their enforcement. Thus it is arguable that the scope of judicial review of agency decisions on questions of law is narrower than would be appellate review of court decisions on legal issues. But that difference does not suggest that res judicata on legal issues should be less applicable to agency judgments, for the rule of deference to agency interpretations of governing statutes is binding not only on a court reviewing an agency decision, but also on a court deciding a legal issue in the first instance.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Borrowing Statutes

Governments > Legislation > Statute of Limitations > General Overview

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

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN7[] Statute of Limitations, Borrowing Statutes

Which state statute is to be borrowed and how it is to be applied to a cause of action based on federal law are federal law questions, and are determined by federal statutory policy. Thus state choice of law rules can govern the choice of a statute of limitations for a § 303(b) of the National Labor Relations Act, *29 U.S.C.S. § 187*, claim only if reference to those rules furthers substantive federal policy.

Banking Law > Types of Banks & Financial Institutions > National Banks > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN8[] Types of Banks & Financial Institutions, National Banks

In a § 303(b) of the National Labor Relations Act, *29 U.S.C.S. § 187*, case the specific state statute of limitations that is adopted, and the manner of its adoption, are to be determined by the policies that underlie the federal regulatory statute.

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

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

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

HN9[] Federal & State Interrelationships, Choice of Law

The choice of law rule to be applied to a § 303(b) of the National Labor Relations Act, *29 U.S.C.S. § 187*, cause of action must meet two criteria. It must produce results consistent with national labor policy, and it should, insofar as is possible, be relatively easy to administer. On both counts, application of a federal choice of law rule to determine the governing time bar is preferable. Federal labor policy may be thwarted by state limitations periods unduly short or discriminatory. State choice of law rules, geared as they are to geographical factors or state policy interests, may be insensitive to this federal concern.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > General Overview

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

Governments > Legislation > Statute of Limitations > General Overview

HN10[] Federal & State Interrelationships, Erie Doctrine

As a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants. Reference to the forum state's statute of limitations absent some such showing provides an efficient and readily administrable rule for the vast majority of § 303(b) of the National Labor Relations Act (NLRA), *29 U.S.C.S. § 187*, cases, while leaving leeway for the relatively rare instances in which the application of the forum state's statute would seriously distort the operation of the § 303 NLRA remedy.

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

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN11[] Defenses, Demurrers & Objections, Affirmative Defenses

The four elements of estoppel en pais are defined: (1) The party to be estopped must know the facts; (2) he must intend that his conduct must be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN12[] Contract Conditions & Provisions, Conditions Precedent

The National Labor Relations Act does not permit the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN13[] Exemptions & Immunities, Labor

A union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN14[] **Exemptions & Immunities, Labor**

When a collective bargaining agreement imposes restraints upon the employer's product market, the most significant issue in determining the availability of the labor exemption is whether the restraint involves a mandatory subject of collective bargaining. The burden is on the union to demonstrate that the challenged product market restraint is in fact no broader than necessary to promote the union's interest in such a subject. Absent such a demonstration, the restraint must fall.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN15[] **Exemptions & Immunities, Labor**

The requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN16[] **Exemptions & Immunities, Labor**

The court begins the antitrust exemption for labor inquiry by asking whether the subject matter of the challenged agreement is itself, or is clearly related to, a mandatory subject of collective bargaining. A finding that the rules were not a mandatory subject of bargaining effectively undercuts any contention that they so fall within the protection of the national labor policy, as to be completely exempt from antitrust scrutiny.

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

Contracts Law > Defenses > Illegal Bargains

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN17[] Collectives & Cooperatives, Clayton Act

Where an action seeks only declaratory or injunctive relief, a finding that an agreement violates § 8(e), *29 U.S.C.S. § 158(e)*, should always remove the antitrust exemption. Once it is clear that a § 8(e) violation has occurred, no labor policy is advanced by permitting ongoing operation of an illegal contract, and injunctive relief pursuant to *§ 16* of the Clayton Act, *15 U.S.C.S. § 15*, is appropriate.

Antitrust & Trade Law > Clayton Act > Claims

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

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

HN18[] Clayton Act, Claims

Where a collective bargaining agreement or conduct taken pursuant to it has been shown to be illegal under federal labor law, a secondary party injured in his business or property by either has made out a prima facie case under *§ 4* of the Clayton Act, *15 U.S.C.S. § 15*. At that point, the defendants may assert, first, that at the time they acted they 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), *29 U.S.C.S. § 158*. A successful showing that the determination of illegality was not reasonably foreseeable is not alone enough to establish an exemption defense. The defendants must also demonstrate that the contract provisions and steps taken to implement them were "intimately related" to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it.

Antitrust & Trade Law > Clayton Act > Defenses

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN19[] Clayton Act, Defenses

The defense of pari delicto is not a bar to an antitrust suit, except when it can be said that the plaintiffs, acting in their own self interest, are equally responsible with the defendants for the antitrust violations.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

HN20[] Directors & Officers, Management Duties & Liabilities

See *29 U.S.C.S. § 106*.

Counsel: Richard A. Whiting (argued), Mark F. Horning, Ellen M. McNamara, Steptoe & Johnson, Washington, D. C., John A. Ridley, Crummy, Del Deo, Dolan & Purcell, Newark, N. J., for appellants.

Ernest L. Mathews, Jr. (argued), Gleason, Laitman & Mathews, New York City, for International Longshoremen's Association, AFL-CIO.

C. P. Lambos, Donato Caruso (argued), Lorenz, Finn, Giardino & Lambos, New York City, Michael S. Waters, Carpenter, Bennett & Morrissey, Newark, N. J., for appellees New York Shipping Association, Inc., International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp. and Universal Maritime Service Corp.

James W. B. Benkard (argued), Paul H. Karlsson, Mary M. Hoag, Davis, Polk & Wardwell, New York City, Jeffrey Reiner, Meyner, Landis & Verdon, Newark, N. J., for appellee Sea-Land Service, Inc.

Judges: Before SEITZ, Chief Judge, and GIBBONS and WEIS, Circuit Judges.

Opinion by: GIBBONS

Opinion

[*497] OPINION OF THE COURT

We here review an order denying plaintiffs' motion for partial summary judgment on issues of liability **[**2]** in a suit pleading causes of action under § 303 of the Labor Management Relations Act (LMRA), *29 U.S.C. § 187*, and *§ 4* of the Clayton Act, *15 U.S.C. § 15*. The order is before us on an interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*. The district court, *452 F. Supp. 1024*, identified four controlling questions of law which in its view were worthy of interlocutory review, and a panel of this court granted leave to appeal. Before this court the parties have addressed those questions as well as other considerations which are urged in support of and in opposition to the district court's ruling. We reverse the court's order denying summary judgment on the § 303(b) claim. Because we conclude that material issues of fact may remain regarding the availability of the non-statutory labor exemption to the antitrust laws we affirm the denial of summary judgment on the antitrust claim.

[*498] I. THE FACTS

A. The Parties and their Businesses

The plaintiffs are Consolidated Express, Inc. (Conex) and Twin Express, Inc. (Twin). They are non-vessel owning common carriers engaged in the business of consolidating **[**3]** less than container load (LCL) or less than trailer load (LTL) cargo for shipment between Puerto Rico and the Port of New York (the Port). At their off-pier facilities, they pack the shipments of several customers into large containers which are then trucked to pierside facilities and loaded on board ship. The defendant New York Shipping Association (NYSA) is an association of employers who engage in various businesses related to the passage of freight through the Port. On behalf of its members NYSA conducts collective bargaining negotiations and enters into collective bargaining agreements with various labor organizations, including the defendant International Longshoremen's Association, AFL-CIO (ILA), a labor organization representing longshoremen in the Port. Defendants International Terminal Operating Co., Inc., John M. McGrath Corp., Pittston Stevedoring Corp., United Terminals Corp., and Universal Maritime Services Corp. (the stevedores) are members of NYSA and employers of ILA longshoremen. They provide stevedoring services to vessels in the Port. Defendants Sea-Land Service, Inc. and Seatrain Lines, Inc. (the vessel owners) are operators of vessels engaged in common carriage **[**4]** by water between the Port and Puerto Rico. Their vessels are designed for the accommodation of large containers. As a part of their business they furnish shippers with containers and trailers for use on board their ships, as well as terminal facilities. They also provide stevedoring services for cargo shipped on their vessels, and thus, like the stevedores, employ ILA longshoremen.

B. Pre-litigation History

Until shortly after World War II most dry cargo was crated by the shipper, delivered to the pier by rail or truck, and loaded into a vessel piece-by-piece by longshoremen. That method of cargo handling has now generally been replaced by the use of vessels specially designed to accommodate mammoth containers. The cargo of large volume shippers may fill one or more containers. That of lower volume shippers is consolidated with the cargo of others in a single container. Many of these containers, when removed from the vessel, serve as semi-trailers, and virtually all are readily shipped by truck. Thus they can be loaded or unloaded ("stuffed" or "stripped" in longshoreman parlance) at sites remote from the pier. This innovation has increased productivity in the movement of cargo by **[**5]** water, but has produced a decline in the demand for longshoreman labor.

When in 1958 ILA struck the members of NYSA, a central issue was the growing use of containers on the docks. The strike was not, however, successful in prohibiting their use, and in the ILA-NYSA contract adopted in 1959 ILA conceded that "any employer shall have the right to use any and all types of containers without restrictions." In the next decade fully containerized ships were introduced, and dockside work opportunities for ILA members declined still further. These developments led ILA to negotiate with NYSA, as a part of its 1969 collective bargaining agreement, the Rules on Containers (Rules). The Rules dealt specifically with the consolidation of LCL and LTL cargo. NYSA agreed that all consolidated LCL and LTL cargo lots originating from or to be shipped to a point within fifty miles of the dock would be stripped by longshoremen at dockside. Outbound cargo was to be restuffed into a container, while inbound cargo was to be left on the pier for pickup by the consignees. The Rules provided for a penalty against the employer of $ 250 for every such container which passed through the dockside without being **[**6]** stripped and stuffed. In 1970 the penalty was increased to $ 1000 per violation.

Shortly after the 1969 Rules became effective Intercontinental Container Transportation Corp. (ICTC), a consolidator with a business similar to that of Conex and Twin, brought an action in the Southern **[*499]** District of New York seeking injunctive relief and damages from NYSA and ILA on the ground that the Rules violated the Sherman Act. At the same time ICTC filed unfair labor practice charges before the NLRB. In the antitrust action, then District Judge Mansfield granted a preliminary injunction prohibiting the defendants from refusing to handle containers stuffed or stripped by the plaintiff. On appeal from that interlocutory order the Second Circuit reversed, holding that there was little likelihood of ultimate success on the merits, because the collective bargaining agreement of which the Rules were a part probably fell within the labor exemption to the antitrust laws. *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2d Cir. 1970)* (ICTC). In ICTC's unfair labor practice case, the Regional Director refused to issue a complaint on the ground that **[**7]** the Rules on Containers were a valid work preservation agreement, and the General Counsel denied the appeal. Joint App. 303a-305a.

The Rules on Containers were carried forward in the 1971-1974 collective bargaining agreement negotiated between ILA and the Council of North Atlantic Shipping Associations (CONASA), an employer bargaining unit composed of NYSA and employer associations in five other North Atlantic ports. But for reasons that are in dispute, the Rules were not consistently enforced. Conex and Twin were therefore able to continue in the business of consolidating LCL and LTL lots, using containers furnished by the vessel owners. Access to such containers was essential to the business of the consolidators, since the vessel owners' ships could carry only specially designed containers, and since prior to October, 1974, Sea-Land and Seatrain were two of only three container carriers operating between the Port and Puerto Rico. [1.]

[8]** The failure to enforce the Rules led to attempts to improve their effectiveness. On January 25-29, 1973, representatives of CONASA, acting for the employers it represented, met with representatives of ILA in Dublin, Ireland. There those parties negotiated and executed Interpretive Bulletin No. 1, generally known as the Dublin Supplement. The Dublin Supplement established new mechanisms for the enforcement of the Rules against consolidators. It provided that off-pier consolidators operating within fifty miles of the Port were to be considered as operating in violation of the Rules. Consolidators could not avoid application of the Rules by relocating their facilities beyond the fifty mile limit, because the agreement contained a so-called "evasion" or "runaway shop" provision. The Supplement also provided for the establishment and circulation to all carriers and stevedores of a list of such

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1. The third shipper, Transamerica Trailer Transport, Inc. (TTT), is not a defendant in this action.

violators, and vessel owners were to be fined $ 1000 for each container furnished to them. The Dublin Supplement was to be policed by a joint ILA-NYSA Container Committee.

In February, 1973, the vessel owners, using ILA labor, commenced stripping and restuffing outbound LCL and LTL containers which **[**9]** had already been stuffed by employees of Conex and Twin at their off-pier facilities and trucked to the pier for shipment to Puerto Rico. Beginning in March, 1973, the three vessel owners operating in the Puerto Rican trade refused to furnish Conex and Twin with empty containers. On April 13, 1973, NYSA and ILA issued a joint statement to NYSA members, naming fourteen consolidators, including Conex and Twin, as operating in violation of the Rules. The notice activated the provision in the Dublin Supplement requiring all NYSA members to refuse containers to the listed companies. These actions had the effect of terminating the plaintiffs' business of freight consolidation for the New York-Puerto Rico trade.

On June 1, 1973, Conex, faced with the destruction of its business, filed charges with the National Labor Relations Board (NLRB). It alleged that by agreeing to the **[*500]** Rules and Dublin Supplement NYSA and ILA had violated § 8(e) [2.] of the Labor Management Relations Act (LMRA), and that by seeking to enforce that agreement ILA had violated § 8(b)(4)(ii)(B) of the Act. [3.] Thereafter the General Counsel of the NLRB, acting pursuant to § 10(L), of the Act, 28 U.S.C. § 160 **[**10]** (L), filed a complaint against ILA in the United States District Court for the District of New Jersey seeking preliminary injunctive relief pending final disposition of those charges by the Board. Judge Lacey conducted a hearing on the § 10(L) application at which an extensive record was compiled respecting the Rules, the Dublin Supplement, and their effect upon the business of Conex. In that hearing the General Counsel contended that the Conex containers had not historically been stripped and restuffed at the docks by longshoremen, and thus that the activity of which Conex complained was secondary, without a work preservation justification, and in violation of §§ 8(b)(4)(ii)(B) and 8(e). ILA made the opposite contention, and testimony was presented on the issue so drawn. The district court concluded that the General Counsel's theory was substantial and not frivolous. It therefore enjoined enforcement of the Rules against Conex, the charging party. *Balicer v. International Longshoremen's Ass'n, 364 F. Supp. 205* (D.N.J.), aff'd, *491 F.2d 748 (3d Cir. 1973)*. Following a separate hearing on substantially identical charges filed with the NLRB by Twin, the **[**11]** General Counsel later obtained a § 10(L) injunction prohibiting enforcement of the Rules against it. *Balicer v. International Longshoremen's Ass'n, 86 L.R.R.M. 2559* (D.N.J.1974).

Before the NLRB the Conex and Twin charges were consolidated for hearing. The parties stipulated that the record made before Judge Lacey in the § 10(L) case, as supplemented by affidavits submitted by intervenor International Brotherhood of Teamsters, Local 807, which represents Conex employees, and by additional affidavits submitted by ILA and NYSA, would constitute the record for the unfair labor practice proceedings. On the basis of that record an Administrative Law Judge found **[**12]** that the Rules and Dublin Supplement, and the resulting boycott of Conex and Twin, were addressed to the labor relations of the NYSA employer-members with their own employees. He therefore concluded that the boycott involved protected primary activity. The NLRB disagreed. The Board rejected the argument that the agreement was a valid effort by ILA to preserve for its members work which they had historically performed. In the Board's eyes, the "work in controversy" was the stuffing and stripping work performed by LCL and LTL consolidators at their off-pier facilities, not loading and unloading of ships at dockside by longshoremen. Thus the Rules could not be justified as a work preservation agreement, valid under the Supreme Court's interpretation of § 8(e) in *National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967)*. Moreover, even if ILA once had a valid claim to the work of stuffing and stripping containers, the Board concluded, that claim had been abandoned in the 1959 ILA-NYSA agreement authorizing the use of container vessels. It therefore held the agreement embodied in the Rules and Dublin Supplement to be a violation **[**13]** of § 8(e) because its object was to force NYSA members to cease doing business with the

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[2.] *29 U.S.C. § 158(e)*. This section prohibits labor agreements by virtue of which an employer ceases to deal with another employer.

[3.] *29 U.S.C. § 158(b)(4)(ii)(B)*. This section forbids coercion the object of which is to force any employer to cease doing business with another employer.

consolidators. The NLRB also held that ILA's actions in enforcing the agreement were unfair labor practices under § 8(b)(4)(ii)(B). It entered an appropriate cease and desist order on December 4, 1975. *Consolidated Express, Inc., 221 N.L.R.B. No. 144 (1975)*.

NYSA and ILA petitioned for review to the United States Court of Appeals for the Second Circuit. The NLRB cross-petitioned for enforcement. Conex, Twin and Teamsters Local 807 intervened. The Second Circuit held that the Board's conclusion that **[*501]** the work in controversy was that historically performed by employees of the consolidators was supported by substantial evidence, and thus that its analysis of the § 8(b)(4) and § 8(e) issues was sound. [4.] It therefore enforced the Board's order and denied the NYSA and ILA petitions for review. *International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976)*, cert. denied, *429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed. 2d 753*, Reh. denied, *430 U.S. 911, 97 S. Ct. 1187, 51 L. Ed. 2d 589 (1977)*. A petition for reconsideration and **[**14]** recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice hearing was denied on August 12, 1978.

II. PROCEEDINGS IN THE DISTRICT COURT

Conex and Twin filed substantially identical complaints in the district court, and on April 22, 1977 the two actions were consolidated. In Count I the plaintiffs alleged that the defendants' enforcement of the Rules on Containers and Dublin Supplement constituted a group boycott of the plaintiffs that is Per se illegal under *§§ 1* and *3* of the Sherman Act. *15 U.S.C. §§ 1*, *3*. They sought treble damages pursuant to *§ 4* of the Clayton Act, *15 U.S.C. § 15*, for injury to their business or property resulting from that boycott. In Count III plaintiffs alleged that ILA committed unfair labor practices in **[**15]** violation of § 8(b)(4)(ii)(B) of the LMRA, that those violations injured plaintiffs in their business or property, and that ILA was liable for such damages under § 303(b) of the LMRA, *29 U.S.C. § 187(b)*. [5.] A jury trial was demanded. Thereafter Conex and Twin moved for partial summary judgment as to liability on Counts I and III. They contended that the decision of the NLRB, enforced by the Second Circuit, established all facts material to liability issues, and that the defendants were collaterally estopped from attempting to relitigate those issues. Thus, they urged, only the amount of damages remained for trial.

[16]** In response to that motion the defendants contended that the judgment in the Second Circuit should have no issue-preclusion effect; that the activities complained of were within the protection of the non-statutory labor exemption to the antitrust laws; that if non-exempt, those activities should be tested by the rule of reason; that there were material issues of fact as to certain defenses; and that the § 303(b) claim was time barred.

The district court, although it accepted the Conex-Twin contentions in several respects, nevertheless denied partial summary judgment on both counts. Recognizing, however, that the order involved controlling questions of law as to which there is a substantial ground for difference of opinion, and that if those questions were decided in plaintiffs' favor partial summary judgment on one or both of the counts in issue might have been proper, the court on February 22, 1978 amended the opinion to include the formal statement required by *28 U.S.C. § 1292(b)*. The plaintiffs filed a timely notice of appeal, and this court permitted it.

III. SCOPE OF REVIEW

The parties disagree as to what legal issues may be considered on this appeal. **[**17]** Both sides agree that the four questions of law certified by the district court are properly before us. [6.]

[4.] The court announced that it was "not similarly impressed" with the Board's other arguments in support of its position. *537 F.2d at 712*.

[5.] That section provides:

Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of (section 301) hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[6.] These are:

[*502] In supporting their motion to strike portions **[**18]** of the appellees' briefs, appellants suggest that since the defendants prevailed in the district court on the motion for summary judgment they may not raise issues of law decided adversely to them, or not decided at all. Absent a cross-appeal, which is unavailable to a prevailing party, they contend that these issues are not properly before this court. The appellees in turn argue that because the district court refused to identify as controlling questions several equitable defenses, those defenses may not be considered in a *§ 1292(b)* appeal. Neither view is correct. In *Katz v. Carte Blanche Corp., 496 F.2d 747* (3d Cir.) (en banc), Cert. denied, *419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974)*, the court stated the rule governing *§ 1292(b)* interlocutory appeals:

> (Once) leave to appeal has been granted the court of appeals is not restricted to a decision of the question of law which in the district judge's view was controlling.

496 F.2d at 754. Accord, *Link v. Mercedes-Benz of North America, Inc., 550 F.2d 860, 865 n. 2* (3d Cir.) (Seitz, C. J., concurring), Cert. denied, *431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)*; **[**19]** *Johnson v. Alldredge, 488 F.2d 820 (3d Cir. 1973)*, cert. denied, *419 U.S. 882, 95 S. Ct. 148, 42 L. Ed. 2d 122 (1974)*. This rule accords with fundamental principles of appellate review. An appeal pursuant to *§ 1292(b)*, like any other, is taken from the order of the district court, not from its opinion, and the court is "called upon not to answer the question certified but to decide an appeal." *Johnson v. Alldredge, supra, 488 F.2d at 823*. When an order or judgment is before a reviewing court, "(t)he prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams, 397 U.S. 471, 475 n.6, 90 S. Ct. 1153, 1156 n. 6, 25 L. Ed. 2d 491 (1970)*; *Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n.4, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)*; See Note, Federal Jurisdiction and Procedure Review of Errors at the Instance of a Non-Appealing Party, 51 Harv.L.Rev. 1058, 1059-60 (1938).

In this case each argument advanced by the appellees would, if accepted, support the refusal to enter **[**20]** summary judgment of liability in favor of Conex and Twin on one or both counts. If, on the other hand, there are no genuine issues of material fact remaining to be tried, and the district court committed the legal errors of which appellants complain, we may correct those errors, and direct the entry of such a judgment. We could, of course, decline to consider all of the legal issues tendered once we found one which would sustain the denial of summary judgment. But ***HN1***[] considerations of judicial economy suggest that when a *§ 1292(b)* appeal is taken from the denial of summary judgment an appellate court should ordinarily consider all issues "properly put in dispute" bearing upon whether entry of judgment was appropriate. *Johnson v. Alldredge, supra, 488 F.2d at 823*. Thus the several motions to strike portions of the parties' briefs will be denied, and ***HN2***[] we will consider all grounds advanced in support of the grant of summary judgment and all grounds suggested for sustaining its denial.

IV. THE § 303 CLAIMS AGAINST ILA

[21]** ***HN3***[] Under § 303(a) of the National Labor Relations Act, *29 U.S.C. § 187(a)*, it is unlawful for a labor organization to engage in any activity or conduct defined as an unfair **[*503]** labor practice in § 8(b)(4) of the Act. Persons injured in their business or property by such a violation may bring suit for money damages against the labor organization which committed it. [7] Conex and Twin pointed out that the NLRB found that ILA had committed § 8(b)(4) unfair labor practices, and that the Second Circuit affirmed that finding. That determination, they suggest, is

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1. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury "in its business" which is compensable in an action under Section 303 of the Labor Management Relations Act?

2. Does the NLRB's finding of an unfair labor practice foreclose consideration of the labor exemptions, statutory or implied, to the antitrust laws?

3. Must the legality of the Rules on Containers be tested against a Per se rule of antitrust violation?

4. Where plaintiff's business is conducted unlawfully, that is, where it operates as a freight forwarder having been refused a license by the Interstate Commerce Commission to so operate, has it suffered injury to its business which is compensable under the Clayton Act?

[7] See note 3 Supra.

binding here, leaving nothing to be litigated except the determination of damages. The appellees resist this suggestion for reasons we now address.

A. Collateral Estoppel

The district court held that the NLRB's finding that the ILA had committed a § 8(b)(4) violation, made in a proceeding to which both ILA and the plaintiffs were parties, collaterally estops it from litigating its liability for damages on **[**22]** the § 303(b) count. ILA contends this holding was error.

First, ILA urges that the finding by the NLRB, an administrative agency, that the boycott complained of was illegal, is not entitled to res judicata effect. The cases relied upon in support of this contention [8.] were, however, decided before the Supreme Court's decision in *United States v. Utah Construction & Mining Co., 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642*, (1966), which stated that:

[23]**

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply Res judicata to enforce repose.

Since Utah Construction courts in several circuits have held that prior NLRB unfair labor practice determinations were controlling on the issue of liability, as to both facts and law, in a subsequent § 303(b) damage action. E. g., *International Wire v. Local 38, IBEW, 475 F.2d 1078* (6th Cir.), cert. denied, *414 U.S. 867, 94 S. Ct. 63, 38 L. Ed. 2d 86 (1973)* (res judicata against charging party); *Texaco, Inc. v. Operative Plasterers & Cement Masons, 472 F.2d 594* (5th Cir.), Cert. denied, *414 U.S. 1091, 94 S. Ct. 721, 38 L. Ed. 2d 548 (1973)* (res judicata against charged party); *Painters District Council 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969)*; *Eazor Express, Inc. v. General Teamsters Local 326, 388 F. Supp. 1264, 1266-67 (D.Del.1975)*. These holdings are undoubtedly sound. **[**24]** ***HN4***[] The NLRB has been designated by Congress as the tribunal of choice for the adjudication of unfair labor practices, and the doctrine of primary jurisdiction is a judicial recognition of the importance of that designation. See, e.g., *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684-85, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*. Board decisions are subject to judicial review on all issues of law. Factual issues are reviewed by a substantial evidence standard, one at least as rigorous as that applied in reviewing non-jury judicial determinations, *Fed.R.Civ.P. 52(a)*, and a good deal more rigorous than is applied to jury verdicts. When an NLRB decision subject to such judicial review has become final it is not readily apparent that it should have any less issue preclusion effect than would judgments resulting from non-jury or jury trials.

ILA next argues that even assuming applicability of collateral estoppel to issues of fact, the issues in this case are primarily legal, and on legal issues less deference to a prior decision is appropriate. The § 303(b) cases referred to above, giving res judicata effect to NLRB unfair labor **[**25]** practice judgments, recognize no such distinction. Moreover, both the Supreme Court and this circuit **[*504]** have rejected that approach. In *Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 601-02, 68 S. Ct. 715, 92 L. Ed. 898 (1948)*, the Court made clear that ***HN5***[] issue preclusion applies both as to issues of fact and as to issues of law, so long as the same transactions and legal principles are involved and there has been no subsequent change in the governing law. See *Vanderveer v. Erie Malleable Iron Co., 238 F.2d 510, 514-15 (3d Cir. 1956)*, Cert. denied, *353 U.S. 937, 77 S. Ct. 815, 1 L. Ed. 2d 760 (1957)*. In *Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844-45 & n.10 (3d Cir. 1974)*, which concerned the collateral estoppel effect of a prior judicial determination that a collective bargaining agreement fell within the labor exemption to the antitrust laws, we expressly recognized that a prior determination of a mixed question of fact

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[8.] See, e.g., *Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598, 602-03 n. 7* (2d Cir.), Cert. denied, *385 U.S. 832, 87 S. Ct. 71, 17 L. Ed. 2d 67 (1966)*; *United Brick & Clay Workers of America v. Deena Artware, Inc., 198 F.2d 637 (6th Cir. 1952)*, Cert. denied, *345 U.S. 906, 73 S. Ct. 644, 97 L. Ed. 1342 (1953)*. In *Riverton Coal Co. v. UMW, 453 F.2d 1035, 1042* (6th Cir.), Cert. denied, *407 U.S. 915, 92 S. Ct. 2439, 32 L. Ed. 2d 690 (1972)*, the legal issues sought to be foreclosed on the basis of a prior agency decision had not been decided in prior NLRB proceedings involving the same parties. Hence that case is inapposite here.

and law precluded relitigation of that issue, provided that the party to be estopped **[**26]** had "a full and fair opportunity" to present his claim in the prior litigation. *Id. at 844*. [9.]

[27]** ***HN6***[] It is a settled principle of administrative law that the courts give considerable deference to the construction of statutes by those agencies charged with the primary responsibility for their enforcement. E.g., *Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969)*. Thus it is arguable that the scope of judicial review of agency decisions on questions of law is narrower than would be appellate review of court decisions on legal issues. But that difference does not suggest that res judicata on legal issues should be less applicable to agency judgments, for the rule of deference to agency interpretations of governing statutes is binding not only on a court reviewing an agency decision, but also on a court deciding a legal issue in the first instance. E.g., *Zemel v. Rusk, 381 U.S. 1, 11-12, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965)*. Moreover, in this case the decision of the NLRB was taken to the Court of Appeals for the Second Circuit which passed upon the legal issues involved.

Finally, ILA suggests that for two reasons it did not receive a "full and fair opportunity" to litigate before the NLRB. First, it contends that **[**28]** the Board's procedures provided inadequate opportunity for discovery against Conex and Twin. Had ILA been able to avail itself of the discovery provisions of the Federal Rules of Civil Procedure, it argues, it might have been able to establish that Conex and Twin had developed their "tradition" of off-pier consolidation by fraudulent avoidance of the 1969 Rules on Containers, and had such evidence been available it might well have led to a different result before the Board.

As a general rule, recognition of a judgment in a prior action between the same parties should be denied only upon a compelling showing of unfairness. See Restatement (Second) of Judgments (Tentative Draft No. 1, 1973) § 68.1 and Comment f. This is particularly true where, as here, the parties litigant were represented by expert lawyers who had every reason to expect that a defeat in the first action might lead to a second suit founded on the judgment. The Supreme Court has suggested, however, that in an appropriate case a district court may deny collateral estoppel effect on the ground of unfairness, even to a judgment in a prior action between the same parties, if there are "procedural opportunities available **[**29]** to the (defendant) that were unavailable in the first action of a kind that might be likely to cause a different result." *Parklane Hosiery Co. v. Shore,* ***[*505]*** *439 U.S. 322, 331, 99 S. Ct. 645, 652* & n. 15, *58 L. Ed. 2d 552 (1979)*. The court included discovery among the procedural devices the unavailability of which in the first action may militate against application of estoppel by judgment. Id. at n.15. On the record considered by the district court, however, ILA has made no showing of unfairness. It stipulated before the NLRB that the record in *Balicer v. ILA, 364 F. Supp. 205* (D.N.J.), aff'd, *491 F.2d 748 (3d Cir.1973)*, together with the supplemental affidavits submitted, sufficed for the decision of the unfair labor practice charges. When it made that stipulation ILA knew that Mr. Jacobs, a principal witness for the charging parties in Balicer, had previously testified before the Federal Maritime Commission regarding a pattern of payoffs on the docks which facilitated evasion of the 1969 Rules. Thus the parties before the Board were undoubtedly on notice of the likely existence of the same evidence they seek to introduce in this proceeding. **[**30]** Nevertheless, ILA stipulated to a more limited record, bypassing the opportunity to resort to the not insubstantial provisions for production and examination of witnesses and documents available in NLRB cases. See *29 C.F.R. §§ 102.30*, *102.31 (1977)*. Instead of probing the transactions described in the Jacobs testimony, ILA stipulated that "there (were) no material issues of credibility in the record before the (Board) for resolution requiring a formal hearing," and assured the ALJ that the unfair labor practice charges "(could) be fully resolved on the basis of the exhibits and transcripts of testimony entered in the (Balicer case)." Joint App. 209-10. Thus whatever the faults of the discovery procedures available before the Board, ILA's failure to discover additional evidence was not the consequence of those procedures, but of its own decision

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[9.] ILA also argues against recognition of the judgment in the unfair labor practice case in that the NLRB's proceedings are directed toward vindication of "public" rights, while those asserted in the § 303(b) count are only private. It is true that the charging party in an unfair labor practice proceeding before the Board advances the public interest in a fair and orderly labor marketplace. But the typical charging party acts primarily in his own interest to halt conduct that is injuring him personally. Equally when resorting to a § 303(b) remedy the plaintiff, while acting primarily in his own interest, vindicates the public policy of the National Labor Relations Act prohibiting unfair labor practices. That public policy, as interpreted by the NLRB, should in the § 303(b) case determine whether or not there has been a violation. We are therefore unpersuaded that the differing object of proceedings before the NLRB should serve as a ground for reducing their collateral estoppel effect.

not to seek or present further evidence in the NLRB proceeding. It cannot rely on procedural inadequacies in the NLRB case which in no way affected its outcome.

ILA relies on *Hudson River Fishermen's Ass'n v. FPC, 498 F.2d 827 (2d Cir. 1974)*, for the proposition that collateral estoppel should not be applied where relevant evidence **[**31]** has come to light that could not have been discovered in the prior proceeding by the exercise of due diligence. That case involved an application to reopen a licensing proceeding before the Federal Power Commission in order to correct an error in a technical report which had been relied upon in that proceeding, which error could not have been discovered by the exercise of due diligence. The Second Circuit, reviewing the FPC's refusal to reopen the hearing, construed Section 313(b) of the Federal Power Act, *16 U.S.C. § 825L (b)*, as permitting reopening, and remanded for a hearing. *Id. at 833-34*. Assuming that a principle similar to that announced in the Hudson River case also applies in NLRB proceedings, this is not the proper forum for its application. For as that case suggests, if ILA has found new evidence, its appropriate remedy is to seek to reopen the unfair labor practice case either before the NLRB or the Second Circuit. We note that such attempts have been made and rejected. [10.]

[32]** Second, ILA argues that collateral estoppel is unfair because the Board's resolution of the unfair labor practice issue represented an abrupt and unanticipated change in the applicable legal doctrine. Prior to 1975, they argue, there were indications that the Rules on Containers were **[*506]** legal under both the antitrust laws and the Labor Act. [11.] ILA cites no authority for the proposition that collateral estoppel effect may be denied to a judgment because it reflects a change in the prior applicable law, and in the § 303 context such a rule appears unwarranted. A primary purpose of the § 303(b) remedy is to make the plaintiff whole for injury done to his business in violation of federal labor law. *Teamsters Local 20 v. Morton, 377 U.S. 252, 260, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964)*. To allow the union a defense of belief in legality in § 303 cases would cast the burden of such losses upon innocent parties in direct contravention of that policy. While the unforeseeability of an unfair labor practice judgment may reduce the deterrent value of the § 303 sanction, Congress's essential compensatory purpose remains, and should not be thwarted. Even if such **[**33]** a rule were recognized it might not help ILA here, for the prior actions upon which it claims to have relied never resulted in a final determination that the Rules on Containers were legal. Moreover, both the ICTC cases were decided prior to the adoption and enforcement of the Dublin Supplement, a development which might well have changed the earlier tribunals' views of the problem. The claim of an unanticipated change in the law does not persuade us that the judgment in the NLRB case should not bind ILA.

B. The Statute of Limitations

ILA pleads that the § 303(b) claim is time-barred by the one year Puerto Rico statute of limitations, *P.R. Laws Ann. tit. 31, § 5298(2)*, because **[**34]** Conex and Twin are incorporated in that Commonwealth and each conducts one end of its freight consolidator business there. The district court rejected that contention, holding that the consolidators' § 303(b) claim was governed by New Jersey's six year statute of limitations for actions in contract, *N.J.Stat.Ann. § 2A:24-1* (West Supp. 1978), and thus was not time-barred. No federal statute imposes an express limitation upon actions brought under § 303(b) of the Labor Management Relations Act. The parties agree that in such a vacuum a federal court will apply the law of the state in which it sits. See, e.g., *United Auto Workers v.*

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10. These rejections also may indicate that evidence of the manner in which Conex and Twin acquired the stuffing and stripping work would not have had any impact on the NLRB decision. It was the General Counsel's position in the § 10(L) case before Judge Lacey, and that of the charging parties before the Board, that regardless of how the latter acquired the work the Rules on Containers were an illegal work reacquisition agreement. The Board appears subsequently to have adopted that position. See *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.), 236 N.L.R.B. No. 42*, 98 L.R.M.M. 1276, 1277 n.3 (1978). Because we hold that there was an adequate opportunity to litigate the work acquisition contention, however, it is not necessary to rest our holding on the probable irrelevancy of the tendered evidence to the unfair labor practice determination.

11. In *International Longshoremen's Ass'n, Local 1248 (U.S. Naval Supply Center), 195 N.L.R.B. 273 (1972)*, an attempt to enforce the Rules against an off-pier consolidator was held to be an unlawful secondary boycott. Thus a full year before the enforcement of the Dublin Supplement began the NLRB had questioned its legality.

Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966); *Cope v. Anderson, 331 U.S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602 (1947)*. At this point they part company.

ILA argues that a federal court sitting in New Jersey on a § 303(b) case would look not to the most closely analogous New Jersey statute of limitations, but rather to New Jersey's choice of law rules. Under those rules, it suggests, New Jersey would apply not its own six year statute of limitations, but that of Puerto Rico. In advancing this argument **[**35]** ILA relies on the Rules of Decision Act, *28 U.S.C. § 1652*, as interpreted in *Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*, and *Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)*. That statute and those authorities, however, deal with the law governing causes of action arising under state law. When, as in § 303(b) cases, the cause of action arises under federal law, they have no applicability. ***HN7***[] Which state statute is to be borrowed and how it is to be applied to a cause of action based on federal law are federal law questions, and are determined by federal statutory policy. *Holmberg v. Armbrecht, 327 U.S. 392, 395, 66 S. Ct. 582, 90 L. Ed. 743 (1946)*. Thus state choice of law rules can govern the choice of a statute of limitations for a § 303(b) claim only if reference to those rules furthers substantive federal policy. *Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83-84* (2d Cir.), Cert. denied, *368 U.S. 821, 82 S. Ct. 39, 7 L. Ed. 2d 26 (1961)*. **[**36]**

This principle has been recognized in § 303(b) cases. In *United Mine Workers v. Railing, 401 U.S. 486, 91 S. Ct. 991, 28 L. Ed. 2d 272* ***[*507]*** *(1970)*, a case presenting, as does this, both a § 303(b) claim and an antitrust claim against a labor organization, the Court remanded to the Fourth Circuit so that it could consider whether the state statute of limitations applicable to the § 303(b) claim should be construed to apply, with respect to accrual of the cause of action, in the same manner as *15 U.S.C. § 15b* had been construed in *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1970)*, as applying to an antitrust claim. On remand Judge Craven recognized that both § 303(b) and *§ 4* of the Clayton Act provided for recovery for injury to business or property, and concluded that the state statute of limitations governing the § 303(b) claim should be interpreted in the same manner as *15 U.S.C. § 15b*. Indeed he went further, suggesting to the district court that on remand it should consider whether to read into the state statute a tolling provision similar to **[**37]** *15 U.S.C. § 16(b)* (which tolls *§ 15b* for private antitrust actions during the pendency of government enforcement actions), to toll the time bar against the § 303(b) count during the pendency of unfair labor practice proceedings before the *NLRB. Railing v. United Mine Workers, 445 F.2d 353 (4th Cir. 1971)*; Cf. *Kreshtool v. International Longshoremen's Ass'n, 242 F. Supp. 551, 554 (D.Del.1965)*. See also *Kinty v. United Mine Workers, 544 F.2d 706, 723 (4th Cir. 1976)*, Cert. denied, *429 U.S. 1093, 97 S. Ct. 1107, 51 L. Ed. 2d 540 (1977)*; *Metropolitan Paving Co. v. International Union of Operating Eng'rs, 439 F.2d 300, 306* (10th Cir.), Cert. denied, *404 U.S. 829, 92 S. Ct. 68, 30 L. Ed. 2d 58 (1971)*. These cases are authority for the rule that ***HN8***[] in a § 303(b) case the specific state statute of limitations that is adopted, and the manner of its adoption, are to be determined by the policies that underlie the federal regulatory statute.

ILA argues that *Cope v. Anderson, 331 U.S. 461, 67 S. Ct. 1340, 91 L. Ed. 1602 (1966)*, **[**38]** indicates that state choice of law rules ought invariably to determine the limitations period for federal causes of action. In Cope, an action brought under the National Bank Act, 12 U.S.C. §§ 63, 64, the Court applied the forum state's "borrowing statute" to determine the limitations period under the Act. The explanation for this holding is obscure, and it is far from certain that the Cope rationale was intended to extend either to judge-made choice of law rules or to actions under § 303(b). Furthermore, in a more recent decision, *UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966)*, the Court expressly reserved the issue whether state choice of law rules should be applied in determining the applicable statute of limitations under § 303(b). *Id. at 705 n.8, 86 S. Ct. 1107*. Cope cannot, therefore, be regarded as foreclosing that question, which is squarely before us.

We resolve it in favor of a federal rule. ***HN9***[] The choice of law rule to be applied to a § 303(b) cause of action must meet two criteria. It must **[**39]** produce results consistent with national labor policy, and it should, insofar as is possible, be relatively easy to administer. On both counts, we think, application of a federal choice of law rule to determine the governing time bar is preferable. Federal labor policy may be thwarted by state limitations periods unduly short or discriminatory. Cf. *UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 707, n.9 16 L. Ed. 2d 192, 86 S. Ct. 1107 (1966)*. State choice of law rules, geared as they are to geographical factors or state policy interests, may be insensitive to this federal concern. From the viewpoint of ease of administration, state choice of law rules have an initial advantage. Already formulated, they are readily at hand. But their frequently complex calculus of contacts and interests may produce considerable difficulty in application and uncertainty of outcome without any corresponding improvement of result. A federal rule, in contrast, recognizing the more limited range of factors relevant under federal law, can be simplified.

While neither party has briefed the issue of the appropriate federal choice of law rule for § 303(b) cases, we conclude upon careful reflection **[**40]** that ***HN10***[] as a general rule the governing statute of limitations should be that of the state in which the **[*508]** federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants. Cf. *UAW v. Hoosier Cardinal Corp., 383 U.S. at 706, 86 S. Ct. 1107*. See Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv.L.Rev. 66, 102-03 & n.64 (1955). Reference to the forum state's statute of limitations absent some such showing provides an efficient and readily administrable rule for the vast majority of § 303(b) cases, while leaving leeway for the relatively rare instances in which the application of the forum state's statute would seriously distort the operation of the § 303 remedy. How serious that distortion must be to displace the forum state's statute of limitations we need not resolve in this case. Here the district court applied that limitations period. Neither party suggests that its application endangers federal labor **[**41]** policy or creates any risk of unfairness to the litigants. Absent such danger or risk the district court's application of the New Jersey statute must be affirmed. [12.]

C. Illegality

ILA argues that even if it is collaterally estopped to contest the § 8(b)(4) violation, and even though the damage action was timely filed, its contention **[**42]** that Conex and Twin were operating at the time of the unfair labor practices without freight forwarder permits issued by the Interstate Commerce Commission (ICC), would, if such licenses were required, be a complete defense to the § 303(b) claim. [13.] Conex and Twin have always asserted that they are not freight forwarders within the meaning of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5)(A), and that the operating authority granted them by the Federal Maritime Commission (FMC) sufficed. The district court, without determining whether or not ICC licenses were required, concluded that if ILA could establish that they were, a judgment in favor of Conex and Twin on the § 303(b) claim would be precluded.

The district court recognized that in an unfair labor practice proceeding before the Board the charging party's violation of an unrelated **[**43]** statute is not a defense to a charge of unlawful secondary boycott activity. See, e. g., *NLRB v. Springfield Building & Construction Trades Council, 262 F.2d 494 (1st Cir. 1958)*. But unlike an action before the Board, a damage action for injury to "business or property" under § 303(b), the district court held, was "purely compensatory," designed to return to plaintiffs only those losses to which they were legally entitled. If the plaintiffs' businesses were conducted without the required ICC permit, the court reasoned, they were "nonexistent in the eyes of the law, (and) entitled to no legal protection." *452 F. Supp. at 1034*.

This argument has a simplistic surface appeal reminiscent of the long discredited doctrine that a person driving without a license is a trespasser on the highway who may not recover for injury negligently inflicted upon him. See, e. g., *Potter v. Gilmore, 282 Mass. 49, 184 N.E. 373 (1933)*; Annotation, *87 A.L.R. 1462*. Like that doctrine the argument suffers from serious flaws. First, despite the fact that only compensatory damages may be recovered under § 303(b), e.g., *Teamsters Local 20 v. Morton, 377 U.S. 252, 260, 84 S. Ct. 1253, 12 L. Ed. 2d 280*

12. Because we hold that the choice of a governing limitations period, borrowed or otherwise, does not depend on New Jersey choice of law rules we need not decide whether, had we concluded New Jersey choice of law rules applied, the result would be different. We note, however, that since New Jersey Teamsters were employed by Conex and Twin in that state, and were deprived of employment there by the unfair labor practices complained of, it seems likely that New Jersey would apply its own statute of limitations. See *Schum v. Bailey, 578 F.2d 493 (3d Cir. 1978)*; *Allen v. Volkswagen of America, Inc., 555 F.2d 361, 364 (3d Cir. 1977)* (Seitz, C.J., concurring).

13. A similar illegality defense is raised with respect to the *§ 4* Clayton Act claim as well, and is discussed, Infra, Part V. C.

(1964), **[**44]** such actions, like the remedies available before the NLRB, serve an important deterrent purpose as well. Discussing the draft legislation that became **[*509]** § 303(b), Senator Taft, its sponsor, observed:

> . . . I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes.

93 Cong.Rec. 5060; II Leg. Hist. of Labor Management Relations Act of 1947 at 1371, Cited in *Twin Excavating Co. v. Garage Attendants Local 731, 337 F.2d 437, 438 (7th Cir. 1964)*. Indeed, a secondary boycott is in the nature of a tort, and it is settled doctrine that almost all causes of action sounding in tort have deterrent as well as compensatory rationales. E.g., G. Calabresi, The Costs of Accidents (1970). Thus the effect of the proposed illegality defense is to sacrifice a recognized purpose of § 303(b), the deterrence of secondary boycotts in violation of federal labor policy, in the interest of encouraging compliance with an entirely unrelated federal policy of ICC licensing. The regulatory scheme enforced by the ICC has goals substantially unrelated to the federal policy against secondary boycotts, and **[**45]** its own independent set of statutory sanctions. See 49 U.S.C. § 1021. Absent contrary evidence, we assume that Congress felt these sufficient for the enforcement of the ICC regulatory scheme. The creation by judicial fiat of an additional sanction the withdrawal of the protection of § 303(b) because of a technical violation of an ICC licensing requirement must be viewed, as was the "trespasser on the highway" doctrine, as enforcing a punishment disproportionate to the crime. In short, the proposed defense would disrupt the balance struck by Congress between permissible and impermissible labor activities, with no discernible benefit, and perhaps some loss, to the ICC regulatory scheme.

Thus we hold that the district court erred in concluding that the absence of an ICC license would be a defense to liability under § 303(b) for the unfair labor practices found by the NLRB. We express no view on the question whether, in the trial on damages, evidence of the absence of such a license would bear upon the extent of injury to the business or property of Conex and Twin. **[**46]** That, we think, would depend upon the proof of such injury, and the relationship of that proof to the ability of Conex and Twin to carry on their business without a Part IV permit.

D. Equitable Defenses

ILA's equitable defenses tendered in opposition to summary judgment on liability were summarized by the district court as follows:

> ILA also argues estoppel En pais, laches, and equitable estoppel. These equitable theories are invoked based on ILA's claims that Conex intentionally avoided challenging the Rules on Containers when they were first implemented because, in fact, Conex thrived on their existence: watching the enforcement of the Rules drive its competitors out of business while developing techniques, including bribery of dock bosses and alteration of shipping documents, to evade the Rules' strictures.

452 F. Supp. at 1036. Without extended analysis the court ruled that a fuller development of the record was needed before it could rule on the sufficiency of the tendered defenses. Conex and Twin contend that this was error because the affidavits filed in support of the defenses were legally insufficient.

We start with the observation that the plaintiffs **[**47]** do not seek damages for any injury to their business or property occurring prior to the adoption of the Dublin Supplement in January, 1973. It was not until February, 1973, that the defendants commenced stripping and restuffing plaintiffs' containers. It was not until March, 1973, that plaintiffs were refused containers by the vessel owners. It was not until April, 1973, that they were blacklisted. In June, 1973, Conex filed an unfair labor practice charge with the NLRB. The record contains nothing suggesting that after January, 1973, Conex or Twin took or failed to take any action which could be the predicate for a defense of laches or of estoppel. Indeed ILA does not so argue. Thus we can eliminate from consideration any possibility **[*510]** that a § 303(b) cause of action which accrued in January, 1973, was barred by laches. Cf. *Falsetti v. Local 2026, UMW, 355 F.2d 658, 662 (3d Cir. 1966)*.

On appeal the ILA concentrates its equitable defense arguments on the period prior to the adoption of the Dublin Supplement. It points to two factors which it suggests are equitable bars to recovery for the post-Dublin Supplement injuries. First, Conex and Twin failed to file **[**48]** unfair labor practice charges between 1969, when the Rules were adopted, and 1973, when they were supplemented and finally enforced. Second, prior to 1973, while the

Rules were in effect, Conex and Twin managed to evade their enforcement. This conduct, ILA contends, gives rise to an estoppel En pais. It reasons that the plaintiffs knew they were targets of the Rules as early as July, 1969, and that they took steps, including forgery, bribery, and diversion of cargo to other ports, to make it appear they were in compliance. At the same time, the plaintiffs failed to bring an action before the Board to challenge the Rules on Containers. "Since appellees have always obeyed both the 10(L) injunction and the Board's cease-and-desist order, such timely challenge would have prevented any further violations of the Act and put an end to Appellant's (sic) damages while they were minimal." (ILA Brief at 33-34). The effect of these evasionary and dilatory tactics, ILA contends, was to persuade it (a) that the Rules were being enforced and (b) that they were not harmful. In reliance on those appearances, it proceeded to force the adoption of the Dublin Supplement. Since the plaintiffs' wrongful **[**49]** conduct induced the adoption of the Dublin Supplement, ILA contends, they cannot now claim compensation for injury resulting from its enforcement.

The defendants have not cited, and we have not found, any case in which the defense of equitable estoppel or estoppel En pais has been recognized in an action brought pursuant to § 303(b) of the Act. We need not decide whether such a defense should be recognized, however, because it is clear that even on the defendants' theory of estoppel En pais, the affidavits supporting the defense were insufficient to sustain it. In the case upon which ILA principally relies, ***HN11***[] the four elements of estoppel En pais are defined:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct must be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970) (quoting *Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104* **[**50]** (9th Cir.), Cert. denied, *364 U.S. 882, 81 S. Ct. 170, 5 L. Ed. 2d 103 (1960))*. The relevant facts about the impact of the Rules apparently were known to the plaintiffs, and thus the first element of an estoppel exists. But there are no facts in the record to support any of the other three elements of the defense. ILA has cited no evidence for its implausible assertion that the consolidators' evasion of the Rules or failure to file an unfair labor practice charge was intended, or could reasonably have been believed to be intended, to induce it to bargain for the Dublin Supplement. The pleadings and affidavits indicate that the plaintiffs hoped that ILA would not respond at all, so that their evasion of the Rules could continue. Nor is the failure of Conex and Twin to bring an NLRB case prior to 1973 a fact which ILA had a "right to believe" was intended to induce the adoption of the Supplement. A rule that persons who failed to charge a continuing unfair labor practice at the first opportunity could for that reason later be barred from recovery, even when as in this case the severity of the practices drastically increased, would have dangerous consequences for national **[**51]** labor policy. Proceedings before the NLRB by a charging party involve substantial expense and often substantial risk of retaliation. Firms not yet seriously injured should not be compelled to risk a confrontation at the earliest possible moment for fear that if they do not they **[*511]** will thereafter be stripped of the protection of § 303(b).

ILA has also failed to suggest any facts indicating that it was in fact ignorant of the true state of affairs on the docks, or that it relied on an inaccurate version of events in adopting the Dublin Supplement. To the contrary, all of the evidence in the record suggests that ILA was very much aware that the Rules on Containers were Not enforced. [14.] Indeed, several sections of the Dublin Supplement are directed in so many words to the "evasion" or circumvention of the Rules on Containers. See Interpretive Bulletin No. 1, Interpretations 1.3-3, 1.6, 1.7, 1.8. ILA nowhere cites any information meeting the standards of *Fed.R.Civ.P. 56(c)* suggesting that it ever held, or acted upon, anything other than an accurate view of events.

[52]** Since there is no material issue of fact with respect to three of the four elements of an estoppel, we conclude that the equitable defense asserted by ILA would be legally insufficient to preclude the imposition of liability under § 303(b) and that the district court erred in denying summary judgment in order to explore it further.

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14. See, e.g., Letter of Thomas W. Gleason (President of the ILA) to James Dickman (President of NYSA) May 11, 1972. Joint App. 321a.

We hold, then, that the order appealed from, insofar as it denied a summary judgment of liability on Count III of the Conex and Twin complaints must be reversed.

V. THE *§ 4* CLAYTON ACT CLAIM

In Count I of their complaints Conex and Twin charge that the Dublin Supplement and the steps taken to implement it are a concerted refusal to deal, and thus a Per se violation of the Sherman Act. While Count III seeks relief only against ILA, Count I joins both union and employer defendants, all of whom, admitting both the agreement and the steps taken to implement it, assert several defenses to the antitrust claim, which we now consider.

A. The Labor Exemption

The principal defense tendered in opposition to summary judgment is that both the Rules and the Dublin Supplement are collective bargaining arrangements falling within the labor exemption to the antitrust **[**53]** laws. The defendants concede that both agreements involved concerted action between the ILA and the employer defendants, and hence are ineligible for the statutory antitrust exemptions provided in the Clayton Act, *15 U.S.C. § 17*, *29 U.S.C. § 52*, and the Norris-LaGuardia Act, *29 U.S.C. §§ 104*, *105*, *113*. *UMW v. Pennington, 381 U.S. 657, 661-62, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *United States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*.

Thus the dispute is over the applicability of the so-called nonstatutory labor exemption, defined by the Supreme Court in the series of cases beginning with *Apex Hosiery v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*, and culminating in *Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. That dispute, in turn, presents two aspects: (1) whether the NLRB finding of violations of §§ 8(b)(4) (ii)(B) and 8(e) precludes relitigation of the illegality of the charged conduct as a matter of federal labor law; and (2) whether, **[**54]** assuming such illegality, the nonstatutory labor exemption should nevertheless be available.

1. The Preclusive Effect of the NLRB Judgment On Labor Law Issues

In Part IV. A., Supra, we held that ILA was estopped by the judgment in the NLRB unfair labor practice case from relitigating in the § 303(b) case the legality of the Dublin Supplement and the steps taken to implement it. To the extent that the undisputed facts and conclusions of law referred to in that Part are relevant on the availability of the labor exemption to ILA, our prior analysis is equally applicable. Moreover, NYSA, as the collective bargaining representative of the vessel owners and **[*512]** stevedores, was a party to the NLRB action, an appellant in the Second Circuit and an unsuccessful petitioner for certiorari in the Supreme Court. None of these defendants contend that they were so insufficiently represented before the Board that they should not be bound to the same extent as ILA by the resulting judgment. [15] Since both ILA and the employer defendants were represented before the NLRB and in the Court of Appeals in the Second Circuit, we hold that they are equally bound by the judgment, and **[**55]** estopped to contest the finding that their efforts to enforce the Rules were unfair labor practices. We reject, as well, appellees' contention that recognizing the issue preclusion effect of the NLRB decision deprives them of their *seventh amendment* right to a jury trial. *Parklane Hosiery Co. v. Shore, 439 U.S. at 332, 99 S. Ct. at 652* & n.19.

2. The Effect of the § 8(e) Violation upon the Availability of the Labor Exemption

We are faced, then, with the question whether a contract or combination, which has been adjudicated to be a violation of the prohibition in § 8(e) against contracts calling for secondary boycotts, can nevertheless be held to be within the nonstatutory antitrust exemption because it was negotiated as a part of a collective bargaining agreement.

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[15] The stevedore defendants do contend that as a matter of ***antitrust law*** the record on summary judgment is legally insufficient to bind them. That contention is discussed at Part V. F., Infra.

Prior to 1959 it was an unfair labor **[**56]** practice under then § 8(b)(4)(A) of the National Labor Relations Act for a union to urge employees of an employer to refuse to perform work in order to compel their employer to cease doing business with a third party. That prohibition did not apply to employer refusals to deal that were embodied in collective bargaining agreements, however, and unions remained free to seek such agreements by collective bargaining, informational picketing or otherwise. See *Brotherhood of Carpenters v. NLRB, 357 U.S. 93, 78 S. Ct. 1011, 2 L. Ed. 2d 1186 (1958)* (Sand Door). Congress concluded that these "hot cargo" agreements gave unions too much leverage against secondary parties, and in 1959 it amended § 8(b)(4), to prohibit coercion directed not only at employees of the primary employer, but also against the employer himself. It also added in § 8(e) a prohibition upon contracts obligating employers to refrain from doing business with third parties. [16.] In *National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967)*, the Court narrowly construed the prohibitions in the 1959 amendments. *Distinguishing Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*, **[**57]** as a case involving secondary boycott activity, the Court held that while secondary activity aimed at acquiring for employers and union members work already being performed by third parties was prohibited, Congress did not intend the prohibition of work preservation clauses in collective bargaining agreements even though such clauses might fall within the literal terms of § 8(e). Indeed the Court explicitly recognized that the 1959 amendments made no change in the rule of *Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964)*, that work preservation is a mandatory subject of collective bargaining. *386 U.S. at 642, 87 S. Ct. 1250*. The determination whether a given demand went beyond the legitimate primary area of work preservation and into the forbidden secondary boycott area was said to involve in each instance a factual inquiry into all the surrounding circumstances. *386 U.S. at 644, 87 S. Ct. 1250*. Here the forum of choice, the NLRB, has made that factual inquiry and has determined that the Rules are directed not at work preservation, but at acquiring work from the employees of a secondary employer. **[**58]**

[*513] One consequence of the NLRB's decision is to foreclose the argument that the object of the agreement ultimately reached is a mandatory subject of collective bargaining, for an agreement that violates § 8(e) cannot meet that standard. The NLRB has stated that:

> ***HN12***[] the Act does not permit . . . the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement **[**59]** which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.

National Maritime Union (Texaco Co.), 78 N.L.R.B. 971, 981-82 (1948), enf'd, *175 F.2d 686 (2d Cir. 1949)*, Cert. denied, *338 U.S. 954, 70 S. Ct. 492, 94 L. Ed. 589 (1950)*. See also *NLRB v. Wooster Div., Borg-Warner Corp., 356 U.S. 342, 360, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958)* (Harlan, J., concurring and dissenting).

A further consequence of the NLRB's factual determination, in the antitrust context, is suggested in Justice Brennan's National Woodwork discussion:

> In effect Congress, in enacting § 8(b)(4)(A) of the Act (the statutory predecessor of § 8(e)), returned to the regime of *Duplex Printing Press Co. and Bedford Cut Stone Co., supra*, and barred as a secondary boycott union activity directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere.

386 U.S. at 632, 87 S. Ct. at 1262. Justice Brennan's reference to *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921)*, **[**60]** and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927)*, is to cases holding that despite § 20 of the Clayton Act a secondary boycott could be enjoined in a private action under the antitrust laws. The quoted dictum, although

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[16.] Congress at the same time recognized that the special historical situation in the construction and apparel industries justified a limited exception to § 8(e) for those two industries. Those provisions are, of course, inapplicable here.

suggestive of the effect of a § 8(e) violation on the nonstatutory antitrust exemption, is not decisive. Both Duplex Printing and Bedford Cut Stone were decided on statutory exemption grounds prior to the full emergence of the nonstatutory exemption. But it must be kept in mind that §§ 8(b)(4) and 8(e), while housed in the National Labor Relations Act, are, like the Sherman Act, statutes reflecting the basic federal economic policy against restraints upon competition in the marketplace for goods and services as distinct from the labor market. Thus §§ 8(b)(4) and 8(e) reinforce rather than conflict with the basic policy of the antitrust laws, and suggest a cautious approach to the recognition of a nonstatutory antitrust exemption for conduct in violation of their prohibitions. [17.] Nonetheless there remains room for the argument that even though ILA achieved at the bargaining table an object **[**61]** that is unlawful under §§ 8(b)(4)(ii)(B) and 8(e), and thus not a mandatory subject of collective bargaining, the nonstatutory exemption should nevertheless apply.

The term nonstatutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market. The opinion generally credited as originating that construction of the antitrust laws is that of Chief Justice Stone in *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*. In that case, an organizational **[**62]** dispute erupted into a sit-in strike which stopped production, and halted the shipment of finished goods. The Court **[*514]** held this conduct exempt from the antitrust laws on two grounds. The union's goal, "elimination of price competition based on differences in labor standards . . .," was not "the kind of curtailment of price competition prohibited by the Sherman Act." *Id. at 503-04, 60 S. Ct. at 998*. Moreover, Justice Stone held, there was no showing that the challenged restraint was "intended to have or in fact ha(d)" an effect upon the product market. *Id. at 512, 60 S. Ct. at 1002*. The Court thus distinguished Duplex Printing Co. (a classic secondary boycott) and Bedford Cut Stone (involving a "refusal to handle" the primary's product) because in those cases the intent and effect of the conspiracy had been to restrain the product market by pressuring secondary parties to withdraw their patronage from the target manufacturer. *Id. at 505-06, 60 S. Ct. 982*. It would seem therefore that had such a secondary purpose and effect been shown, Sherman Act liability would have attached. See also *United States v. Hutcheson, 312 U.S. at 241-42, 61 S. Ct. 463* **[**63]** (Stone, C. J., concurring).

Apex Hosiery establishes two principles central to the subsequent development of the nonstatutory exemption. First, the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act. Second, restraints, like those in Duplex Printing Co. and Bedford Cut Stone, which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act.

When the Court first had occasion to consider the application of the infant non-statutory exemption to a collective bargaining agreement, it might have taken the position that anything achieved as a result of collective bargaining with the primary employer was exempt from antitrust sanction. Such a course would have avoided many difficulties. In *Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*, however, the Court took a different turn, holding that the distinction between union efforts aimed at the labor market and those aimed at the product **[**64]** market applied even to a collective bargaining agreement. In that case a union successfully negotiated, by legitimate means, refusal-to-deal clauses with local electrical equipment manufacturers and contractors. The union's success in obtaining those agreements created a product market cartel in the New York area, which in time came to look not only "to terms and conditions of employment but also to price and market control." *Id. at 800, 65 S. Ct. at 1535*. The union had actively assisted in policing and protecting that cartel. When an excluded electrical manufacturer sued to enjoin union activities on behalf of the cartel, the union's participation in the illegal scheme was held to be an antitrust violation despite the collective bargaining context and despite the relationship of the restraints to wage and job stability. With the Allen Bradley decision faded any hope for a bright

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[17.] The Supreme Court has recently cautioned that all exemptions from the antitrust laws, including the labor exemption, are to be narrowly construed. *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 229, 230, 99 S. Ct. 1067, 1082, 59 L. Ed. 2d 261 (1979)*.

line between union activities exempt from and subject to the antitrust laws based on the existence of a collective bargaining relationship. The opinion, however, strongly reaffirmed the suggestion in Apex Hosiery that secondary product or service market restraints must meet a higher standard **[**65]** of justification to claim the antitrust exemption. Cf. *National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. at 628-30, 87 S. Ct. 1250* (characterizing Allen Bradley as a secondary work acquisition scheme that would now be forbidden under § 8(e)).

Justice Black's opinion in Allen Bradley indicates that if a union coerced a refusal-to-deal clause, or some other clause having secondary market effects, solely in its own interest, and not in the interest of conspiring businessmen, the exemption applies. See *Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. at 809-10, 65 S. Ct. 1533*. Under that reading of Allen Bradley, collective bargaining agreements might have been held exempt from Sherman Act scrutiny, regardless of their impact on the nonlabor marketplace, absent a showing of an intent on the part of the union to join with **[*515]** employers in a larger Sherman Act conspiracy. And an appropriate test for whether the union was to be deemed to be acting solely in its own interest might well have been whether the subject matter of the agreement was a permissive or mandatory subject of collective bargaining.

In *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, **[**66]** the Court considered a collective bargaining agreement with a multi-employer unit of coal producers in which the union agreed with the employers in that unit to impose the agreed-upon wage scale upon all coal producers with whom it had a collective bargaining relationship. The Union contended that since the agreement concerned wage standards, a quintessential labor market concern, it was exempt from the antitrust laws. Six Justices rejected that contention. Justice White, writing for three members of the Court, conceded that "wages lie at the very heart of those subjects about which employers and unions must bargain." *Id. at 664, 85 S. Ct. at 1590*. Recognizing that the union could unilaterally have adopted a uniform wage standard as a matter of bargaining policy, the Court held that the alleged agreement was not necessarily exempt. Justice White wrote:

> We think ***HN13***[] a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not **[**67]** conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

Id. at 665-66, 85 S. Ct. at 1591. He went on, however, to suggest that the unavailability of the exemption was not dependent upon a predatory intention on the part of the employers in the bargaining union.

> From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored **[**68]** employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.

Id. at 668, 85 S. Ct. at 1592.

Justice White's definition of the prohibited conduct is decidedly ambiguous. The first quoted excerpt seems to say that the antitrust evil is knowing union participation in an employer's conspiracy to eliminate competitors, a view consistent with some language in Allen Bradley. But the second passage suggests that the more serious evil, impinging upon both labor and antitrust policy, is the union's restriction of its freedom to deal with other competitor employers. That defect, Justice White suggested, remained "without regard to predatory intention or effect in the particular case." *Id. at 668, 85 S. Ct. at 1592*. This latter theme echoes the concern expressed in Apex Hosiery and Allen Bradley with agreements directed at secondary parties.

Citing Justice White's opinion, the plaintiffs argue that Pennington stands for the proposition that "an agreement which is tactically designed to achieve objectives outside the bargaining unit is not entitled to **[**69]** antitrust immunity." Plaintiffs' Brief at 38. This reads the Pennington holding too broadly. Although it is denominated the opinion of the Court, Justice White's Pennington opinion did not command a majority for his labor exemption discussion. In a concurring opinion Justice Douglas, writing for three Justices, expressly stated that as **[*516]** he read Justice White's opinion, it "reaffirms the principles of Allen Bradley . . . ." *Id. at 672, 85 S. Ct. at 1595*. He suggested that on remand, the jury should be instructed that in order to find an antitrust violation, they must conclude Both that the union agreed to press a wage scale that smaller employers could not pay, and that the agreement "was made for the purpose of forcing some employers out of business . . . ." *Id. at 672-73, 85 S. Ct. at 1595*. Elsewhere, he stressed that the "purpose" described earlier involves both "knowledge" that the minor manufacturers would be driven out of business, and "intent" to do so. *Id. at 675, 85 S. Ct. at 1585*. Since the three Justices who joined in the Douglas opinion would have upheld the union's claim of antitrust immunity absent a showing of predatory **[**70]** intent, and three others would have upheld the claim of immunity on broader grounds announced by Justice Goldberg, the Douglas opinion may well be read as limiting antitrust liability for agreements concerning subjects at the "very heart" of the collective bargaining process to cases where predatory intent can be shown. Accord, *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974)* ("concerted purpose"); *Lewis v. Pennington, 400 F.2d 806, 814* (6th Cir.), Cert. denied, *393 U.S. 983, 89 S. Ct. 450, 21 L. Ed. 2d 444 (1968)* ("predatory intent"); Meltzer, Labor Unions, Collective Bargaining and the Antitrust Laws, 32 U.Chi.L.Rev. 659, 720-21 (1965); 1 P. Areeda & D. Turner, ***Antitrust Law***, P 229e at 211 (1977). Such a standard would tend to insulate collective bargaining over subjects like wages, which are at the core of legitimate union concern, from the disrupting effect of potential antitrust sanctions. See *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d at 908*; 1 P. Areeda & D. Turner, Supra, P 229e at 209-11.

If Pennington were the controlling precedent the plaintiffs' **[**71]** motion for summary judgment should properly have been denied. Assuming Arguendo that the agreement here concerned a subject at the "very heart" of the collective bargaining process, the affidavits suggest that in determining the intent of ILA and the employer defendants issues of fact remain. ILA avers that the sole purpose of the Dublin Supplement was to protect union job opportunities. The vessel owners say that they did not really want the acquired business, and that they therefore lacked the predatory intent required by Pennington. We are mindful that summary judgment is generally inappropriate in antitrust cases "where motive and intent play leading roles." *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962)*.

A second line of authority, however, permits the imposition of antitrust liability without a showing of predatory intent. On the same day that Pennington was decided the Court handed down *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*, which involved a multi-unit collective bargaining agreement in the food store industry. The agreement imposed on the **[**72]** entire bargaining unit a restriction on marketing hours, a direct restraint on the product market. Jewel Tea Company, a member of the unit, signed the agreement under protest but promptly brought an action for declaratory and injunctive relief against the union. It contended that the marketing hours restraint violated the Sherman Act because it limited the hours during which Jewel could compete with other meat retailers in the bargaining unit. The Court's judgment held that the agreement was exempt from the Sherman Act, but three opinions were filed, each receiving three votes. Justice White, announcing the judgment, in an opinion joined by Chief Justice Warren and Justice Brennan, said that for restraints on the product market, the test of exemption was whether the restraint:

> . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the **[*517]** national labor policy and is therefore exempt from the Sherman Act.

[73]** *Id. at 689-90, 85 S. Ct. at 1602* (footnote omitted). But if a union demanded, and an employer agreed to, an anticompetitive restraint designed to protect an interest not a mandatory subject of bargaining, White "seriously doubt(ed)" that the antitrust exemption would apply. *Id. at 689, 85 S. Ct. 1596*. Relying on NLRB decisions holding that hours of work were a subject of mandatory bargaining, he then considered whether the restriction on hours of operation was justified by its close relationship to the union members' interest in avoiding night work. *Id. at 692, 85 S. Ct. 1596*. The trial court had found that such operations would threaten that protected interest. Since that finding was not clearly erroneous, Justice White said that the agreement was exempt. *Id. at 697, 85 S. Ct. 1596*.

Justice Goldberg, concurring in an opinion in which Justices Harlan and Stewart joined, proposed a test similar to, although somewhat broader than Justice White's. Goldberg would have held that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." *Id. at 710, 85 S. Ct. at 1614*. **[**74]** He also observed that "decisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant in determination of the applicability of the labor exemption." *Id. at 710 n.18, 85 S. Ct. at 1614*.

The six Justices comprising the Jewel Tea majority were thus agreed that ***HN14***[] when a collective bargaining agreement imposed restraints upon the employer's product market, the most significant issue in determining the availability of the labor exemption was whether the restraint involved a mandatory subject of collective bargaining. Moreover Justice White's opinion suggests that the burden is on the union to demonstrate that the challenged product market restraint is in fact no broader than necessary to promote the union's interest in such a subject. Absent such a demonstration, the restraint must fall. *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n, 579 F.2d 484, 503 (9th Cir. 1978)* (Hufstedler, J., concurring and dissenting), Cert. denied, *439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1979)*. **[**75]**

The Court's most recent pronouncement on the application of the Sherman Act in the labor context, *Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*, is consistent with this analysis. In that case a labor organization coerced a general contractor into an agreement to hire only those subcontractors who had collective bargaining agreements with it. Like the Jewel Tea Company, the contractor sued to invalidate the agreement under the Sherman Act. The case did not involve a collective bargaining agreement, and so, as Justice Powell carefully noted, considerations peculiar to the collective bargaining context were absent. *Id. at 625-26, 95 S. Ct. 1830*. Nonetheless, the Court analyzed the restraint in terms similar to Jewel Tea's. It found that the goal of the agreement the organization of non-union employers was legitimate. But the agreement exacted in Connell, Powell held, reached too broadly, for it operated as a direct restraint upon the competition of non-union subcontractors, even if their competitive advantage was derived from efficiency rather than substandard wages and working conditions. **[**76]**

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625, 95 S. Ct. at 1836. Despite its explicit distinction of the collective bargaining situation, the Connell mode of analysis is similar to that of the Jewel Tea majority. ***HN15***[] The requirements for antitrust exemption are, first, that the market restraint advance **[*518]** a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal. In addition Connell clarifies the relationship between unfair labor practice remedies under § 8(e) and treble damage actions under the antitrust laws. Local 100 had argued that the unfair labor practice remedies under § 10(L) and § 303 of the Act were exclusive and precluded a suit **[**77]** in antitrust based on a § 8(e) violation. The Court rejected this contention, stating that such remedies were available despite and in addition to the availability of Labor Act remedies. *Id. at 633-34, 95 S. Ct. 1830*.

Were this an action for injunctive relief, we think that Jewel Tea and Connell would require a summary judgment rejecting the labor exemption. The anticompetitive effect of the enforcement of the Rules and the Dublin Supplement is on this record undisputed. By requiring that LCL and LTL containers be stripped at the dock, the Rules exerted a substantial upward pressure upon the price of container shipping. More important, the Boycott provisions of the Dublin Supplement led to the foreclosure of all LCL and LTL consolidators operating within the forbidden fifty mile range from the entire shipping market between the Port and Puerto Rico. This anticompetitive impact is significant and uncontested. These anticompetitive effects cannot now be justified by their advancement of legitimate labor goals. ***HN16***[] Six Justices in the Jewel Tea majority began the exemption inquiry **[**78]** by asking whether the subject matter of the challenged agreement was itself, or was clearly related to, a mandatory subject of collective bargaining. Whether one prefers the White or Goldberg formulations in Jewel Tea, under either a finding that the Rules were not a mandatory subject of bargaining effectively undercuts any contention that they so "fall within the protection of the national labor policy," as to be completely exempt from antitrust scrutiny. See *UMW v. Pennington, 381 U.S. at 665, 85 S. Ct. at 1596* (White, J.); *Jewel Tea, 381 U.S. at 689, 85 S. Ct. at 1596* (White, J.); *Id. at 706, 85 S. Ct. at 1596* (Goldberg, J., dissenting) (all suggesting that whether a particular union demand is a mandatory subject of bargaining central to a determination of the scope of the labor exemption). Here, the NLRB has held that the Rules and the Dublin Supplement violated §§ 8(b)(4) and 8(e) of the Labor Act. Hence the "direct and overriding interest of unions" in mandatory subjects of bargaining, *381 U.S. at 732, 85 S. Ct. 1596* (Goldberg, J., dissenting), is absent. Nor can it fairly be contended in the wake of that holding that the **[**79]** Rules are protected because they served a legitimate union interest. The NLRB has found that the object of the Rules was work acquisition, an activity that is condemned by national labor policy. *NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 529 n.16, 97 S. Ct. 891, 51 L. Ed. 2d 1 (1976)*. As we noted above, Apex Hosiery, Allen Bradley, and Nat'l Woodwork Manufacturers Ass'n all indicate that illegal secondary activity of this kind is subject to Sherman Act sanctions.

Although no court has yet had occasion to hold that an NLRB finding of an unfair labor practice precludes recognition of complete nonstatutory antitrust immunity, well reasoned decisions in other circuits support that conclusion. See *Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976)* (Lay, J.), Cert. dismissed, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)* ("federal labor policy is sufficiently implicated to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining."); *Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Electrical Contractors Ass'n, 579 F.2d 484, 503 (9th Cir. 1978)* **[**80]** (Hufstedler, J., concurring and dissenting), Cert. denied, *439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1979)*. That result is also consistent with this court's decisions in *International Ass'n of Heat & Frost Insulators v. United Contractors' Ass'n, 483 F.2d 384 (3d Cir. 1973)*, modified, *494 F.2d 1353 (3d Cir. 1974)*. Heat Insulators was an antitrust suit by AFL-CIO craft locals against a contractors' association and its assertedly "captive" union. Many of the charged antitrust violations, if proven, would also have been unfair **[*519]** labor practices. In the court's initial opinion, Judge Forman upheld the primary jurisdiction of the NLRB over those unfair labor practices. He stated that "if the allegations (of unfair labor practices) are true, then such acts would not be immune" under the labor exemption. *483 F.2d at 402*. When informed that the Board had already heard the plaintiff's unfair labor practice charges and determined there was no labor law violation, the court vacated its opinion requiring that the district court certify the labor issues to the Board. But it recognized that the NLRB holding that the agreements **[**81]** were legal under the Labor Act was "not conclusive" on the issue of their illegality under the antitrust laws. *494 F.2d at 1354*, Citing *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*. Taken together the two opinions in Heat Insulators suggest that conduct illegal under federal labor law can claim no immunity from antitrust sanctions.

In support of the contrary position the appellees rely principally upon *Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793* (2d Cir.), Cert. denied, *434 U.S. 923, 98 S. Ct. 400, 54 L. Ed. 2d 280 (1977)*. There, as here, a clause in a collective bargaining agreement had been held to be in violation of § 8(e) in a prior NLRB proceeding. There, as here, the injured party argued that the NLRB's finding of illegality eliminated the antitrust exemption. The district court rejected the antitrust claim on another ground, and thus did not reach the immunity issue. On appeal, the district court's ground of decision was rejected by the Second Circuit. That court, however, refused to rule that the § 8(e) violation eliminated the antitrust exemption, both because **[**82]** the district court had not considered the issue, and because only one party had briefed it on appeal. It did state in dictum that it did not think that the finding of a § 8(e) violation "necessarily determine(d)" the immunity issue, although it "le(nt) support to appellant's position." *Id. at 802*. The Commerce Tankers court's reasons for disposing of the exemption issue suggest that the holding does not have the force of a fully considered decision on the merits. Moreover, the Commerce Tankers opinion does not explain why the finding of a § 8(e) violation did not "necessarily determine" the exemption question. Judge Lumbard's cogent dissent, which argued a position similar to that adopted here, thus went unanswered. To the extent that Commerce Tankers may suggest the possibility that a § 8(e) violation may be completely exempt under the Sherman Act we find it unpersuasive.

Thus we hold that the enforcement of the Rules and Dublin Supplement was not exempt under the Sherman Act. Those agreements are illegal under § 8(e), and under the tests of Jewel Tea and Connell could be enjoined. If this were an action for injunctive relief brought pursuant to *§ 16* of the Clayton **[**83]** Act an injunction against their prospective operation plainly would be required. That does not end the inquiry, however, for this is an action, not for prospective relief, but for money damages. As we noted above, the term non-statutory exemption describes an interpretation of the antitrust laws. Both primary and secondary authorities discussing the nonstatutory exemption tend to assume that if a Sherman Act violation is shown, then all antitrust remedies are equally available. There is no a priori reason why this should be the case. If the Sherman Act itself can be interpreted to accommodate conflicting federal labor and antitrust policies Clayton Act *§ 4* can be similarly interpreted. We think that a distinction between injunctive and treble damages remedies is warranted.

HN17[] Where an action seeks only declaratory or injunctive relief, a finding that an agreement violates § 8(e) should always remove the antitrust exemption. Once it is clear that a § 8(e) violation has occurred no labor policy is advanced by permitting ongoing operation of an illegal contract, and injunctive relief pursuant **[**84]** to *§ 16* of the Clayton Act is appropriate. In considering the availability of *§ 4* relief, however, a more refined analysis is required. For while the agreement which resulted from **[*520]** the collective bargaining process may have been found to be illegal, it is possible that at the time when the negotiating session took place the parties reasonably believed that their agreement was directly related to the lawful goal of work preservation. That possibility raises a labor policy consideration which the Supreme Court has not yet addressed: the extent to which antitrust exemption should protect not only lawful labor agreements, but also the collective bargaining process. In our view, consideration of the competing public policies which may be implicated indicates the need to recognize a limited labor exemption defense to a claim for money damages under the Clayton Act for conduct which has been held to be illegal under federal labor law.

The decision in Allen Bradley not to exempt from antitrust remedies all collective bargaining agreements with a primary employer created a powerful potential sanction against both the union and the employer. Today this sanction provides both parties **[**85]** to the bargaining process with a strong incentive to take into account in their negotiations the public interest in competition in the secondary marketplace. Especially in oligopolistic industries and Atlantic shipping is one entirely removing antitrust incentives would place too much uncontrolled economic power in the hands of those at the bargaining table. But the question remains how much antitrust incentive is necessary to encourage the parties to the collective bargaining process to take into account anticompetitive injury to secondary parties. One possible answer is that the *§ 16* injunctive remedy, coupled with § 303 damage remedy against the union, and the NLRB's unfair labor practice jurisdiction is all the incentive that is required. We think not, however, for while those remedies may provide strong incentive for unions not to make excessive secondary demands, they provide very little incentive to employers to resist such demands. Employers may have no predatory purpose against secondary targets, but may nevertheless be quite willing to sacrifice in the bargaining process the interests of those targets in exchange for concessions on other bargaining issues. Since employers **[**86]** are not liable for damages under § 303, the only risk they would run from overwilling acquiescence in a bargained for § 8(e) violation would be that either in a § 10(L) or *§ 16* injunctive action they would be made to stop. That would give employers the best of all possible worlds at the collective bargaining table, since they would keep the benefit of the concessions bargained for on other issues, while the risk of economic injury to secondary targets would be borne by those targets and an often shallow pocket union. Complete removal from the bargaining equation of the *§ 4* incentive to employers to take into account injury to secondary targets would not, we think, be in the public interest.

Nor is there unfairness in requiring employers to resist excessive union claims. 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 **[**87]** of § 8(e). Any resulting strike pressure might then be enjoined as in violation of § 8(b)(4). We recognize that these remedies may not, in the short run, be as conducive to labor peace as acquiescence. But this court and others have recognized that affirmative obligations imposed by nonlabor federal legislation may on occasion require an employer to resist illegal union demands even at the cost of a strike. See *Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3d Cir. 1976)*.

On the other hand, we recognize that a damage remedy is effective as a deterrent only when its application to an agreement can be foreseen by the parties at the time they are engaged in collective bargaining. Moreover, since the *§ 4* remedy, while in part compensatory, has a strong punitive element, it may seem harsh to apply it to conduct which the parties had no reason to **[*521]** believe would ever be held to be illegal, and may even have reasonably believed to be legally compelled. Concern about the lack of meaningful deterrence is particularly relevant when the determination of illegality results from an unanticipated shift in NLRB policy. Antitrust policy may not be significantly **[**88]** advanced by giving retroactive effect, in a damage action, to such unanticipated shifts in interpretation of §§ 8(b)(4) and 8(e). Thus it seems to us that there is room for a defense to a *§ 4* damage claim that would not be available in a *§ 16* injunctive action or a government injunctive action.

Casting the issue in terms of an exemption defense to a *§ 4* damage action affords an opportunity to strike a balance between the interest of parties to the collective bargaining process, and those of secondary targets. If we eliminate entirely the element of foreseeability, and allow a *§ 4* treble damage recovery whenever the agreement is found to be illegal, the scales tilt too far away from the national interest in collective bargaining over arguably legitimate subject matters. If, on the other hand, we impose too low a burden on those asserting a lack of foreseeability defense, we risk slighting the national interest in deterring anticompetitive injury to secondary parties. The proper accommodation, we think, is recognition, in the collective bargaining context of a defense to *§ 4* damage recovery involving several elements. **[**89]** ***HN18***[] Where, as here, a collective bargaining agreement, or conduct taken pursuant to it, has been shown to be illegal under federal labor law, a secondary party injured in his business or property by either has made out a prima facie case under *§ 4*. At that point, to accommodate the labor policy favoring collective bargaining, the defendants may assert, first, that at the time they acted (here, the Dublin meeting and later) they 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). If they fail to prove that the illegality determination was unforeseeable, the defendants should not be exempt from liability for damages under *§ 4*. A successful showing that the determination of illegality was not reasonably foreseeable is not alone enough to establish an exemption defense, however, for Jewel Tea suggest that the defendants must also demonstrate that the contract provisions and steps taken to implement them were "intimately related" to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraints in the secondary market than was reasonably necessary **[**90]** to accomplish it. Thus our test for the collective bargaining exemption defense to *§ 4* liability is conjunctive, and objective, and the defendants have the burden on all elements of going forward and of persuasion. The limited *§ 4* exemption defense we now recognize obviously is unavailable to defendants shown to have acted with the predatory intent against secondary targets referred to in Pennington and Allen Bradley.

The district court did not consider the summary judgment record in light of the possible *§ 4* exemption defense we have posited. On this appeal it is inappropriate that we decide its availability, since neither the parties nor the district court focused on the fact issues possibly relevant to it. The defendants' burden of proving lack of foreseeability is formidable, considering the NLRB decision in *International Longshoremen's Ass'n, Local 1248 (U.S. Naval Supply Center), 195 N.L.R.B. 273 (1972)*, which held that the Rules were illegal over a year before the Dublin meeting. Nevertheless, they may be able to establish that a factfinder could believe that the Naval Supply Center warning should not have alerted reasonable collective bargainers to a § 8(b)(4) **[**91]** and § 8(e) risk. Moreover, while the provisions in the Dublin Supplement requiring the total withholding of containers from Conex and Twin seem overbroad when compared with the supposed ILA object of preserving the work of stuffing LCL and LTL freight originating with shippers close to the Port, it is at least conceivable that a convincing justification for all the boycott provisions of the Dublin Supplement can be successfully advanced. Thus a **[*522]** remand is required for the determination of the availability of the limited defense to *§ 4* liability which we have here announced. If the district court concludes that material issues of fact remain regarding both of its requirements, it may then proceed to a factual hearing. But whether the exemption defense to the *§ 4* claim is resolved summarily or after a hearing, it must be resolved in the first instance in the district court. A remand is therefore required.

B. The Claim of Per Se Illegality

If the Rules and Dublin Supplement are held to be nonexempt, the issue of the proper standard of antitrust liability will arise. Conex and Twin contend that if the nonstatutory exemption is unavailable they are entitled to a summary **[**92]** judgment that the Sherman Act was violated. The district court, treating the questions of the labor exemption and the Sherman Act violation as "inseparable," denied it. We hold that the proper method of analysis is to determine the issue of nonstatutory labor exemption separately, as we have done, and then to proceed with conventional antitrust scrutiny of the complaint. The district court also assumed that even if the labor exemption was inapplicable the Rules and steps taken to enforce them must be judged, for antitrust purposes, under a rule of reason standard rather than, as Conex and Twin suggest, as a Per se violation. The appellants argue that the Rules and Dublin Supplement comprised a Per se illegal group boycott directed against the LCL and LTL consolidators. We agree.

The defendants suggest that the trend in the case law is to apply the "rule of reason" to concerted refusals to deal. Not all concerted refusals to deal have been held Per se illegal. Yet in a core group of situations group boycotts have been held to be Per se violations of the Sherman Act. The Court has condemned as Per se violations: (1) horizontal combinations of traders at one level of distribution having **[**93]** the purpose of excluding direct competitors from the market, e.g., *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; *Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914)*; (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combination, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; and (3) coercive combinations aimed at influencing the trade practices of boycott victims. E.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*; *Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941)*. See generally, *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)*; Note, Boycott: A Specific Definition Limits the Applicability of a Per Se Rule, 71 Nw. U.L. Rev. 818, 822-23 (1977). **[**94]**

The Rules and Dublin Supplement have horizontal, vertical, and coercive aspects. Under the Rules, the consolidators were required to accede to stuffing and stripping of their cargoes, and later were denied containers altogether. ILA, the vessel owners and the stevedores agreed to exclude the consolidators from providing services which compete directly with the stevedores and with those vessel owners who provide their own stevedoring services. The vessel owners and the stevedores have agreed with ILA to exclude from competition with ILA longshoremen the Teamster stuffers and strippers employed by the consolidators. The NLRB has determined that ILA's goal was "work acquisition." Where the work that the union seeks to acquire is being performed by the union's direct competitors, here the Teamsters, the union's efforts clearly were directed toward the elimination of Teamster competition. ILA, the vessel owners, and the stevedores agreed to coerce the consolidators into changing their method of operation by allowing their containers to be stuffed and stripped at the docks. In every aspect, the anticompetitive effect of this arrangement is clear. The Rules and the Dublin Supplement wholly **[**95]** **[*523]** bar the consolidators from providing their lower cost services to the shipping market between the Port and Puerto Rico. Nor is there any suggestion in the record that the application of the Rules will in the long run have procompetitive rather than anticompetitive effects. In sum, the Rules and Dublin Supplement are "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Society of Professional Eng'rs v. United States, 435 U.S. 679, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)*.

The defendants also contend that a finding of Per se illegality is not possible on this record because there is "no showing that the defendants had an anticompetitive intent to exclude plaintiffs from the market or to accomplish any other anticompetitive purpose." NYSA Brief at 43. They point out that the record contains evidence that the consolidators were valued customers of the carrier defendants, and that those defendants made a serious effort to maintain business relations with Conex and Twin even in the face of ILA resistance. The appellees' argument, however, does **[**96]** not accurately reflect the role of intent in civil antitrust cases. If a Per se violation has been established, the court will already have found that "the nature and Necessary effect " of the challenged conduct is "plainly anticompetitive." *National Society of Professional Eng'rs v. United States, 435 U.S. at 690, 98 S. Ct. at 1364* (emphasis added). Once that fact has been established, all that need be shown is that the charged anticompetitive acts were in fact performed by the defendant. *United States v. United States Gypsum Co., 438 U.S. 422, 442, 98 S. Ct. 2864, 2876, 57 L. Ed. 2d 854 (1978)*. A showing of a specific intent to harm one's competitors or restrain competition need not be shown. *Times- Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. Here the "necessary effect" of the container boycott was to drive the plaintiff consolidators from the New York to Puerto Rico shipping market. No further showing of intent is required.

In the alternative the appellees and the dissenting opinion urge that, at least in the context of labor agreements, the Per se approach should never be applied. **[**97]** The principal support for that view is Professor Handler's statement that "(a) fair reading of Jewel Tea (satisfied him) that the court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust." Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239-40 (1971). See also *Commerce Tankers v. National Maritime Union, 553 F.2d 793, 802 n.8* (2d Cir.), Cert. denied, *434 U.S. 923, 98 S. Ct. 400, 54 L. Ed. 2d 280 (1977)*; *Id. at 804 n.4* (Lumbard, J., concurring in relevant part). Mindful as we are of Professor Handler's expertise in both the labor and antitrust fields, we do not agree with his approach. Certainly we find no support for it in either the Jewel Tea or Pennington opinions. Indeed, the three groups of Justices in those cases, while they diverged widely on other issues, appear to have agreed that "settled antitrust principles" would be "appropriate and applicable" to activity found to be nonexempt. *United Mineworkers v. Pennington, 381 U.S. at 715, 85 S. Ct. 1585* (Goldberg, J., dissenting); *Meatcutters v. Jewel Tea, 381 U.S. at 693 n.6, 85 S. Ct. 1596* **[**98]** (White, J.); *Id. at 736-37, 85 S. Ct. 1596* (Douglas, J., dissenting). Those "settled" principles include the Per se rule, where the facts warrant its application. The Supreme Court's intimations thus do not support Professor Handler's view. Moreover, once a court has concluded that the labor exemption does not shield anticompetitive conduct, application of the rule of reason is redundant. The justification offered for application of the rule of reason is the need to recognize, in the antitrust context, labor's legitimate interest in the collective bargaining process. That interest, however, is precisely the same one that must be taken into account in determining the scope of the nonstatutory labor exemption. A holding that the exemption does not apply embodies a judgment that considerations of labor policy are outweighed **[*524]** by the anticompetitive dangers posed by the challenged restraint. The proposed use of the rule of reason would, therefore, simply be an invitation to the court or jury to reweigh under a different label the question of the non-statutory exemption. The appellees have suggested no reason why a second such inquiry is necessary or appropriate.

[99]** Further, we think that reliance upon broad "public interest" considerations like the advancement of labor policy as a ground for application of the rule of reason is barred by the view of that rule adopted by the Court in *National Society of Professional Eng'rs v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. As the Court stated there:

> Contrary to its name, the Rule 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.

Id. at 688, 98 S. Ct. at 1363 (emphasis added). Later in the opinion Justice Stevens repeated the same theme even more forcefully:

> (T)he purpose of both (rule of reason and Per se) analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692, 98 S. Ct. at 1365 **[**100]** (footnote omitted). Since the labor policy arguments advanced to support the application of the rule of reason do not relate to the procompetitive impact of the Rules on Containers and the Dublin Supplement in the shipping market, they cannot remove this boycott from the category of Per se violations. [18]

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18. Even if the rule of reason were to be applied here, the parties have suggested no procompetitive effects which would justify the challenged restraints under a rule of reason analysis.

Two additional points made by the dissent deserve comment. One is the suggestion that the Dublin Supplement is not a group boycott arrangement to which the Per se rule should apply because "the union is not a competitor of the shipping association or the stevedoring companies." Dissenting Opinion at 528. That suggestion assumes that the Per se ban on group boycotts applies only to horizontal competitors. *Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, disposes of **[**101]** the question, since Broadway Hale, like the ILA here, was not a competitor of the wholesaler parties with whom it conspired. Like the stevedores, however, Broadway Hale was a competitor of the boycott target. The dissent's other point is that by applying a Per se rule to employee-labor union boycotts we are somehow giving the union lesser rights than political, religious, racial, or consumer groups which may try to advance their goals by boycott activity. Antitrust regulation of political or religious boycotts may raise important *first amendment* questions. See Note, Political Boycott Activity and the *First Amendment*, 91 Harv.L.Rev. 659 (1978). Those questions are absent here, just as they are absent when commercial organizations, which also have *first amendment* rights, step over the line drawn by Congress in the Sherman Act. In this case Congress has drawn the line between legitimate and illegitimate labor organization activities in §§ 8(b) and 8(e). We are not prepared to hold that those statutes violate the *first amendment*. Congress has made no similar statement of policy with respect to political or religious boycotts, and the application of a Per se rule here is in **[**102]** no way analogous to its application in those contexts.

Thus we hold that the district court erred in rejecting the contention of Conex and Twin that the enforcement of the Dublin Supplement, if nonexempt, was a group boycott and a Per se violation of the Sherman Act.

C. Election of Remedies

Faced with enforcement of the Dublin Supplement, Conex and Twin not **[*525]** only filed unfair practice charges with the NLRB, but also filed complaints with the Federal Maritime Commission (FMC) against the vessel owners seeking damages under § 22 of the Shipping Act of 1916, 46 U.S.C. § 821. The FMC complaints were voluntarily withdrawn without prejudice about the time the instant complaints were filed. [19.] **[**103]** The appellees now argue that the filing of complaints with the FMC concerning the enforcement of the Dublin Supplement was an irrevocable election of remedies which as a matter of law bars their claim under the Clayton Act. Nothing in either the Shipping Act or the Clayton Act so provides. [20.]

In support of their argument the defendants rely upon *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224, 86 S. Ct. 781, 787-788, 15 L. Ed. 2d 709 (1966)*. There the Court held that although the FMC had jurisdiction over practices unlawful under the Shipping Act, that statute, unlike the Interstate Commerce Act, did not vest exclusive jurisdiction for reparations litigation in the administrative agency. The defendants in an antitrust suit had urged that by authorizing the FMC to approve conference shipping rates Congress had precluded the application of the antitrust laws to the shipping industry. The Court rejected this contention. Recognizing that a stay of the antitrust action might in some cases be appropriate while issues under the Shipping Act were litigated before the FMC, Chief Justice Warren wrote:

> Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely **[**104]** collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

Id. 86 S. Ct. at 787-788. The appellees would have us read the last quoted sentence as establishing a rule that the FMC filing was an irrevocable election of remedies. But Chief Justice Warren neither said nor suggested any such rule, and no considerations of policy support it. The purposes of an election of remedies prevention of double

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19. Conex and Twin settled the FMC proceeding with TTT, the third vessel owner and dismissed the FMC complaint against it with prejudice. Twin settled its FMC complaint against Seatrain and dismissed its complaint with prejudice as to that defendant only. Whether Seatrain is entitled to a credit for whatever it paid in reparation for violations of the Shipping Act should Twin establish damage to its business or property is an issue not presented on this appeal.

20. Compare, e.g., The Interstate Commerce Act, 49 U.S.C. § 9.

recovery, forum shopping, and harassment of defendants by dual proceedings are adequately served by a rule that plaintiffs may not pursue both their Shipping Act and Clayton Act claims to a decision on the merits. Cf. *Abdallah v. Abdallah, 359 F.2d 170, 175 (3d Cir. 1966)*. It would be both formalistic and unfair to hold that the filing and voluntary dismissal without prejudice of a complaint seeking Shipping Act reparations is a bar to the *§ 4* Clayton Act remedy, and we decline to do so.

D. Illegality

The vessel owners and stevedores join ILA in the assertion that because Conex and Twin lacked ICC permits they cannot recover **[**105]** damages. The reasoning of Part IV. C., Supra, is applicable here, and will not be repeated. We do note, however, that the case for application of an illegality defense to the *§ 4* Clayton Act claim is by virtue of antitrust case law even weaker than that for its application under § 303(b). In *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, the Court held that ***HN19***[] the defense of Pari delicto was not a bar to an antitrust suit by distributors challenging restrictive provisions in agreements to which they were parties, except when it could be said that the plaintiffs, acting in their own self interest, were equally responsible with the defendants for the antitrust violations. While Perma Life dealt only **[*526]** with illegality alleged to be a concurrent violation of the antitrust laws, it has been understood to have abolished the defense of illegality even when the plaintiff's wrongdoing is unrelated to antitrust policy. E. g., *Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425 (10th Cir. 1977)* (absence of **[**106]** a liquor license); *Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977)* (absence of state and federal beer wholesaler permits); *Memorex Corp. v. IBM Corp., 555 F.2d 1379 (9th Cir. 1977)* (theft of trade secrets); *Health Corp. of America, Inc. v. New Jersey Dental Ass'n, 424 F. Supp. 931 (D.N.J. 1977)*, Mandamus denied without opinion sub nom. New Jersey Dental Ass'n v. Brotman, No. 77-1268 (3d Cir. Feb. 24, 1977), Mandamus denied, *434 U.S. 812, 98 S. Ct. 238, 54 L. Ed. 2d 162 (1977)* (violation of state health care regulations). Contra, *Cottonwood Mall Shopping Center, Inc. v. Utah Power & Light Co., 440 F.2d 36* (10th Cir.), Cert. denied, *404 U.S. 857, 92 S. Ct. 107, 30 L. Ed. 2d 99 (1971)*.

The authorities rejecting illegality defenses not directly related to the antitrust policy in issue in the plaintiff's case recognize the inappropriateness of requiring that the federal antitrust enforcement policy yield to unrelated regulatory policies, state or federal. The ICC permit requirements, which so often are administered to protect existing carriers from excessive competition, have **[**107]** nothing to do with the procompetitive policies of the antitrust laws. As we observed in Part IV. C., Supra, the ICC has sanctioning authority for the vindication of the public policies which are its responsibility. Additional enforcement at the expense of antitrust policy would not, in view of Perma Life, be appropriate. [21]

E. Equitable Estoppel

The vessel owners and stevedores join ILA in pleading equitable estoppel on the same theory that ILA asserts in defense to the § 303(b) count. For the reasons set forth in Part IV. D., Supra, we hold that it is not a legally sufficient defense to Count I.

VI. NONPARTICIPATION OF THE STEVEDORE DEFENDANTS

The final defense to summary judgment, advanced only by the stevedore defendants, is that they should not be held liable for the adoption and enforcement **[**108]** of the Dublin Supplement, even though they are members of NYSA and are parties to the collective bargaining agreement with ILA, because the record does not contain the clear proof of their complicity required by § 6 of the Norris-LaGuardia Act, *29 U.S.C. § 106*. Section 6, which applies both in civil and criminal actions, provides that:

> ***HN20***[] No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States

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[21] The appellees also rely on *Maltz v. Sax, 134 F.2d 2* (7th Cir.), Cert. denied, *319 U.S. 772, 63 S. Ct. 1437, 87 L. Ed. 1720 (1943)*. We do not believe that holding survives Perma Life.

> for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

The "clear proof" standard has been applied by the Supreme Court in an antitrust enforcement context. *Brotherhood of Carpenters v. United States, 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973 (1947)*.

We assume for purposes of this appeal that the acts complained of in Count I qualify **[**109]** as a labor dispute for purposes of § 6, and thus that the clear proof standard applies with respect to the authority of NYSA to act on behalf of the stevedores. As to other facts, such as the existence of a contract or combination, and the injury to the consolidators' business or property, the ordinary preponderance of the evidence test governs. *Ramsey v. United Mine Workers, 401 U.S. 302, 308-11, 91 S. Ct. 658, 28 L. Ed. 2d 64 (1971)*. But while § 6 binds the federal courts to a clear proof standard on the authority question, neither its text nor any judicial construction that has been called to our attention suggests that it precludes **[*527]** summary judgment on that question. Indeed the standard of *Fed.R.Civ.P. 56(c)* the absence of a genuine issue as to any material fact is higher than the clear proof standard imposed by § 6, which merely instructs the factfinder how to resolve genuine fact issues.

Contrary to the stevedores' argument, we find no genuine issue of material fact as to the authority of NYSA to act for them in negotiating and implementing the Dublin Supplement. All the stevedore defendants are members of NYSA and it bargains collectively on their **[**110]** behalf with ILA, which represents their longshoremen employees. The NYSA bylaws provide that any agreement negotiated by it is binding on all members unless within fourteen days members refuse to subscribe. The stevedores did not refuse to subscribe to, and thus became parties to, the Dublin Supplement. Any suggestion that they lacked knowledge of the charged group boycott is negated by the letter of April 13, 1973, directed to all NYSA members, including the stevedores, identifying Conex and Twin as violators of the Rules and activating the boycott provisions of the Dublin Supplement. No answering affidavits were submitted suggesting that either at the time of its execution or at the time of its implementation the stevedores took any action to disassociate themselves from the unlawful agreement to which they were parties. There is, therefore, no genuine issue of material fact as to the authority of NYSA to act for all its members, including the stevedores, in negotiating and implementing the contract undertaking a group boycott. The sole question is whether, having become a party to that contract with full knowledge of its contents, they are liable for the injury to the consolidators' **[**111]** business and property resulting from its implementation. We hold that they are.

VII. CONCLUSION

The order appealed from to the extent that it denied the motions of Conex and Twin for partial summary judgment of liability against ILA on Count III will be reversed, and the case remanded for the entry of such a judgment and for a trial on damages on that Count. Insofar as that order denied summary judgment on Count I against ILA, NYSA and the vessel owners it will be affirmed and the case will be remanded to the district court for further proceedings respecting the availability of the labor exemption defense to the *§ 4* Clayton Act claim which we have announced, and for a trial on damages on that Count if that defense should prove to be unavailing. Each party shall bear its own costs.

Dissent by: WEIS

Dissent

WEIS, Circuit Judge, concurring and dissenting.

Although I concur with the majority's disposition of most of the issues in this case, [1.] I am unable to agree that on remand, if the challenged conduct is found to be nonexempt, a per se approach would be proper. Determining the applicability of the labor exemption and choosing the appropriate level of antitrust scrutiny are discrete **[**112]** issues. Accordingly, if it is concluded that the exemption does not apply, consideration must then be given to utilizing a full rule of reason inquiry or applying the abbreviated per se approach.

The fact that the labor exemption **[**113]** does not insulate certain conduct does not make it a violation of the antitrust laws, but simply means that the activity is subject to scrutiny under those statutes. This has been made clear by the Supreme Court **[*528]** decisions discussing the labor exemption. In each instance, the Court has carefully separated the exemption inquiry from the ultimate liability determination. See *Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 637, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*; *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 693, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)* (opinion of White, J.); *United Mine Workers v. Pennington, 381 U.S. 657, 661, 669, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* (opinion of White, J.).

I start with the basic proposition that the rule of reason is the prevailing standard of analysis. *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440, 446 (3d Cir. 1978)*, and that the per se standard is applicable only in limited situations. As the **[**114]** Court explained in *Northern Pacific Railway v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*:

> "(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

The majority opinion correctly points out that some refusals to deal have been classified as per se violations. All of the cited cases, however, reviewed fact situations involving business competitors. The Supreme Court has never held that all boycotts, even those involving noncompetitors are per se violations, nor is there any present indication that that position will prevail. [2.] Indeed, in *De Filippo v. Ford Motor Co., 516 F.2d 1313, 1317-18 (3d Cir. 1975)*, we cautioned that a consequence of an overreliance on the "boycott" label would be the indiscriminate extension of the per se principle. The case at bar does not represent a classic commercial boycott because the union is not a competitor of the shipping association or of **[**115]** the stevedoring companies. Its aim was not the elimination of competition but work preservation or acquisition. Concededly, a boycott may include noncompetitors and be a violation of the Clayton Act, but that does not answer the question whether a per se violation is involved. See *St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)*. [3.]

[116]** A political, religious, racial, or consumer group that promotes a boycott of particular products to enforce its aims would not be guilty of a per se violation. In these cases, although the refusal to deal may be intended to inflict some injury upon the object of the boycott, the target is not a competitor of those who have actively urged the

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1. I do not dispute that collateral estoppel, to the extent it establishes violations of §§ 8(b)(4) and 8(e), is applicable here. I do not, however, agree with all of the dictum in the majority opinion. I note particularly that in *International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 99 S. Ct. 790, 58 L. Ed. 2d 808 (1979)*, the Supreme Court cautioned that the weight to be given an administrative agency's interpretation of the statute under which it operates must be limited by a court's obligation to honor the clear meaning of the legislation. I also read *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*, as permitting scrutiny of administrative procedures before according collateral estoppel effect to agency decisions.

2. *National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*, though emphasizing the anti-competitive focus of the rule of reason, was interpreting that very precept, not announcing a new per se classification. That opinion, therefore, is of no relevance in determining as an initial matter which mode of antitrust analysis to employ. See generally Handler, Antitrust 1978, 78 Colum.L.Rev. 1363, 1364-74 (1978).

3. The courts of appeals have favored the rule of reason in noncompetitor boycott situations. See the cases collected in *Smith v. Pro Football, Inc., 193 U.S.App.D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978)*.

restraint. See L. Sullivan, Antitrust § 92 (1977); Note, Boycott: A Specific Definition Limits the Applicability of a Per Se Rule, 71 Nw.U.L.Rev. 818, 830-32 (1977). See generally McCormick, Group Boycotts Per Se or Not Per Se, That is the Question, 7 Seton Hall L.Rev. 703 (1976).

The majority argues that permitting a rule of reason inquiry after a finding of no labor exemption would be redundant. But if a boycott by a political, religious, racial, or consumer group is to be subjected to rule of reason scrutiny, it is difficult to understand why that procedure should be denied a labor union simply because some but not necessarily all of the pertinent factors have been resolved in the labor exemption examination. The rule of reason analysis does not duplicate the exemption inquiry in its entirety and should not be **[**117]** forsaken **[*529]** merely because there might be some overlap. A union should not be singled out in a manner that would deny it all the opportunities for defense afforded other noncompetitor participants in similar boycotts. Indeed, I find myself in agreement with Professor Handler's view that an automatic finding of antitrust liability after a determination that union activity is nonexempt "would be a Per se approach with a vengeance." Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239 (1971). Moreover, some consideration should be given to the other defendants' contentions that the restraint was forced upon them through union pressure and not through any desire of their own.

Perhaps none of the defendants can satisfy the rule of reason analysis, but it is premature on this record to decide whether the restraint violates the antitrust laws. That determination must be made initially by the district court after reviewing all relevant considerations. A shortcut is not appropriate in this case. Accordingly, I would remand to the district court with directions that if the labor exemption is not found to be applicable, the rule of reason should be **[**118]** applied to the antitrust claims.

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.

Supreme Court of the United States

January 15, 1979, Argued ; April 17, 1979, Decided [*]

No. 77-1578

Reporter

441 U.S. 1 *; 99 S. Ct. 1551 **; 60 L. Ed. 2d 1 ***; 1979 U.S. LEXIS 84 ****; 201 U.S.P.Q. (BNA) 497; Copy. L. Rep. (CCH) P25,064; 1979-1 Trade Cas. (CCH) P62,558

BROADCAST MUSIC, INC., ET AL. v. COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

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

Disposition: 562 F.2d 130, reversed and remanded.

Core Terms

license, blanket, music, compositions, rights, Sherman Act, users, composers, price fixing, antitrust, negotiate, copyright owner, network, television, cases, decree, practices, television network, anti trust law, per se rule, per se violation, competitors, costs, restraint of trade, consent decree, monopoly, holders, musical composition, broadcasters, publishers

LexisNexis® Headnotes

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 > Per Se Rule & Rule of Reason > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Regulated Industries, Higher Education & Professional Associations**

[*] Together with No. 77-1583, American Society of Composers, Authors and Publishers et al. v. Columbia Broadcasting System, Inc., et al., also on certiorari to the same court.

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, certain agreements or practices are so plainly anticompetitive, and so often lack any redeeming virtue, that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This per se rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities held to be within the per se category.

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

Governments > Legislation > Overbreadth

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Per Se Rule & Rule of Reason, Per Se Violations**

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.

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

HN3[] **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.

Lawyers' Edition Display

Decision

Blanket licensing for use of copyrighted musical compositions, held not to be per se illegal price fixing under Sherman Act (*15 USCS 1 et seq.*).

Summary

Two organizations serving as "clearinghouses" for copyright owners and users were sued in the United States District Court for the Southern District of New York for violation of the Sherman Act (*15 USCS 1 et seq.*) and copyright laws with respect to a system of blanket licensing whereby the organizations give licensees the right to perform any and all of the musical compositions owned by the organizations' members or affiliates as often as the licensees desire, for a stated term, in return for the licensees' payment of fees which do not directly depend on the amount or type of music used, but ordinarily reflect a percentage of total revenues or a flat dollar amount. The plaintiff, the operator of a national commercial television network holding blanket licenses from both organizations, alleged that the two organizations were unlawful monopolies and that the blanket licenses constituted illegal price fixing, unlawful tying arrangements, concerted refusals to deal, and misuse of copyrights. The District Court ultimately dismissed the complaint, rejecting a claim that the blanket licenses constituted price fixing that was a per se violation of the Sherman Act, and holding that since direct negotiation with individual copyright owners was available and feasible there was no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization (*400 F Supp 737*). On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded for consideration of an appropriate remedy, holding that the blanket licenses issued to television networks constituted a form of price fixing illegal per se under the Sherman Act, the determination as to price fixing settling the issue of liability under the Act and establishing copyright misuse (*562 F2d 130*).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by White, J., joined by Burger, Ch. J., and Brennan, Stewart, Marshall, Blackmun, Powell, and Rehnquist, JJ., it was held that the system of blanket licensing for the use of copyrighted musical compositions did not constitute a type of price fixing per se violative of the Sherman Act, and that in determining whether the system of blanket licensing violated the Sherman Act, the appropriate standard of examination was that of the rule of reason generally applied in Sherman Act cases, such standard of analysis being one for the Court of Appeals to utilize on remand if the issue of blanket licenses as employed in the television industry had been preserved in the Court of Appeals.

Stevens, J., dissenting, agreed with the Court's holding that the blanket licenses did not constitute a species of price fixing categorically forbidden by the Sherman Act, but would not have remanded the case, and instead would have affirmed the judgment of the Court of Appeals on the ground that the question whether the blanket licenses were unlawful under a rule of reason inquiry was properly before the court and should be answered affirmatively.

Headnotes

MONOPOLIES §16 > blanket licensing -- copyrighted musical compositions -- price fixing -- per se illegality -- rule of reason -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

The system of blanket licensing whereby organizations operating as clearinghouses for copyright owners and users issue blanket licenses for the use of copyrighted musical compositions--which licenses give the licensees the right to perform any and all of the compositions owned by the organizations' members or affiliates as often as the licensees desire, for a stated term, in return for a fee which does not directly depend on the amount or type of music used, but ordinarily is based upon a percentage of total revenues or a flat dollar amount--does not constitute a type of price fixing that is illegal per se under the Sherman Act (*15 USCS 1 et seq.*), but rather, when such a system of blanket licensing is attacked as constituting price fixing under the Act, it should be subjected to examination under the federal ***antitrust law***'s rule of reason standard of analysis.

MONOPOLIES §9 > per se rule -- rule of reason -- > Headnote:
LEdHN[2][] [2]

Under the per se rule used in construing and applying the ban of the Sherman Act (*15 USCS 1 et seq.*) against contracts, conspiracies, and combinations in restraint of trade, certain agreements or practices are so plainly anticompetitive and so often lack any redeeming virtue that they will be conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

MONOPOLIES §62 > price fixing -- blanket license -- copyrighted musical compositions -- per se illegality -- > Headnote:
LEdHN[3][] [3]

Although a system for the blanket licensing of copyrighted musical compositions through the joining together of the composers of musical compositions and publishing houses into an organization that sets a price for the blanket licenses sold by the organization might be "price fixing" in the literal sense, such does not alone establish that the licensing practice is one so plainly anticompetitive and so often lacking any redeeming virtue as to be conclusively presumed illegal under the Sherman Act (*15 USCS 1 et seq.*) without further examination under the rule of reason generally applied in Sherman Act cases.

COPYRIGHT §11 > MONOPOLIES §62 > blanket license -- musical composition -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

The mere fact that a broadcaster of television programs, as the licensee under a blanket license for the use of copyrighted musical compositions, pays a flat fee regardless of the amount of use it makes of copyrighted compositions under the agreement, and even though many of its programs contain little or no music, does not alone make out a violation of federal ***antitrust law*** or misuse of copyrights.

MONOPOLIES §37 > price fixing -- per se violation -- Sherman Act -- > Headnote:
LEdHN[5][] [5]

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 (*15 USCS 1 et seq.*).

MONOPOLIES §9 > federal antitrust laws -- per se violation -- > Headnote:
LEdHN[6][] [6]

It is only after considerable experience with a certain business relationship that such relationship will be classified as a per se violation of federal antitrust laws.

COPYRIGHT §15 > prior consent -- performance of copyrighted music -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent.

MONOPOLIES §19 > per se rule -- effect and purpose of practice -- competition -- > Headnote:
LEdHN[8][] [8]

In characterizing conduct for purposes of the rule whereby certain agreements or practices that are so plainly anticompetitive and so often lacking any redeeming virtue are conclusively presumed illegal under federal ***antitrust law*** without further examination under the rule of reason generally applied in cases arising under the Sherman Act (*15 USCS 1 et seq.*), the inquiry must focus on whether the effect and, where the conduct tends to show effect, the purpose of the practice is to threaten the proper operation of the predominately free market economy--that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead is one designed to increase economic efficiency and render markets more, rather than less, competitive.

MONOPOLIES §37 > agreements among competitors -- impact on price -- per se violation of Sherman Act -- > Headnote:
LEdHN[9][] [9]

Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act (*15 USCS 1 et seq.*) or even unreasonable restraints; mergers among competitors eliminate competition, including price competition, but they are not per se illegal and many of them withstand attack under any existing antitrust standard; joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

ERROR §1537 > Court of Appeals' judgment -- reversal and remand by Supreme Court -- > Headnote:
LEdHN[10][] [10]

On certiorari to review the decision of a Federal Court of Appeals, which reversed and remanded as to a Federal District Court's dismissal of a complaint in an action brought by the operator of a television network alleging that blanket licenses under which the operator was licensed to use copyrighted musical compositions violated the Sherman Act (*15 USCS 1 et seq.*) and copyright laws because they constituted illegal price fixing, unlawful tying arrangements, concerted refusals to deal, and misuse of copyrights, the United States Supreme Court will--upon holding that the blanket licenses do not constitute a type of price fixing that is per se illegal under the Sherman Act but must be examined under the rule of reason--reverse the Court of Appeals' judgment that the blanket licenses constitute price fixing per se violative of the Sherman Act and also its judgment, dependent upon its holding regarding price fixing, that the blanket licenses constitute copyright misuse, and the Supreme Court will remand the case for further proceedings to consider any unresolved issues that the network operator might have properly brought to the Court of Appeals, including an assessment under the rule of reason of blanket licenses as employed in the television industry, if such issue had been preserved by the network operator in the Court of Appeals. (Stevens, J., dissented from this holding.)

ERROR §1087.5(2) > Court of Appeals' judgment -- affirmance despite error -- failure to raise point in petition for certiorari -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]

On certiorari to review the decision of a Federal Court of Appeals, which reversed and remanded as to a Federal District Court's dismissal of a complaint in an action brought by the operator of a television network alleging that blanket licenses under which the network was licensed to use copyrighted musical compositions violated the Sherman Act (*15 USCS 1 et seq.*) and copyright laws as constituting illegal price fixing, unlawful tying arrangements, concerted refusals to deal, and misuse of copyrights, the United States Supreme Court--upon holding that the Court of Appeals had erred in ruling that the blanket licenses constituted a type of price fixing that is per se illegal under the Sherman Act--will not affirm the Court of Appeals' judgment on the ground that the blanket licenses constitute tying arrangements violative of the Sherman Act or on the ground that the licensors monopolized the relevant market contrary to the Sherman Act; the Supreme Court will leave undisturbed the Court of Appeals' judgment in respect to its rejection of the tying and monopolization arguments, particularly since the network operator did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain the tying and monopolization claims.

Syllabus

[498] Respondent Columbia Broadcasting System, Inc. (CBS), brought this action against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates, alleging, *inter alia*, that the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is illegal price fixing under the antitrust laws. Blanket licenses give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music **[****2]** used. After a trial limited to the issue of liability, the District Court dismissed the complaint, holding, *inter alia*, that the blanket license was not price fixing and a *per se* violation of the Sherman Act. The Court of Appeals reversed and remanded for consideration of the appropriate remedy, holding that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act and established copyright misuse.

Held: The issuance by ASCAP and BMI of blanket licenses does not constitute price fixing *per se* unlawful under the antitrust laws. Pp. 7-25.

(a) "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc., 405 U.S. 596, 607-608*. And though there has been rather intensive antitrust scrutiny of ASCAP and BMI and their blanket licenses, that experience hardly counsels that this Court should outlaw the blanket license as a *per se* restraint of trade. Furthermore, the United States, by its *amicus* brief in the present case, urges that the blanket licenses, which **[****3]** consent decrees in earlier actions by the Government authorize ASCAP and BMI to issue to television networks, are not *per se* violations of the Sherman Act. And Congress, in the Copyright Act of 1976, has itself chosen to employ the blanket license and similar practices. Thus, there is no nearly universal view that the blanket licenses are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason generally applied in Sherman Act cases. Pp. 7-16.

(b) In characterizing the conduct of issuing blanket licenses under the *per se* rule, this Court's inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of a predominantly free-market economy. The blanket license is not a "naked [restraint] of trade with no purpose except stifling of competition," *White Motor Co. v. United States, 372 U.S. 253, 263*, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use, which would be difficult and expensive problems if left to individual users **[****4]** and copyright owners. Although the blanket license fee is set by ASCAP and BMI rather than by competition among individual copyright owners, and although it is a fee for the use of any of the compositions covered by the license, the license cannot be wholly equated with a simple horizontal arrangement among competitors and is quite different from anything any individual owner could issue. In light of the background, which plainly indicates that over the years, and in the face of available alternatives including direct negotiation with individual copyright owners, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, it cannot automatically be declared illegal in all of its many manifestations. Rather, it should be subjected to a more discriminating examination under the rule of reason. Pp. 16-24.

(c) The Court of Appeals' judgment holding that the licensing practices of ASCAP and BMI are *per se* violations of the Sherman Act, and the copyright misuse judgment dependent thereon, are reversed, and the case is remanded for further proceedings to consider any unresolved issues **[****5]** that CBS may have properly brought to the Court of Appeals, including an assessment under the rule of reason of the blanket license as employed in the television industry. Pp. 24-25.

Counsel: Amalya L. Kearse argued the cause for petitioners in No. 77-1578. With her on the briefs were George A. Davidson and Conley E. Brian, Jr. Jay Topkis argued the cause for petitioners in No. 77-1583. With him on the briefs were Bernard Korman, Simon H. Rifkind, Herman Finkelstein, and Allan Blumstein.

Alan J. Hruska argued the cause for respondents in both cases. With him on the briefs were John D. Appel and Robert M. Sondak.

Deputy Solicitor General Easterbrook argued the cause for the United States as amicus curiae urging reversal. With him on the briefs were Solicitor General McCree, Assistant Attorney General Shenefield, William Alsup, John J. Powers III, and Andrea Limmer. [+]

[**6]**

Judges: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, post, p. 25.

Opinion by: WHITE

Opinion

[*4] **[***6]** **[**1554]** MR. JUSTICE **WHITE** delivered the opinion of the Court.

LEdHN[1A][] [1A]This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, **[499]** Inc. (BMI), and their members and affiliates. [1] The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

[**7]** I

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated stations and telecasting approximately 7,500 network programs per year. Many, but not all, of these

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[+] Briefs of amici curiae urging reversal were filed by Irwin Karp for the Authors League of America, Inc.; by Philip Elman and Robert M. Lichtman for the Performing Right Society, Ltd., et al.; and by Robert H. Bork for Aaron Copland et al.

Briefs of amici curiae urging affirmance were filed by Ira M. Millstein for the All-Industry Television Music License Committee; by Clarence Fried for American Broadcasting Companies, Inc.; by David R. Hyde for National Broadcasting Company, Inc.; by John H. Midlen, Jr., for National Religious Broadcasters, Inc.; and by John L. Hill, Attorney General of Texas, David M. Kendall, First Assistant Attorney General, and Robert S. Bickerstaff and Susan Dasher, Assistant Attorneys General, for the Universities of the State of Texas et al.

Irving Moskovitz filed a brief for the All-Industry Radio Music License Committee as amicus curiae.

[1] The District Court certified the case as a defendant class action. *400 F.Supp. 737, 741 n. 2 (SDNY 1975)*.

programs make use of copyrighted music recorded on the soundtrack. CBS also owns television and radio stations in various cities. It is "'the giant of the world in the use of **[***7]** music rights,'" the "'No. 1 outlet in the history of entertainment.'" [2]

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit, [3] but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed **[****8]** **[*5]** copyrighted music for profit were so numerous and widespread, and **[**1555]** most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. "ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. *400 F.Supp. 737, 741 (SDNY 1975)*. As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

BMI, a nonprofit corporation owned by members of the broadcasting industry, [4] was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates **[****9]** in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI. Until this litigation, CBS held blanket licenses from both organizations for its television network on a continuous basis since the late 1940's and **[****10]** had never attempted to secure any other form of **[*6]** license from either ASCAP [5] or any of its members. *Id., at 752-754*.

The complaint filed by CBS charged various violations of the Sherman Act [6] and the copyright laws. [7] CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, **[***8]** a concerted refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the *per se* rule. *337 F.Supp. 394, 398 (SDNY 1972)*. After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the blanket license was price fixing and a *per se* violation of *§ 1* of the Sherman Act, and holding that since direct **[****11]** negotiation with individual copyright owners is available and feasible there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. *400 F.Supp., at 781-783*.

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[2] *Id., at 771*, quoting a CBS witness. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI, and is the world's largest manufacturer and seller of records and tapes. *Ibid*.

[3] Act of Jan. 6, 1897, 29 Stat. 481.

[4] CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959. *400 F.Supp., at 742*.

[5] Unless the context indicates otherwise, references to ASCAP alone in this opinion usually apply to BMI as well. See n. 20, *infra*.

[6] *15 U. S. C. §§ 1* and *2*.

[7] CBS seeks injunctive relief for the antitrust violations and a declaration of copyright misuse. *400 F.Supp., at 741*.

[500] Though agreeing with the District Court's factfinding and not disturbing its legal conclusions on the other antitrust theories of liability, [8] **[****12]** the Court of Appeals held that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act. *562 F.2d 130, 140 (CA2 1977)*. This conclusion, without more, settled the issue of liability under the Sherman Act, established copyright misuse, [9] and required reversal of the District **[**1556]** Court's **[*7]** judgment, as well as a remand to consider the appropriate remedy. [10]

[**13]** ASCAP and BMI petitioned for certiorari, presenting the questions of the applicability of the *per se* rule and of whether this constitutes misuse of copyrights. CBS did not cross petition to challenge the failure to sustain its other antitrust claims. We granted certiorari because of the importance of the issues to the antitrust and copyright laws. *439 U.S. 817 (1978)*. Because we disagree with the Court of Appeals' conclusions with respect to the *per se* illegality of the blanket license, we reverse its judgment and remand the cause for further appropriate proceedings.

[*9]** II

LEdHN[2][] [2]***HN1***[] In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, **[*8]** the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)*;*Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)*, **[****14]** and so often "lack . . . any redeeming virtue," *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)*, that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. [11] **[****15]** And agreements among competitors to fix prices on their

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[8] The Court of Appeals affirmed the District Court's rejection of CBS's monopolization and tying contentions but did not rule on the District Court's conclusion that the blanket license was not an unreasonable restraint of trade. See *562 F.2d 130, 132, 135, 141 n. 29 (CA2 1977)*.

[9] At CBS's suggestion, the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing. *Id., at 141 n. 29*.

[10] The Court of Appeals went on to suggest some guidelines as to remedy, indicating that despite its conclusion on liability the blanket license was not totally forbidden. The Court of Appeals said:

"Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing -- in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all circumstances. The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

"Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." *Id., at 140* (footnotes omitted).

[11] "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)*.

See *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n. 16 (1977)*; *United States v. Topco Associates, Inc., 405 U.S. 596, 609 n. 10 (1972)*.

individual goods or services are among those concerted activities that the Court has held to be within the *per se* category. [12] But easy labels do not always supply ready answers.

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LEdHN[3][] [3]**LEdHN[4A]**[] [4A]**LEdHN[5]**[] [5]To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. [13] **[****17]** But this **[*9]** is not a **[**1557]** **[501]** question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. **HN2**[] **[****16]** When two partners set the price of their goods or services **[***10]** they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (CA6 1898)*, aff'd, *175 U.S. 211 (1899)*. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label *"per se* price fixing." That will often, but not always, be a simple matter. [14]

LEdHN[4B][] [4B]

LEdHN[6][] [6]Consequently, as we recognized in *United States v. Topco Associates, Inc., 405 U.S. 596, 607-608 (1972)*,**HN3**[] "[it] is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . ." See **[*10]** *White **[****18]** Motor Co. v.United States, 372 U.S. 253, 263 (1963)*. We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "[in] dealing with performing rights in the music industry we confront conditions both in copyright law and in ***antitrust law*** which are *sui generis*." *562 F.2d, at 132*. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.

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[12] See cases discussed in n. 14, *infra*.

[13] CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music. We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:

"Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them." *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 (1950)*.

See also *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)*.

[14] Cf., *e. g., United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)* (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)* (firms controlling a substantial part of an industry agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); *United States v. Trenton Potteries Co., 273 U.S. 392 (1927)* (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

This litigation and other cases involving ASCAP and its licensing practices have arisen out of the efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act. As already indicated, ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, "[neither] ASCAP nor BMI is a stranger to antitrust **[****19]** litigation." *400 F.Supp., at 743*.

The Department of Justice first investigated allegations of anticompetitive conduct by ASCAP over 50 years ago. [15] **[****20]** A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged that the blanket license, which was then the only license **[**1558]** offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool. [16] The Government sought **[*11]** to enjoin ASCAP's exclusive licensing powers and to require **[***11]** a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations. [17] Following complaints relating to the television industry, successful private litigation against ASCAP by movie theaters, [18] and a **[502]** Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950. [19]

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested **[****21]** it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions, either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court **[*12]** for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness. [20]

[**22]** The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business under the decree. The courts have twice construed the decree not to require ASCAP to issue licenses for selected portions of its repertory. [21] **[****23]** It also

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[15] Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo. L. J. 407, 424 n. 91 (1941).

[16] *E. g*., complaint in *United States* v. *ASCAP*, Civ. No. 13-95 (SDNY 1941), pp. 3-4.

[17] *United States* v. *ASCAP*, 1940-1943 Trade Cases para. 56,104 (SDNY 1941).

[18] See *Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (SDNY 1948)*; *M. Witmark & Sons v. Jenson, 80 F.Supp. 843 (Minn. 1948)*, appeal dismissed *sub nom.* ***M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (CA8 1949)***.

[19] *United States* v. *ASCAP*, 1950-1951 Trade Cases para. 62,595 (SDNY 1950).

[20] BMI is in a similar situation. The original decree against BMI is reported as *United States* v. *BMI*, 1940-1943 Trade Cases para. 56,096 (ED Wis. 1941). A new consent judgment was entered in 1966 following a monopolization complaint filed in 1964. *United States v. BMI, 1966 Trade Cases para. 71,941 (SDNY*). The ASCAP and BMI decrees do vary in some respects. The BMI decree does not specify that BMI may only obtain nonexclusive rights from its affiliates or that the District Court may set the fee if the parties are unable to agree. Nonetheless, the parties stipulated, and the courts below accepted, that "CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members." *400 F.Supp., at 745*.

remains true that the decree guarantees the legal availability of direct licensing of performance **[***12]** rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so. Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit **[**1559]** arose that the CBS network demanded any other kind of license. [22]

[*13] Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. See *Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690 (1961)*, which involved this same decree. But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. **[****24]** [23] In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. [24] Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See *id., at 694-695*. That fact alone might not remove a naked price-fixing **[503]** scheme from the ambit of the *per se* rule, but, as discussed *infra*, Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers.

[**25]** After the consent decrees, the legality of the blanket license was challenged in suits brought by certain ASCAP members against individual radio stations for copyright infringement. The stations raised as a defense that the blanket license was a form of price fixing illegal under the Sherman Act. The parties **[*14]** stipulated that it would be nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio. Against this background, and relying heavily on the 1950 consent judgment, the Court of Appeals for the Ninth Circuit rejected claims that ASCAP was a combination in restraint of trade and that the blanket license constituted illegal price fixing. *K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (1967)*, **[***13]** cert. denied, *389 U.S. 1045 (1968)*.

The Department of Justice, with the principal responsibility for enforcing the Sherman Act and administering the consent decrees relevant to this case, agreed with the result reached by the Ninth Circuit. In a submission *amicus curiae* opposing one station's petition for certiorari in this Court, the Department **[****26]** stated that there must be "some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." Memorandum for United States as *Amicus Curiae* on Pet. for Cert. in *K-91, Inc*. v. *Gershwin Publishing Corp*., O. T. 1967, No. 147, pp. 10-11. And the Department elaborated on what it thought that fact meant for the proper application of the antitrust laws in this area:

"The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict

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[21] *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 208 F.Supp. 896 (SDNY 1962)*, aff'd, *331 F.2d 117* (CA2), cert. denied, ***377 U.S. 997 (1964)***; *United States v. ASCAP (Application of National Broadcasting Co.), 1971 Trade Cases para. 73,491 (SDNY 1970)*. See also *United States v. ASCAP (Motion of Metromedia, Inc.), 341 F.2d 1003 (CA2 1965)*.

[22] National Broadcasting Co. did, in 1971, request an annual blanket license for 2,217 specific ASCAP compositions most frequently used on its variety shows. It intended to acquire the remaining rights to background and theme music through direct transactions by it and its program packagers. See *United States v. ASCAP (Application of National Broadcasting Co.), supra.*

[23] *1950-1951 Trade Cases para. 62,595, p. 63,756*.

[24] Cf. *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S., at 50 n. 16*. Moreover, unthinking application of the *per se* rule might upset the balancing of economic power and of procompetitive and anticompetitive effects presumably worked out in the decree.

limitations **[**1560]** under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press v. United States, 326 U.S. 1*; *United States v. St. Louis Terminal, 224 U.S. 383*; *Appalachian Coals, Inc. v. United States, 288 U.S. 344*; *Chicago Board of Trade v. United States, 246 U.S. 231*. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, **[****27]** the ease with which a performance may be broadcast, the sheer volume **[*15]** of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music." *Id., at 10* (footnote omitted).

The Department concluded that, in the circumstances of that case, the blanket licenses issued by ASCAP to individual radio stations were neither a *per se* violation of the Sherman Act nor an unreasonable restraint of trade.

As evidenced by its *amicus* brief in the present case, the Department remains of that view. Furthermore, the United States disagrees with the Court of Appeals in this case and urges that the blanket licenses, which the consent decree authorizes ASCAP to issue to television networks, are not *per se* violations of the Sherman Act. It takes no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.

Finally, we note that Congress itself, in the new Copyright Act, has **[****28]** chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems and provided that "[notwithstanding] any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, **[***14]** may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." 17 U. S. C. App. § 111 (d)(5)(A). And the newly created compulsory license for the use of copyrighted compositions in jukeboxes is also a blanket license, which is payable to the performing-rights societies such as ASCAP unless an individual copyright holder can prove his entitlement to a share. *§ 116 (c)(4)*. Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music, Congress again provided that "[notwithstanding] **[*16]** any provision of the antitrust laws" copyright owners "may designate common agents to negotiate, agree to, pay, or receive payments." *§ 118(b)*. Though these provisions are not directly controlling, **[****29]** they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.

[504] There have been District Court cases holding various ASCAP practices, including its licensing practices, to be violative of the Sherman Act, [25] but even so, there is no nearly universal view that either the blanket or the per-program licenses issued by ASCAP at prices negotiated by it are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason.

III

LEdHN[1B][] [1B] **[****30]** Of course, we are no more bound than is CBS by the views of the Department of Justice, the results in the prior lower court **[**1561]** cases, or the opinions of various experts about the merits of the blanket license. But while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to *per se* invalidation.

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As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue

[25] See cases cited n. 18, *supra*. Those cases involved licenses sold to individual movie theaters to "perform" compositions already on the motion pictures' soundtracks. ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners.

blanket licenses to **[*17]** individual radio or television stations or to other users who perform copyrighted music for profit? [26] Likewise, if the present network licenses issued through ASCAP on behalf of its members are *per se* violations, why would it not be equally illegal for the members to authorize ASCAP to issue licenses establishing various categories of uses that a network might have for **[***15]** copyrighted music and setting a standard **[****31]** fee for each described use?

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the *per se* rule does not accommodate itself to such flexibility and that the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability. [27]

[**32]**

[*18] ***LEdHN[7A]***[] [7A]CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. *400 F.Supp., at 747 n. 7*.[28] **[****33]** But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works. [29] Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are **[505]** quite sure, however, that the *per se* rule does not require any such holding.

LEdHN[7B][] [7B]

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[1562]** In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public

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[26] Certain individual television and radio stations, appearing here as *amici curiae*, argue that the *per se* rule should extend to ASCAP's blanket licenses with them as well. The television stations have filed an antitrust suit to that effect. *Buffalo Broadcasting Co*. v. *ASCAP*, 78 Civ. 5670 (SDNY, filed Nov. 27, 1978).

[27] See n. 10, *supra*. The Court of Appeals would apparently not outlaw the blanket license across the board but would permit it in various circumstances where it is deemed necessary or sufficiently desirable. It did not even enjoin blanket licensing with the television networks, the relief it realized would normally follow a finding of *per se* illegality of the license in that context. Instead, as requested by CBS, it remanded to the District Court to require ASCAP to offer in addition to blanket licensing some competitive form of per-use licensing. But per-use licensing by ASCAP, as recognized in the consent decrees, might be even more susceptible to the *per se* rule than blanket licensing.

The rationale for this unusual relief in a *per se* case was that "[the] blanket license is not simply a 'naked restraint' ineluctably doomed to extinction." *562 F.2d, at 140*. To the contrary, the Court of Appeals found that the blanket license might well "serve a market need" for some. *Ibid*. This, it seems to us, is not the *per se* approach, which does not yield so readily to circumstances, but in effect is a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint.

[28] Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per-use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent. Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S., at 139-140*.

[29] In its complaint, CBS alleged that it would be "wholly impracticable" for it to obtain individual licenses directly from the composers and publishing houses, but it now says that it would be willing to do exactly that if ASCAP were enjoined from granting blanket licenses to CBS or its competitors in the network television business.

performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties. [30] Furthermore, nothing in the Copyright Act of 1976 indicates in the slightest that Congress intended **[***16]** to weaken the rights of copyright owners to control the public **[*19]** performance of musical compositions. Quite the contrary is true. [31] Although the copyright laws confer no rights on copyright owners **[****34]** to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned. [32]

[**35]** C

LEdHN[8][] [8]More generally, in characterizing this conduct under the *per se* rule, [33] our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States v. United States Gypsum Co., 438 U.S. 422, 436 n. 13 (1978)*, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or **[*20]** almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id., at 441 n. 16*; see *National Society of Professional Engineers v. United States, 435 U.S., at 688*;*Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S., at 50 n. 16*;*Northern Pac. R. Co. v. United States, 356 U.S., at 4*.

[**36]** The blanket license, as we see it, is not a "naked [restraint] of trade with no purpose except stifling of competition," *White Motor Co. v. United States, 372 U.S. 253, 263 (1963)*, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, **[***17]** rapid, and indemnified access to any and all of the repertory of compositions, **[**1563]** and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, *562 F.2d, at 140 n. 26*, and it was **[****37]** in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing

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[30] 17 U. S. C. App. § 506.

[31] See Koenigsberg, The 1976 Copyright Act: Advances for the Creator, 26 Cleve. St. L. Rev. 515, 524, 528 (1977).

[32] Cf. *Silver v. New York Stock Exchange, 373 U.S. 341 (1963)*.

Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws *and* an effective way to enforce those legal rights. See *Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162 (1975)*. It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.

[33] The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers v. United States, 435 U.S. 679, 690-692 (1978)*, or else we should apply the rule of reason from the start. That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.

task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket **[*21]** license, which gave unlimited access to the repertory and reliable protection against infringement. When ASCAP's major and user-created competitor, BMI, came **[506]** on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. [34] But even for television network licenses, ASCAP reduces costs absolutely **[****38]** by creating a blanket license that is sold only a few, instead of thousands, [35] of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. [36] ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

[**39]** D

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the **[*22]** sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of **[***18]** prior individual negotiations, [37] and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable **[**1564]** package, [38] and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. [39] **[****41]** Thus, 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. [40] ASCAP, **[*23]** in short, made a market in which individual **[****40]** composers are inherently unable to compete fully effectively. [41]

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[34] And of course changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.

[35] The District Court found that CBS would require between 4,000 and 8,000 individual license transactions per year. *400 F.Supp., at 762*.

[36] To operate its system for distributing the license revenues to its members, ASCAP relies primarily on the networks' records of which compositions are used.

[37] See Timberg, The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp. Prob. 294, 297 (1954) ("The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author"). Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which are licensed on an individual basis.

[38] Cf. *United States v. Grinnell Corp., 384 U.S. 563, 572-573 (1966)*; *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 356-357 (1963)*.

[39] Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind. L. J. 168, 170 (1950). See also Garner, *United States* v. *ASCAP*: The Licensing Provisions of the Amended Final Judgment of 1950, 23 Bull. Copyright Soc. 119, 149 (1975) ("no performing rights are licensed on other than a blanket basis in any nation in the world").

[40] Moreover, because of the nature of the product -- a composition can be simultaneously "consumed" by many users -- composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased

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LEdHN[9][] [9]Finally, we have some doubt **[****42]** -- enough to counsel against application of the *per se* rule -- about the extent to which this practice threatens the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59 (1940)*, that is, competitive pricing as the free **[507]** market's means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to **[***19]** market the product at all.

Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for **[****43]** its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket **[*24]** license to mask price fixing in such other markets. [42] Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.

LEdHN[1C][] [1C]With this background in mind, which plainly enough indicates that over the years, and in the face of available **[****44]** alternatives, the blanket license has provided an acceptable mechanism for at least a large **[**1565]** part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.

IV

LEdHN[10][] [10] *LEdHN[11A]*[] [11A]As we have noted, n. 27, *supra*, the enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the court's strict, *per se* approach and to have invited a more careful analysis. But this left the general import of its judgment that the licensing practices of ASCAP and BMI under the consent decree are *per se* violations of the Sherman Act. We reverse that judgment, and the copyright misuse judgment dependent upon it, see n. 9, *supra*, and remand for further proceedings to consider any unresolved **[****45]** issues that CBS may have properly brought to the Court of Appeals. [43] Of course, this will

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output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction.

[41] Cf. *United States v. Socony-Vacuum Oil Co., 310 U.S., at 217* (distinguishing *Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)*, on the ground that among the effects of the challenged rule there "was the creation of a public market"); *United States v. Trenton Potteries Co., 273 U.S., at 401* (distinguishing *Chicago Bd. of Trade* on the ground that it did not involve "a price agreement among competitors in an open market").

[42] "CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them." *400 F.Supp., at 748*.

[43] It is argued that the judgment of the Court of Appeals should nevertheless be affirmed on the ground that the blanket license is a tying arrangement in violation of *§ 1* of the Sherman Act or on the ground that ASCAP and BMI have monopolized the relevant market contrary to *§ 2*. The District Court and the Court of Appeals rejected both submissions, and we do not disturb the latter's judgment in these respects, particularly since CBS did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain its tying and monopolization claims.

include an assessment under **[*25]** the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals. [44]

LEdHN[11B][] [11B]

[**46]** The **[***20]** judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: STEVENS

Dissent

MR. JUSTICE STEVENS, dissenting.

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the cases to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule-of-reason inquiry. I think that question is properly before us now and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment. [1] In this litigation, the judgment of the **[508]** Court of Appeals was **[*26]** not that blanket licenses may never be offered by ASCAP and BMI. Rather, its judgment directed the District Court to fashion relief requiring them to offer additional forms of license as well. [2] Even though that judgment may not be consistent with its stated conclusion that the blanket **[****47]** license is "illegal *per se"* as a kind of price fixing, it is entirely consistent with a conclusion that petitioners' exclusive all-or-nothing blanket-license policy violates the rule of reason. [3]

The **[**1566]** Court of Appeals may well so decide on remand. In my judgment, however, a remand is not necessary. [4] The record before this Court is a full one, reflecting extensive discovery and **[****48]** eight weeks of trial. The District Court's findings of fact are thorough and well supported. They clearly reveal that the challenged

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[44] The Court of Appeals did not address the rule-of-reason issue, and BMI insists that CBS did not preserve the question in that court. In any event, if the issue is open in the Court of Appeals, we prefer that that court first address the matter. Because of the United States' interest in the enforcement of the consent decree, we assume it will continue to play a role in this litigation on remand.

[1] See *United States v. New York Telephone Co., 434 U.S. 159, 166 n. 8*; *Dayton Board of Education v. Brinkman, 433 U.S. 406, 419*; *Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U.S. 479, 480-481*; *United States v. American Railway Express Co., 265 U.S. 425, 435*.

[2] *562 F.2d 130, 140-141 (CA2 1977)*.

[3] See *ante*, at 17 n. 27 (describing relief ordered by Court of Appeals as "unusual" for a *per se* case, and suggesting that that court's decision appears more consistent with a rule-of-reason approach).

[4] That the rule-of-reason issues have been raised and preserved throughout seems to me clear. See *562 F.2d, at 134*. ("CBS contends that the blanket licensing method is not only an illegal tie-in or blockbooking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation . . . "); *id., at 141 n. 29* ("As noted, CBS also claims violation of *§ 2* of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The *§ 2* claim must therefore fail at this time and on this record"); Brief for Respondents 41.

policy does have a significant adverse impact on competition. I would therefore affirm the judgment of the Court of Appeals.

[**49]** I

In December 1969, the president **[***21]** of the CBS television network wrote to ASCAP and BMI requesting that each "promptly . . . grant a new performance rights license which **[*27]** will provide, effective January 1, 1970, for payments measured by the actual use of your music." [5] ASCAP and BMI each responded by stating that it considered CBS's request to be an application for a license in accordance with the provisions of its consent decree and would treat it as such, [6] **[****50]** even though neither decree provides for licensing on a per-composition or per-use basis. [7] Rather than pursuing further discussion, CBS instituted this suit.

Whether or not the CBS letter is considered a proper demand for per-use licensing is relevant, if at all, only on the question of relief. For the fact is, and it cannot seriously be questioned, that ASCAP and BMI have steadfastly adhered to the policy of only offering overall blanket or per-program licenses, [8] notwithstanding requests for more limited authorizations. Thus, ASCAP rejected a 1971 request by NBC for licenses for 2,217 specific compositions, [9] as well as an earlier request by a group of television stations for more limited authority than the blanket licenses which they were then **[*28]** purchasing. [10] Neither ASCAP nor BMI has ever offered to license anything less than its entire portfolio, even on an experimental basis. Moreover, if the response to the CBS letter were not sufficient to characterize their consistent policy, the defense of this lawsuit surely is. It is the refusal to license anything less than the entire repertoire -- rather than the decision to offer blanket licenses themselves -- that raises the serious antitrust questions **[****51]** in this case.

II

[1567]** Under our prior cases, there would be no question about the illegality of the **[****52]** blanket-only **[509]** licensing policy if ASCAP and BMI were the exclusive sources of all licenses. A copyright, like a patent, is a statutory grant of monopoly privileges. The rules which prohibit a patentee from enlarging his statutory monopoly by conditioning a license on the purchase **[***22]** of unpatented goods, [11] or by refusing to grant a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights. [12]

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[5] *400 F.Supp. 737, 753 (SDNY 1975)*.

[6] ASCAP responded in a letter from its general counsel, stating that it would consider the request at its next board of directors meeting, and that it regarded it as an application for a license consistent with the decree. The letter from BMI's president stated: "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." *Id., at 753-754*.

[7] See *ante*, at 12, and n. 21.

[8] The 1941 decree requires ASCAP to offer per-program licenses as an alternative to the blanket license. *United States v. ASCAP, 1940-1943 Trade Cases para. 56,104, p. 404 (SDNY)*. Analytically, however, there is little difference between the two. A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license. As is true of a long-term blanket license, the fees set are in no way dependent on the quantity or quality of the music used. See *infra*, at 30-33.

[9] See *United States v. ASCAP (Application of National Broadcasting Co.), 1971 Trade Cases para. 73,491 (SDNY 1970)*.

[10] See *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 208 F.Supp. 896 (SDNY 1962)*, aff'd, *331 F.2d 117 (CA2 1964)*, cert. denied, ***377 U.S. 997***.

[11] *Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661*; *Ethyl Gasoline Corp. v. United States, 309 U.S. 436*; *International Business Machines Corp. v. United States, 298 U.S. 131*; *United Shoe Machinery Corp. v. United States, 258 U.S. 451*.

[**53]** It is clear, however, that the mere fact that the holder of several patents has granted a single package license covering them all does not establish any illegality. This point was settled by *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834*, and reconfirmed in *Zenith Radio Corp.* ***[*29]*** *v. Hazeltine Research, Inc., 395 U.S. 100, 137-138*. The Court is therefore unquestionably correct in its conclusion that ASCAP's issuance of blanket licenses covering its entire inventory is not, standing alone, automatically unlawful. But both of those cases identify an important limitation on this rule. In the former, the Court was careful to point out that the record did not present the question whether the package license would have been unlawful if Hazeltine had refused to license on any other basis. *339 U.S., at 831*. And in the latter case, the Court held that the package license was illegal because of such a refusal. *395 U.S., at 140-141*.

Since ASCAP offers only blanket licenses, its licensing practices fall on the illegal side of the line drawn by the two *Hazeltine* cases. But there **[****54]** is a significant distinction: unlike Hazeltine, ASCAP does not have exclusive control of the copyrights in its portfolio, and it is perfectly possible -- at least as a legal matter -- for a user of music to negotiate directly with composers and publishers for whatever rights he may desire. The availability of a practical alternative alters the competitive effect of a blockbooking or blanket-licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the blockbooking and package-licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.

The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market. And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market. [13] We **[**1568]** therefore must consider **[*30]** what the record tells **[***23]** us about the competitive character of this market.

[**55]** III

The market for music at issue here is wholly dominated by ASCAP-issued blanket licenses. [14] Virtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI. And again, virtually without exception, the only means that has been used to secure authority to perform such compositions is the blanket license.

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[12] Indeed, the leading cases condemning the practice of "blockbooking" involved copyrighted motion pictures, rather than patents. See *United States v. Paramount Pictures, 334 U.S. 131*; *United States v. Loew's Inc., 371 U.S. 38*.

[13] See *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 334* (upholding requirements contract on the ground that "[there] is here neither a seller with a dominant position in the market as in *Standard Fashion [Co. v. Magrane-Houston Co., 258 U.S. 346]*; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil [Co. v. United States, 337 U.S. 293]*; nor a plainly restrictive tying arrangement as in *International Salt [Co. v. United States, 332 U.S. 392]*"); *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 610-612* (upholding challenged advertising practice because, while the volume of commerce affected was not "'insignificant or insubstantial,'" seller was found not to occupy a "dominant position" in the relevant market). While our cases make clear that a violation of the Sherman Act requires both that the volume of commerce affected be substantial and that the seller enjoy a dominant position, see *id., at 608-609*, proof of actual compulsion has not been required, but cf. *Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 251 (CA2 1959)*, cert. denied, ***361 U.S. 885***; *Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (CA7 1951)*, cert. denied, ***342 U.S. 909***. The critical question is one of the likely practical effect of the arrangement: whether the "court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co. v. Nashville Coal Co., supra, at 327*.

[14] As in the majority opinion, my references to ASCAP generally encompass BMI as well.

[510] The blanket all-or-nothing license is patently discriminatory. [15] The user purchases full access to ASCAP's entire **[*31]** repertoire, even though his needs could be satisfied by a far more limited selection. The price he pays for this access is unrelated either to the quantity or the quality of the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues, [16] **[****57]** a measure that reflects the customer's ability to pay [17] but is totally unrelated **[****56]** to factors -- such as the cost, quality, or quantity of the product -- that normally affect price in a competitive market. The ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what **[***24]** is "reasonable" for the access they are getting, [18] may well be far higher than what they would choose to spend for music in **[*32]** a competitive system. It is a classic example of economic discrimination.

The record plainly establishes **[****58]** that there is no price competition between separate musical compositions. [19] Under a blanket license, it is no more expensive for a network **[**1569]** to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music, [20] the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to **[*33]** break into the market **[****59]** by

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[15] See Cirace, *CBS* v. *ASCAP*: An Economic Analysis of A Political Problem, 47 Ford. L. Rev. 277, 286 (1978) ("the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms").

[16] For many years prior to the commencement of this action, the BMI blanket-license fee amounted to 1.09% of net receipts from sponsors after certain specified deductions. *400 F.Supp., at 743*. The fee for access to ASCAP's larger repertoire was set at 2.5% of net receipts; in recent years, however, CBS has paid a flat negotiated fee, rather than a percentage, to ASCAP. 23 Jt. App. in CA2 No. 75-7600, pp. E1051-E1052, E1135.

[17] See Cirace, *supra*, at 288:

"This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license."

[18] Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply to the United States District Court for the Southern District of New York for the determination of a "reasonable fee." *United States v. ASCAP, 1950-1951 Trade Cases para. 62,595, p. 63,754 (SDNY 1950)*. The BMI decree contains no similar provision for judicial determination of a reasonable fee.

[19] ASCAP's economic expert, Robert Nathan, was unequivocal on this point:

"Q. Is there price competition under this system between separate musical compositions?

"A. No sir." Tr. 3983.

[20] See *562 F.2d, at 136 n. 15*. In determining royalties ASCAP distinguishes between feature, theme, and background uses of music. The 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to the performance of the compositions." The 1960 decree provided for the additional option of receiving royalties under a deferred plan which provides additional compensation based on length of membership and the recognized status of the individual's works. See *United States v. ASCAP, 1960 Trade Cases para. 69,612, pp. 76,469-76,470 (SDNY 1960)*.

offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market. [21]

[**60]** The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited -- and thus less restrictive -- licenses by ASCAP is not feasible. The District Court's findings disclose no reason **[511]** why music-performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases. [22] **[****61]** If distributions of royalties can be calculated **[***25]** on a per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the same way. Moreover, the record also shows that where ASCAP's blanket-license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists, [23] and after the use of blanket licenses in the motion picture industry was discontinued, [24] such a market promptly developed in that industry. [25] In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all.

[*34] IV

Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably. ASCAP argues, however, that at least as to CBS, there has been no restraint at all since the network is free to deal **[****62]** directly with copyright holders.

[1570]** The District Court found that CBS had failed to establish that it was compelled to take a blanket license from ASCAP. While CBS introduced evidence suggesting that a significant number of composers and publishers, satisfied as they are with the ASCAP system, would be "disinclined" to deal directly with the network, the court found such evidence unpersuasive in light of CBS's substantial market power in the music industry and the importance to copyright holders of network television exposure. [26] Moreover, it is arguable that CBS could go further and, along with the other television networks, use its economic resources to exploit destructive competition among purveyors of music by driving the price of performance rights down to a far lower level. But none of this demonstrates that ASCAP's practices are lawful, or that ASCAP cannot be held liable for injunctive relief at CBS's request.

The fact that CBS has substantial **[****63]** market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the protection of the law. [27] Moreover, a conclusion that

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[21] See generally 2 P. Areeda & D. Turner, ***Antitrust Law*** 280-281, 342-345 (1978); Cirace, *supra* n. 15, at 286-292.

[22] See n. 20, *supra*.

[23] The "synch" right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music. It is the latter which is controlled by ASCAP and BMI. See *CBS, Inc. v. ASCAP, 400 F.Supp., at 743*.

[24] See *Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (SDNY 1948)*.

[25] See *400 F.Supp., at 759-763*; 5 Jt. App. in CA2 No. 75-7600, pp. 775-777 (testimony of Albert Berman, managing director of the Harry Fox Agency, Inc.). Television synch rights and movie performance and synch rights are handled by the Fox Agency, which serves as the broker for thousands of music publishers.

[26] See *400 F.Supp., at 767-771*.

[27] See *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-140*; *Simpson v. Union Oil Co., 377 U.S. 13, 16-17*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214*.

excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not **[*35]** constitute a defense to a violation of the Sherman **[***26]** Act. [28] Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct.

[**64]** More basically, ASCAP's underlying argument that CBS must be viewed as having acted with complete freedom in choosing the blanket license is not supported by the District Court's findings. The District Court did not find that CBS could cancel its blanket license "tomorrow" and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts. [29] In other words, although the barriers to direct dealing by CBS as an alternative to paying for a **[512]** blanket license are real and significant, they are not insurmountable.

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality **[****65]** of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market. [30] Despite its size, CBS itself **[*36]** may not obtain **[**1571]** music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the marketwide restraint.

[**66]** Whatever management decision CBS should or might have made, it is perfectly clear that the question whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. That may well be the state of **[***27]** this market. Even without judicial intervention, the ASCAP monopoly might eventually be broken by CBS, if the benefits of doing so outweigh the significant costs and risks involved in commencing direct dealing. [31] But that hardly means that the blanket-licensing **[*37]** policy at issue here is lawful. An arrangement that

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[28] See *National Society of Professional Engineers v. United States, 435 U.S. 679, 689-690*.

[29] See *400 F.Supp., at 762-765*.

[30] For an individual user, the transaction costs involved in direct dealing with individual copyright holders may well be prohibitively high, at least in the absence of any broker or agency routinely handling such requests. Moreover, the District Court found that writers and publishers support and prefer the ASCAP system to direct dealing. *Id., at 767*. While their apprehension at direct dealing with CBS could be overcome, the District Court found, by CBS's market power and the importance of television exposure, a similar conclusion is far less likely with respect to other users.

[31] The risks involved in such a venture appear to be substantial. One significant risk, which may be traced directly to ASCAP and its members, relates to music "in the can" -- music which has been performed on shows and movies already in the network's inventory, but for which the network must still secure performing rights. The networks accumulate substantial inventories of shows "in the can." And, as the Government has pointed out as *amicus curiae*:

"If they [the networks and television stations] were to discontinue the blanket license, they then would be required to obtain performance rights for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' It would produce, in other words, a case of bilateral monopoly. Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music 'in the can' to produces marketwide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character.

[**67]** Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders. **[*38]** Indeed, ASCAP itself argues that its blanket license constitutes a **[513]** product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 45 et seq.

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1 et seq.

US L Ed Digest, Restraints of Trade and Monopolies 16, 62

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR **[****68]** Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Literary and artistic rights for purposes of, and their infringement by or in connection with, motion pictures, radio, and television. 23 ALR2d 244.

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allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable." Brief for United States as *Amicus Curiae* 24-25.

This analysis is in no sense inconsistent with the findings of the District Court. The District Court did reject CBS's coercion argument as to music "in the can." But as the Government again points out, the District Court's findings were addressed essentially to a tie-in claim; "the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS' dropping the blanket license sufficiently high that ASCAP and BMI could take this 'termination penalty' into account in setting fees for the blanket license." *Id.*, at 25 n. 23.

In re Armored Car Antitrust Litigation

United States District Court for the Northern District of Georgia, Atlanta Division

April 18, 1979

Civ. A. No. 78-139A

Reporter

472 F. Supp. 1357 *; 1979 U.S. Dist. LEXIS 12964 **; 1979-1 Trade Cas. (CCH) P62,662

In re ARMORED CAR ANTITRUST LITIGATION

Core Terms

settlement, plaintiffs', damages, conspiracy, objectors, estimate, defendants', claimants, armored car, notice, settlement fund, settlement proposal, profits, antitrust, customers, markets, expenses, profit margin, class action, law firm, circumstances, petitioners', discovery, charges, cases, hourly rate, differential, calculated, prices, risks

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1[] **Types of Contracts, Settlement Agreements**

Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits. In class actions this policy must be coupled with the two-fold requirement that there is no fraud or collusion in arriving at the settlement and the settlement is fair, adequate and reasonable.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN2[] **Class Members, Absent Members**

In a class action the court is charged as an overseer of the rights of unnamed passive members of the class and must therefore evaluate settlement proposals with circumspection. *Fed. R. Civ. P. 23(e)*. The facets of the court's circumspection may be enumerated as: (1) the circumstances of the settlement; (2) the complexity, expense, and possible duration of the litigation; (3) the present stage of the proceedings; (4) the risks of establishing liability; (5) the risks of proving damages; (6) the risks of maintaining the action as a class action through trial; (7) the range of reasonableness of the settlement fund relative to the best possible recovery; (8) the range of reasonableness of the settlement fund relative to the risks posed in this litigation; (9) the ability of the defendants to withstand a greater judgment; and (10) the reaction of the class to the settlement proposal.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN3[] **Settlements, Settlement Agreements**

The proponents of a settlement bear the burden of proving that the proposal should be approved. They should be put to a rigorous test but should not be required to stage a mini-trial on the merits, the event which settlement aims to preclude. The court's review need not reach ultimate conclusions of fact and law in the underlying action. Rather, the court's task is one of balancing probabilities and likelihoods in an evaluation of the settlement proposal. The court should be reluctant to interpose its business judgment for that of the settlors, but rather, the litigants should be encouraged to determine their respective rights between themselves.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN4[] **Settlements, Settlement Agreements**

The strength or weakness of a plaintiffs' case is crucial to a determination of the adequacy of a settlement.

Antitrust & Trade Law > Sherman Act > Claims

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN5[] **Sherman Act, Claims**

While proof under *§ 1* of the Sherman Act (act), codified at *15 U.S.C.S. § 1*, requires only proof of a violation of the act, civil recovery under § 4 of the Clayton Act, codified at *15 U.S.C.S. § 15*, demands 2-part proof of liability and damages. To establish liability under § 4, the civil plaintiff must prove a violation and an impact on plaintiff. The impact, sometimes referred to as the fact of damage or causal link, has been declared the sine qua non for stating a cause of action.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Sherman Act, Claims**

Nolo contendere pleas to federal antitrust charges, unlike guilty pleas or verdicts, are not accorded the status of prima facie evidence of a violation in subsequent civil actions. *15 U.S.C.S. § 16(a)*.

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

HN7[] **Private Actions, Remedies**

In a casebook instance of price-fixing involving a fungible product peddled in the same or similar markets to standardized categories of consumers, the proof of impact can nearly be presumed from the overcharge.

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

HN8[] **Private Actions, Remedies**

While damages need not be established with precision, they may not be merely speculated.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN9[] **Settlements, Settlement Agreements**

The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.

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

HN10[] **Private Actions, Remedies**

No single formula of damage calculation is prescribed or possible in antitrust actions. What is necessary is a just and reasonable estimate of the damages based on relevant data. The essential thing is that the plaintiff develop a theory about how the amount of injury can be measured and introduce the data necessary to make the estimate.

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

HN11[] **Private Actions, Remedies**

Damages in antitrust actions conventionally are estimated by internal comparisons of the conspirators' prices during and after the conspiracy or by external comparisons of the conspirators' prices with those of a nonconspiring competitor or in an unaffected market.

Evidence > ... > Expert Witnesses > Court Appointed Experts > General Overview

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

HN12[] Expert Witnesses, Court Appointed Experts

The court may appoint an expert when the parties' experts have offered conflicting or irreconcilable opinions or when any well-recognized school of thought is not represented in the opinions proposed to be offered or when a court-appointed expert would facilitate understanding of the technical issues involved or under circumstances in which a court-appointed expert might be necessary or desirable.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN13[] Settlements, Settlement Agreements

In a review of a settlement proposal the most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN14[] Settlements, Settlement Agreements

In reviewing a settlement for approval, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.

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

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

HN15[] Costs & Attorney Fees, Clayton Act

The Clayton Act, specifically *15 U.S.C.S. § 15*, provides for the recovery of attorneys' fees and expenses upon successful prosecution of a treble damage action. No statute expressly allows for recovery of these amounts upon settlement of antitrust litigation and the only authority for reimbursement derives from the equitable fund doctrine. The doctrine recognizes that class members who have benefited from counsel's efforts to create, increase, protect or preserve a recovery fund should contribute toward the costs of counsel's services. Just compensation should thus be subtracted from the claimants' recovery fund. The court, while calculating reasonable compensation, must maintain vigilant oversight of the unnamed class members' interests.

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

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

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

Under the common fund doctrine, attorneys' fee awards must be made with moderation and a jealous regard to the rights of those who are interested in the fund.

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

HN17[] **Private Actions, Costs & Attorney Fees**

A just attorneys' fee award will only be entered after careful exercise of the court's role as overseer and after critical application of the factors for awarding attorneys' fees from an equitable fund. The court's charge is to continue as the guardian of the rights of absent class members, and to be assured that the expenses claimed are for efforts to create, increase, or protect the settlement fund. The touchstone is an evaluation of the actual effort made by the attorney to benefit the class. The petitioners for attorneys' fees hold the burden of demonstrating that their billed time and expenses served to benefit the fund.

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

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN18[] **Private Actions, Costs & Attorney Fees**

Calculation of attorneys' fees requires a two-step review: first, the calculation of a customary fee from the identification and multiplication of an attorney's reasonable hourly rate times a compensable number of hours; and, second, the determination of whether an increase or reduction of these expenses is justified in light of the risk of litigation and the quality of work performed.

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

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Exclusions

HN19[] **Private Actions, Costs & Attorney Fees**

In calculating attorneys' fees, the trial judge should closely observe the attorney's work product, his preparation, and general ability before the court.

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

HN20[] **Private Actions, Costs & Attorney Fees**

The calculation of an attorneys' award on a contingent fee basis in equitable fund cases has been resoundingly rejected. Determination of the amount of attorneys' fees to be subtracted from an equitable fund is a decision in equity in the nature of a proceeding in quantum meruit, and it is not an action in contract for a percentage of the plaintiffs' recovery.

Counsel: **[**1]** William L. Harper, U. S. Atty., John T. Orr, Jr., Atty., U. S. Dept. of Justice, Antitrust Div., Atlanta, Ga., for United States.

Baxter L. Davis, Davis, Matthews & Quigley, Atlanta, Ga., for Food Fair Stores, Raley's Corp., L.D.C., Inc. and Liberty Coin Shop.

Harold E. Kohn, Dianne M. Nast, Kohn, Savett, Marion & Graf, P. C., Philadelphia, Pa., for Food Fair Stores and Philadelphia Electric Co.

Emmet J. Bondurant, II, Trotter, Bondurant, Griffin, Miller & Hishon, Atlanta, Ga., Samuel W. Murphy, Jr., Donovan, Leisure, Newton & Irvine, New York City, Lewis A. Noonberg, Piper & Marbury, Baltimore, Md., for Brink's, Inc.

D. R. Cumming, Jr., Sutherland, Asbill & Brennan, Atlanta, Ga., William E. Willis, Sullivan & Cromwell, New York City, John Henry Lewin, Jr., Venable, Baetjer & Howard, Baltimore, Md., for Wells Fargo Armored Service Corp.

Elwood S. Kendrick and Nancy Miller Bennett, Kendrick, Netter & Bennett, Los Angeles, Cal., J. J. Brandlin, Brandlin & McAllister, Los Angeles, Cal., for Raley's Inc.

John E. Burke, Richard J. Rappaport, Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Ill., for L.D.C., Inc. and People Gas, Light & Coke Co.

John C. Staton, Jr., Curtis **[**2]** L. Frisbie, Jr., King & Spalding, Atlanta, Ga., Dennis G. McInerney, Cahill, Gordon & Reindel, New York City, for Purolator, Inc.

John M. Sikes, Jr., Jay I. Solomon, Zusmann, Sikes, Pritchard & Cohen, Atlanta, Ga., David Berger and H. Laddie Montague, Jr., Berger & Montague, Philadelphia, Pa., Milton J. Wallace, Wallace & Breslow, Miami, Fla., Seymour Kurland and Judah I. Labovitz, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for Biscayne Bank.

Howard A. Specter, Michael D. Buchwach, Pittsburgh, Pa., for Liberty Coin Shop.

Litman, Litman, Harris & Specter, P. A., Pittsburgh, Pa., for Liberty Coin Shop, Kleinman, Steinberg & Lapuk and Specks & Goldberg, Ltd.

Eugene F. McShane, Paul L. Binder, Asst. Attys. Gen., Antitrust Section, Columbus, Ohio, for the State of Ohio.

Patricia A. Cutler, Deputy Atty. Gen., San Francisco, Cal., for State of California.

David B. Goldstein, Asst. Atty. Gen., Antitrust Section, Economic Protection Div., Phoenix, Ariz., for the State of Arizona.

Howard F. Naughton, Jr., Exxon Company, U. S. A., Houston, Tex., for Exxon & Esso.

Peyton S. Hawes, Jr., Robert S. Jones, Cofer, Beauchamp & Hawes, Atlanta, Ga., for Atlantic Richfield Co.

[3]** Jack L. Ratzkin, Federated Department Stores, Cincinnati, Ohio as member of class.

John E. Grasberger, Pittsburgh, Pa., David W. Porter, Morris, O'Brien, Manning & Brown, Atlanta, Ga., Granvil I. Specks, Chicago, Ill., for Kleinman, Steinberg & Lapuk and Specks & Goldberg, Ltd.

Specks & Goldberg, Ltd., Chicago, Ill., pro se and for Kleinman, Steinberg & Lapuk.

Guido Saveri, Saveri & Saveri, San Francisco, Cal., for Saveri & Saveri.

Theodore W. Flowers, Francis P. Devine, III, Ronald J. Restrepo, White & Williams, Philadelphia, Pa., for Central Penn Natl. Bank.

William J. Scott, Atty. Gen., State of Illinois, John E. Noel and Lee H. Weiner, Asst. Attys. Gen., Chicago, Ill., for State of Illinois.

Arnold Levin, Adler, Barish, Daniels, Levin & Creskoff, Philadelphia, Pa., Fred W. Phelps, Topeka, Kan., for Weston L. Sampson.

Bernard M. Gross, Warren Rubin, Philadelphia, Pa., for Sunshine Stores, Inc.

David I. Shapiro, Dickstein, Shapiro & Morin, Washington, D. C., for Sunnydale Farms, State of Connecticut, Commonwealth of Massachusetts and Hillmans, Inc.

Kleinman, Steinberg & Lapuk, Marvin H. Lapuk, Daniel E. Kleinman, Hartford, Conn., for State of Connecticut.

Joseph **[**4]** M. Wells, Philip B. Hill, Chicago, Ill., for Peoples Gas, Light & Coke Co.

John D. Ashcroft, Atty. Gen., Roger Bern, Walter O. Theiss and Nanette Laughrey, Asst. Attys. Gen., Jefferson City, Mo., for State of Missouri.

Stephen D. Susman and Terrell W. Oxford, Mandell & Wright, Houston, Tex., for Brazosport Bank of Texas.

Francis Bill Burch, Atty. Gen., Timothy J. Shearer, Asst. Atty. Gen., Baltimore, Md., for State of Maryland.

Opinion by: FREEMAN

Opinion

[*1362] ORDER

This multidistrict antitrust class action is presently before the court on plaintiffs' motion seeking approval of a proposed settlement of the litigation, *Rule 23(e), Fed.R.Civ.P.* Attendant to this evaluation, the State of California, a class member objecting **[*1363]** to the settlement proposal, has moved to reopen discovery on the issue of damages and has requested the court's appointment of an expert to aid resolution of conflicting economic opinion evidence. Additionally, in the event that settlement is approved, plaintiffs' counsel have filed a joint petition for recovery of fees and expenses. Also if the settlement were approved, the court would schedule preparation, briefing, and argument of a plan **[**5]** of distribution of the settlement fund. As preliminaries to our review and evaluation of the settlement, the court will offer: (1) a brief recapitulation of the proceedings to date; and (2) a short description of the affected industry.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 21, 1977, a federal grand jury sitting in the Northern District of Georgia returned indictments charging two corporations, Brink's, Inc. and Wells Fargo Armored Car Service Corp. and six corporate officers, with violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. United States v. Brink's, Inc., et al., Cr. No. 77-207A (N.D.Ga.); United States v. Edgar A. Jones, et al., Cr. No. 77-208A (N.D.Ga.). In particular, the indictments charged the defendants with combining and conspiring during a period from early 1968 through August 1975 in order to allocate customers and to rig bids and price quotations. These violations, it was alleged, had the effect of restraining trade and artificially inflating prices of armored car services. On April 21, 1978, the defendants' pleas of Nolo contendere to the charges contained in the two indictments were accepted and approved. Defendant Wells Fargo appealed, but **[**6]** the Fifth Circuit affirmed the judgment, *United States v. Wells Fargo Armored Car Service Corp., 587 F.2d 782 (5th Cir. 1979)*.

On June 21, 1977, simultaneous with the return of the indictments, the Government filed a civil enforcement action against the two corporate defendants and thereby sought to enjoin defendants' continuing or future violations of the Sherman Act, United States v. Brink's, Inc., et al., C.A. No. 77-1027A (N.D.Ga.). [1.] **[**7]** Predictably, within sixty days of the Government's initiation of the criminal and civil enforcement actions several private parties and states attorneys general filed treble damage actions, *15 U.S.C. § 15*, against Brink's, Wells Fargo, and a third armored car service, Purolator Security, Inc. [2.] The civil complaints filed in this and other district courts tracked the language of the criminal indictment and charged defendants with unlawful market allocation and bid-rigging practices from 1968 through 1975. Many of the plaintiffs sought relief on behalf of a statewide or nationwide class of the defendants' customers.

Defendant Wells Fargo petitioned the Judicial Panel on Multidistrict Litigation for identification and transfer of all the civil actions to a single forum pursuant to *28 U.S.C. § 1407*. On November 16, 1977, the Judicial Panel granted the Wells Fargo petition and transferred all then pending actions to this court for coordinated or consolidated discovery and pretrial purposes. *In re Armored Car Antitrust Litigation, 441 F. Supp. 921 (Jud.Pan.Mult.Lit.1977)*. The instant litigation is the assembly of seventeen private treble damage actions either originally filed in or subsequently transferred to this district. [3.] **[**9]** The Government's **[**8]** civil **[*1364]** enforcement suit has proceeded at all times independent of the coordinated private actions. Sixteen of the seventeen private actions [4.] now seek the court's approval of their settlement.

Immediately before the First Principal Pretrial Conference in this litigation, See Manual for Complex Litigation, Part 1, § 1.00 (rev. ed. 1977), the parties entered settlement negotiations. After approximately two months of negotiating and caucusing, a bargain was struck, with the defendants offering $ 11.8 million (representing contributions of $ 5,653,333 from Brink's, $ 2,346,667 from Wells Fargo, and $ 3,800,000 from Purolator Security) in exchange for civil peace for a ten-year period from the plaintiffs.

The court, on April 3, 1978, entered Settlement Order No. 1 which tentatively approved the settlors' proposal, conditionally certified the class of claimants, and formally authorized notification **[**10]** of the class. The conditional class for settlement [5.] was defined as:

[1.] The Government's civil enforcement action against Brink's and Wells Fargo is nearing settlement. A consent judgment has been proposed and is currently published for comment pursuant to the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*.

[2.] Purolator Security, Inc. was named in the conspiracy but not indicted by the Atlanta Grand Jury. After investigations covering several cities and spanning three years, the Government filed an information accusing Purolator Security of antitrust violations in the city of Detroit with respect to certain customers for a ten-month period. This defendant tendered and the court, sitting in the Eastern District of Michigan, accepted a Nolo contendere plea to the information.

[3.] The seventeen consolidated actions are: Food Fair Stores, Inc., et al. v. Brink's, Inc., et al., C.A. No. 77-1246A; Raley's Corp. v. Brink's, Inc., et al., C.A. No. 77-1273A; L.D.C., Inc., et al. v. Brink's, Inc., et al., C.A. No. 77-1294A; Biscayne Bank, et al. v. Brink's, Inc., et al., C.A. No. 77-1363A; Liberty Coin Shop, Inc. v. Brink's Inc., et al., C.A. No. 77-1412A; Illinois v. Brink's, Inc., et al., C.A. No. 77-1733A; Weston L. Sampson, et al. v. Brink's, Inc., et al., C.A. No. 77-1874A; Sunshine Stores, Inc., et al. v. Brink's, Inc., et al., C.A. No. 77-1875A; Philadelphia Electric Co. v. Brink's, Inc., et al., C.A. No. 77-1876A; Sunnydale Farms, Inc. v. Brink's, Inc., et al., C.A. No. 77-1877A; Connecticut v. Brink's, Inc., et al., C.A. No. 77-1878A; Massachusetts v. Brink's, Inc., et al., C.A. No. 77-1879A; Hillman's Inc., et al. v. Brink's, Inc., et al., C.A. No. 77-1880A; People's Gas, Light & Coke Co., et al. v. Brink's, Inc., et al., C.A. No. 77-1881A; Missouri v. Brink's, Inc., et al., C.A. No. 77-2020A; Brazosport Bank of Texas v. Brink's, Inc., et al., C.A. No. 78-422A; and Maryland v. Brink's, Inc., et al., C.A. No. 79-133A. For convenience, all filings and entries which concern all seventeen cases have been made in a master file, In re Armored Car Antitrust Litigation, C.A. No. 78-139A (All cases). Pretrial Order No. 1, entered January 30, 1978.

[4.] Only Maryland v. Brink's, Inc., et al., C.A. No. 79-133A, has not joined in the motion to approve settlement. The State of Maryland previously sought to be excluded from the class of settling plaintiffs. Hillman's, et al. v. Brink's, Inc., et al., C.A. No. 77-1880A is proceeding to settlement but plaintiffs have retained their own counsel and are not represented by counsel for the class.

[11]**

> All plaintiffs and all purchasers from any armored car company (not limited to Brink's, Incorporated, Wells Fargo Armored Service Corporation or Purolator Security, Inc.) or its affiliates of armored car and related services, including coin sorting and wrapping, preparation and distribution of payrolls and air and ground courier services, from January 1, 1968 to February 21, 1978 (including banking institutions which have been furnished by others with armored car and said related services and which have legally recognizable claims against defendants based on the allegations and assertions in the consolidated actions which relate to alleged violations of Federal or State ***antitrust law*** in the provision of armored car or related services), excluding only the United States Government, its agencies, departments and instrumentalities, whether corporate or otherwise; the twelve Federal Reserve Banks, including **[*1365]** their branches; and the defendants, their affiliates, parents, and subsidiaries.

Although the settlement period runs from January 1, 1968 to February 21, 1978, the parties acknowledge a statute of limitations period from June 21, 1973 to August 31, 1975, absent **[**12]** a showing of fraudulent concealment (and no fraudulent concealment has been alleged).

On May 19, 1978, plaintiffs' representatives mailed 175,000 printed notices [6.] and entered advertisements in eleven newspapers across the country, announcing the settlement proposal. The notices identified the named plaintiffs and defendants, recited the complaint allegations, defined the conditional class, and described the amount and terms of settlement. [7.] **[**14]** The announcement scheduled a series of 4-6 week deadlines for filing: (i) requests for exclusion from the class, *Rule 23(b)(3), Fed.R.Civ.P.*; (ii) sworn statements of purchases, and (iii) notices of intention to appear and object at a hearing to review the settlement proposal. The court concluded in the April 1978 order that such notice was "the best notice practicable under the circumstances . . . " *Rule 23(c)(2), Fed.R.Civ.P. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*. The noticed deadlines have now lapsed, the proponents and four objectors [8.] have filed written memoranda, and the court has

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[5.] The court certified a conditional class pursuant to *Rule 23(c)(1), Fed.R.Civ.P.*, for settlement. Settlement Order No. 1, entered April 3, 1978. The Manual for Complex Litigation, Part 1, § 1.46 (rev. ed. 1977), recognizes tentative certification of classes as a growing practice in complex actions but recommends that the practice not be continued. The Manual's recommendation has, it appears, been more honored by breach than by compliance. See *City of Detroit v. Grinnell Corp., 495 F.2d 448, 466 (2d Cir. 1974)* and cases cited therein. See also Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1555-60 (1976). The procedures set out in the Manual are not intractable rules but are suggestions for the orderly progress of complicated litigation. Manual for Complex Litigation, Foreword (rev. ed. 1977). The causes for not conditionally certifying a class for settlement (possibilities of collusion, of less than total representation of class members, of hasty and inadequate settlements by attorneys jockeying to earn a fee award) are not present herein. There have been no charges of collusion and no offers for settlement for less than the whole class, Cf. *In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, n. 38 (7th Cir. 1979)*. (subclass tentatively certified for settlement). Class counsel worked jointly through lead counsel to secure the proposed settlement conditions and terms. Conditional certification of the class for settlement was appropriate under the circumstances presented.

[6.] The notices were mailed to a list of potential class members. The master list was compiled from the defendants' records of customers, their suggestions of customers of competitors' services, their identification of the Governor, Secretary of State, and Attorney General of each of the fifty states, and from the plaintiffs' purchase from National Business Lists, Inc., mailing lists of: (a) banks, (b) savings and loan associations, (c) grocery stores with a net worth in excess of $ 75,000, (d) department and discount stores with a net worth in excess of $ 75,000, (e) city halls, (f) county seats, (g) stock and bond brokers, (h) universities and colleges, (i) junior colleges, and (j) school district headquarters.

[7.] The settlement amount of $ 11,800,000.00, deposited on April 3, 1978, bears interest at the prime rate. The fund reportedly totalled $ 12,931,991.65 on March 19, 1979. The notice stated that attorney fees and expenses and costs of administration of the fund, estimated not to exceed $ 1,750,000, would be subtracted from the settlement fund. The potential class members were notified that the settlement fund was offered in exchange for the dismissal with prejudice of all antitrust claims held against the three codefendants for the period January 1, 1968 to February 21, 1978. It further announced that the proportional shares of the claimants would be determined upon a plan of distribution to be presented to the claimants and court if the settlement proposal were approved.

convened two hearings to determine the fairness, adequacy, and reasonableness of the settlement proposal. **[**13]**

The first hearing, on September 18, 1978, was adjourned upon a finding that the proponents' "attempted support of the settlement was patently insufficient." Order entered September 20, 1978, at 1. See *In re Armored Car Antitrust Litigation, 462 F. Supp. 394, 395 (Jud.Pan.Mult.Lit.1978)*. The court cautioned that the settlement could not be approved without the tender of reliable economic data in justification of the proposal amount. See Manual for Complex Litigation, Part 1, § 1.46 (rev. ed. 1977).

Plaintiffs thereafter filed an economic supplement to their original memorandum. Included with **[**15]** the supplement were: Affidavit of Myer Rashish (plaintiffs' economic expert); Affidavit of David I. Shapiro (plaintiffs' counsel's account of the negotiations); Exhibit A sample customer price histories of the three defendants; Exhibit B sample customer contracts of three defendants; Exhibit C affidavits of selected officers of the three defendants; Exhibit D schedules of economic data tabulating or graphing defendants' revenues and profits on company-wide, local branch, and various competitive market bases; Exhibit E **[*1366]** report of federal and state regulation of the three defendants; Exhibit F report of the changing geographic markets of the three defendants over the settlement period; and Exhibit G balance sheets itemizing the net income and net worth of the three defendants. Defendant Purolator Security also filed a memorandum in support of approval of the settlement based on the economic data introduced in the affidavit of its president, William Steele, contained in Plaintiffs' Exhibit C. The State of California and the Atlantic Richfield Company, two of the four original objectors, renewed and amplified their opposition to the settlement proposal in light of plaintiffs' **[**16]** economic supplement. [9.]

The objections to the settlement may be grouped as charges: that the agreement was hasty and premature; that the notice to class members was inadequate; that the class is improperly drawn; that the proposal lacks reliable economic support; and that the settlement fund amount is insufficient. These objections will be considered in our review of the fairness, adequacy, and reasonableness of the settlement. Additional categories of objections have been lodged against the **[**17]** form, content, and amount of the attorneys' fee petition. These latter challenges will be entertained in our separate review of the fee petition, Infra.

Continuing the procedural history of this litigation, a second hearing on the proposed settlement was held on January 25, 1979. At the second hearing, exhibits of economic data and affidavits of economists, corporate officers, and lead counsel were proffered and admitted into evidence, expert testimony was elicited and cross-examined, and proponents' and objectors' arguments were heard. The primary matter of fairness, adequacy, and reasonableness of the settlement was taken under advisement upon announcement that the instant order, a final approval or disapproval of the settlement, would issue after thorough review of all the evidence and argument.

II. THE ARMORED CAR INDUSTRY

As a second predicate to our review, the settling parties have urged that a familiarity with the nature of the armored car industry will aid an appreciation of the settlement herein. At trial, plaintiffs would bear the burden of proving defendants' antitrust violations and the resultant injury which they suffered. Plaintiffs would also need to establish **[**18]** the difficult prerequisites of a class action, *Rule 23, Fed.R.Civ.P.*, in order to proceed on behalf of the intended nationwide class. It is argued that these tasks become formidable indeed when the affected industry is

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[8.] The State of California, the Central Penn National Bank, and the Atlantic Richfield Company have filed objections to the settlement proposal and the joint petition for attorneys' fees. The State of Ohio (nominally joined by the State of Arizona) has filed objection to the attorneys' fee request.

The State of Missouri, a named settling plaintiff, apprised the court in timely fashion of its concern that the attorneys' fee position was excessive and noted belatedly its objection to the settlement.

[9.] The court might conclude that the State of Ohio's and the Central Penn National Bank's failure to renew their objections after the plaintiffs' submission of the economic supplement should be deemed an abandonment of their opposition. The court will not draw this conclusion but will consider Ohio's objection to the fee petition and Central Penn's objection to the notice, definition of the class, and attorneys' fees along with similar opposition raised by the State of California and the Atlantic Richfield Company.

the armored car trade because: a nonhomogeneous service rather than a fungible commodity is offered; a finely fragmented market is presented; and decentralized decision-making is common. Plaintiffs' Exhibit C: Affidavits of A. Schossow, Brink's general manager; T. Jordan, Wells Fargo assistant vice-president; and W. Steele, Purolator Security president. All of these characteristics so complicate the trade as to make proof of violation and impact through comparative price data arguably insurmountable.

The service offered by the defendants is tailored to fit individual customer needs. Customizing the service includes considerations of: the amount and type of valuable to be transported, the level of liability coverage to be assumed, the hour and frequency of pick-ups, and the need for additional assistance (such as, coin sorting and wrapping, check cashing, or safe rental and installation). See Plaintiff's Exhibits A and B (prices paid and contracts executed). As **[**19]** the terms of individual service vary, so too do the prices charged on each account. Comparisons of accounts and invoices therefore provide no meaningful measures of liability or damage.

[*1367] Prices vary as a function of the constellation of services requested but they also vary to reflect the status and health of the defendants in a given market. Within a single market locale, the price charged different customers, and even the same customer owning several branches, may vary depending on the density and profitability of the defendants' service routes. If several customers line a single route, the fixed costs of labor, fuel, and vehicle use may be shared. But if a customer or a particular branch office is not convenient to an existing service route and a new route must be mapped, the fixed costs will be borne by the customer and the armored car company. Attempts at price comparisons within a single market then become useless gestures.

As the price charged varies within a given market, it also varies among markets. The local labor conditions or collective bargaining agreements may greatly affect prices charged from market to market. Brink's alone was signatory to 124 **[**20]** separate collective bargaining agreements in 1977. The geography and demography of a market may influence costs and pricing. State public service commissions, while not regulating armored car service prices, do regulate entry of providers into local markets and thus affect competition. Plaintiffs' Exhibit E. Finally, the autonomy of local service centers may account for further variations in pricing. In 1976 Brink's maintained 160 branch offices, Wells Fargo divided into 103 branches, and Purolator Security had 55 profit centers. The managers and sales representatives in these terminal centers held nearly free rein to negotiate customer contracts and to set service prices.

This catalogue of variables, all characteristic of the industry, arguably render usual price comparisons meaningless and tend to confound plaintiffs' prima facie proof of antitrust liability and impact. In light of the above-described progress in this litigation and mindful of the industry's idiosyncracies, the court may now begin the review of the proposed settlement.

III. FAIRNESS, ADEQUACY, AND REASONABLENESS OF THE SETTLEMENT

> ***HN1***[] Settlement agreements are "highly favored in the law and will be upheld **[**21]** whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." . . . In class actions this policy must be coupled with the two-fold requirement that (1) there is no fraud or collusion in arriving at the settlement and (2) the settlement is fair, adequate and reasonable . . . .

Miller v. Republic National Life Insurance Co., 559 F.2d 426, 428-29 (5th Cir. 1977). ***HN2***[] In a class action the court is charged as an overseer of the rights of unnamed passive members of the class and must therefore evaluate settlement proposals with circumspection. *Rule 23(e), Fed.R.Civ.P.* The facets of our circumspection may be enumerated as: (1) the circumstances of the settlement; (2) the complexity, expense, and possible duration of the litigation; (3) the present stage of the proceedings; (4) the risks of establishing liability; (5) the risks of proving damages; (6) the risks of maintaining the action as a class action through trial; (7) the range of reasonableness of the settlement fund relative to the best possible recovery; (8) the range of reasonableness of the settlement fund relative to the risks posed in this litigation; (9) the ability of the defendants **[**22]** to withstand a greater judgment; and (10) the reaction of the class to the settlement proposal. *Miller v. Republic National Life Insurance Co., supra*; City of Detroit v. Grinnell Corp. ("Grinnell I"), *495 F.2d 448 (2d Cir. 1974)*. See Manual for Complex Litigation, Part 1, § 1.46 (rev. ed. 1977).

HN3[] The proponents of the settlement, of course, bear the burden of proving that the proposal should be approved. Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975), Cert. denied, *423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975)*. They should be put to a rigorous test but should not be required to stage a mini-trial on the merits, the event which settlement aims to preclude. Newman v. Stein, 464 F.2d 689, 692 (2d Cir. 1972).

[*1368] The court's review need not reach ultimate conclusions of fact and law in the underlying action, Grinnell I, 495 F.2d at 456, 462; rather, our task is one of balancing probabilities and likelihoods in an evaluation of the settlement proposal. Young v. Katz, 447 F.2d 431 (5th Cir. 1971). See also Protective Committee v. Anderson, 390 U.S. 414, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968). Similarly, we should be reluctant to interpose **[**23]** our business judgment for that of the settlors; rather, "(the) litigants should be encouraged to determine their respective rights between themselves." Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). See Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). Mindful of these principles, the court's review of the proponents' and objectors' evidence and argument may proceed Seriatim through the sometimes overlapping fairness criteria.

1. Circumstances of the Settlement. Our review under this first criterion investigates whether the settlement negotiations were conducted in an adversarial or collusive manner. No objector charges any fraud or collusion. Atlantic Richfield argues that the negotiations may have been hasty and premature, and California suggests that the plaintiffs' bargainers may have opened the negotiations lower than they should have. In essence, the objectors contend that a more favorable compromise might have otherwise been struck. Our evaluation of the settlement proposal is a measurement of fairness, adequacy, and reasonableness, not of optima. The court acknowledges the extensive experience of counsel for plaintiffs and defendants **[**24]** in antitrust litigation and must accede to their business judgment in this review. Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975).

The proponents of the settlement have detailed a chronology of proposals, bargaining, caucuses, and counter-proposals throughout the negotiations. Affidavit of David I. Shapiro. See also Plaintiffs' Exhibit C, Affidavit of William Steele, Pres. of Purolator Security. Plaintiffs argue that the timing of their settlement overtures just prior to the court's first pretrial conference was critical. It was speculated that the court at the preliminary conference would direct discovery on the limited issue of class certification and that plaintiffs' initial investigation [10] revealed that the strength of their bargaining position would diminish after such discovery. They thereupon contend that a deferral of the negotiations would have lessened the settlement prospects and amount.

[25]** Plaintiffs' opening offer, $ 19 million, approximated 5% Of defendants' sales during the June 21, 1973 to August 31, 1975 statute of limitations period. Counsel had studied a correlation of settlement amount to percentage of sales in a number of similar antitrust cases and chose an ample starting figure which would allow room for later bargaining. When an agreement was finally executed, the settlement fund of $ 11.8 million represented 3.88% Of defendants' sales for the limitations period and thus fell among the more generous recoveries counsel had studied.

While the proponents of the settlement have not persuaded nor even attempted to persuade the court in the preeminence or efficacy of any particular strategy, they have established the fact that the negotiations were conducted at arms length and in the best interests of the plaintiff class. The objectors' challenges have been investigated, Cf. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979) (abuse of discretion not to review conduct of and hear objections to the settlement negotiations), and have been answered.

2. Complexity, expense, possible duration of the litigation : The few objectors **[**26]** must concede that this multidistrict antitrust **[*1369]** litigation will require complicated, expensive, and lengthy prosecution. If this litigation progressed to its full term, it would daresay outlive many of us. The costs of litigation might very well consume any final recovery, earning only a Pyrrhic victory for the survivors. If the litigation could not proceed on behalf of a

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[10] Before the settlement agreement was executed plaintiffs' counsel reviewed thousands of documents, those produced by defendants pursuant to Grand Jury subpoena and those produced in discovery in this litigation, in order to verify defendants' negotiation representations of the structure and economics of the industry and the nature of the violations charged. Counsel also interviewed their named plaintiff clients for a customer's view of these matters. Affidavit of D. Shapiro.

nationwide class and was instead split into 50 state-wide actions, or 500 market locale prosecutions, or 5-50,000 individual plaintiff lawsuits, the burden on the judiciary and the time taken from all others before the court would be enormous. See *Grinnell I, 495 F.2d at 467*. These factors all favor acceptance of the settlement proposal.

3. Stage of the proceedings : The litigation is in its infancy and the greatest savings of time and expense relative to full-term prosecution are now recoverable. However, as the objectors argue, this is also the time when the least is known about the prospects of full-term litigation. The objectors charge that the settlement was hastily entered into and was precipitously foisted upon the unwary class. They assail any settlement before an opportunity for formal **[**27]** discovery.

Plaintiffs' initial discovery attempts were stayed by our order entered October 13, 1977, pending a decision on transfer of the cases by the Judicial Panel for Multidistrict Litigation. They were also slowed in their investigation by the magistrate's sealing of the Bill of Particulars in the criminal actions. Once settlement was proposed and before an agreement was executed, teams of plaintiffs' counsel reviewed the mass of Grand Jury documents. Further, once we adjourned the first fairness hearing for want of supporting economic data, the parties engaged in extensive informal and cooperative discovery. The objectors are not satisfied but seek wider and more formal discovery.

We now have a compendium of documentary evidence and a selection of testimonial evidence upon which to evaluate the settlement. The fact that this material was produced informally and cooperatively is not a failing but is a recommendation for the settlement. See *Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977)*. [11] This material, under protective seal upon defendants' motion, See Order entered October 20, 1978, has been made accessible and available to the objectors. The fact that this **[**28]** material was compiled informally or cooperatively does not alter its reliability or thoroughness. Although these antitrust actions are in their infancy, "the desired quantum of information necessary to achieve a settlement. . . ." *Cotton v. Hinton, 559 F.2d at 1332*, has been reached. Because this stage of the litigation affords the greatest returns and yet, under the circumstances, does not compromise the necessary amount of supportive data, settlement appears to be favored.

[29]** **[*1370]** 4. Risks of establishing liability : ***HN4***[] The strength or weakness of plaintiffs' case is of course crucial to a determination of adequacy of a settlement. *Protective Committee v. Anderson, 390 U.S. 414, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968)*. Assaying the strength of the claims requires a consideration of the required proof in a treble damage action. ***HN5***[] While proof under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, requires only proof of a violation of the Act, civil recovery under Section 4 of the Clayton Act, *15 U.S.C. § 15*, demands 2-part proof of liability and damages. To establish liability under Section 4, the civil plaintiff must prove: (1) a violation and (2) an impact on plaintiff. *State of Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978)*. The "impact", sometimes referred to as the "fact of damage" or "causal link", Id., has been declared "the Sine qua non for stating

[11] The court is reminded of similar circumstances raised in this appellate review of a trial court's approval of the settlement of an employment discrimination action:

It is true that very little Formal discovery was conducted and that there is no voluminous record in the case. However, the lack of such does not compel the conclusion that insufficient discovery was conducted.

At the outset, we consider this an appropriate occasion to express our concern over the common belief held by many litigators that a great amount of formal discovery must be conducted in every case. Often has this Court reviewed records of cases which attest to this commonly held fallacy. We have often seen cases which were "over discovered." In addition to wasting the time of this Court, the parties and their attorneys, it often adds unnecessarily to the financial burden of litigation and may often serve as a vehicle to harass a party. Discovery in its most efficient utilization should be totally extra-judicial. The Court should rarely be required to intervene. Being an extra-judicial process, informality in the discovery of information is desired. It is too often forgotten that a conference with or telephone call to opposing counsel may often achieve the results sought by formal discovery.

In the instant case, Judge Pointer specifically requested the plaintiffs and defendants to conduct discovery on an informal basis. Counsel proceeded to do just that. The attorneys for plaintiffs and defendants indicated to the trial judge that they had achieved the desired quantum of information necessary to achieve a settlement. The Court was informed of the results of their discovery in several conferences.

Cotton v. Hinton, 559 F.2d at 1332.

a cause of action." *Shumate & Co. v. National Association of Securities Dealers, Inc., 509 F.2d 147, 152 (5th Cir. 1975)*. Plaintiffs contend that while proof of a violation by a nationwide conspiracy would be difficult, proof of nationwide impact would be nearly impossible. California, **[**30]** as an objector, responds contending that plaintiffs protest too much and that from local, limited investigation violation and impact are readily apparent.

At the outset the court notes that plaintiffs herein are not armed with prima facie proof of defendants' violation of the federal antitrust laws. A similar circumstance was presented in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Corp., 382 F. Supp. 999 (E.D.Pa.1974)*, Vacated and remanded, *540 F.2d 102 (3d Cir. 1976)*:

> Thus, this was not a case where plaintiffs received from the government on a silver platter the evidence necessary to prove their claims against the three convicted defendants, much less against the thirteen which had entered pleas of Nolo contendere. Substantial problems of proof were present as to both liability and damages.

382 F. Supp. at 1016. Brinks and Wells Fargo pleaded Nolo contendere to conspiracy charges of market allocation and bid-rigging from 1968 through 1975. These charges were echoed in plaintiffs' civil complaints. Purolator Security pled Nolo contendere to similar charges but limited to a conspiracy in the city of Detroit for a 10-month period, 1974-75. ***HN6***[] The Nolo contendere **[**31]** pleas, unlike guilty pleas or verdicts, are not accorded the status of prima facie evidence of a violation in subsequent civil actions, *15 U.S.C. § 16(a)*. Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp. ("Lindy I"), *487 F.2d 161 (3d Cir. 1973)*. Lacking this automatic proof, plaintiffs would have to adduce their own evidence to build proof of a Sherman Act violation. Plaintiffs do not contend that the proof of a pervasive conspiracy would be impossible, merely difficult, in light of the fragmented market and discontinuous violations, and thus a risk of litigation which would have to be countenanced. Defendant Purolator Security argues that proof of a violation would be impossible. Cf. *Liebman v. J. W. Petersen Coal & Oil Co., 73 F.R.D. 531, 535 (N.D.Ill.1973)* (prima facie case readily established and probability of liability was substantial). The court need delve no further into this first part of the liability proof than to ascertain that some risk is involved, as the second part of plaintiffs' proof, by all appearances, would be decidedly difficult.

Plaintiffs must establish in the second part of their liability proof that defendants' violation **[**32]** of the Sherman Act caused them harm. ***HN7***[] In a casebook instance of price-fixing involving a fungible product peddled in the same or similar markets to standardized categories of consumers, the proof of impact can nearly be presumed from the overcharge. See e.g., *In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322 (E.D.Pa.1976)*. Here, however, the charges are of market allocation and bid-rigging in the sale of a service in variant markets to nonhomogeneous buyers. The circumstances created by the very nature of the industry do not lend themselves to a generalized proof; rather, regional or individual evidence of impact might ultimately be required. See *State of Alabama v. Blue Bird Body Co., 573 F.2d at 322 (5th Cir. 1978)*; **[*1371]** *Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977)* (class certification to be denied upon a finding that neither the products nor the purchasers were fungible). California, as an objector, points to the apparent uniformity of bids and prices submitted to its political subdivisions and predicts that similar patterns may emerge in other markets. The court has previously ruled that the conspiracy causing artificially inflated prices in **[**33]** California appears to be a different conspiracy from the one here in issue as it allegedly involves only codefendant Brink's acting in concert with other armored car services not parties to this litigation. Order entered December 4, 1978. [12.] Therefore, plaintiffs' proof of liability may not be impossible, as defendants would boast, but it is, upon our review, uncertain.

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12. The court notes that a federal grand jury sitting in the Central District of California has recently returned criminal indictments: (1) charging Armored Transport, Inc. and two of its corporate officers with engaging in a conspiracy to allocate customers and to rig bids and price quotations; and (2) charging Loomis Armored Car Service, Inc. with engaging in an unlawful combination to submit rigged and collusive bids and price quotations. These conspiracies are alleged to have restrained trade in the armored car industry in the State of California and the Los Angeles area, respectively. Brink's, Inc. is named, but not charged in both indictments. California's Further Authority in Opposition to the Class Settlement, filed March 15, 1979. These indictments lend support to our determination that California may have been injured as a result of an unrelated conspiracy. California should be free to pursue any antitrust claims it holds against Armored Transport and Loomis.

[34]** 5. Risk of establishing damages : If, as we have found, plaintiffs face a substantial risk in proving defendants' liability, that is, in demonstrating "violation" and "impact," they then must also admit to an uncertainty in establishing damages. This uncertainty results from the apparently sporadic conduct of the alleged conspiracy and from the idiosyncracies of the armored car industry itself. The wages of the conspiracy may have ebbed and flowed with the entry or exit of other competitors in a particular market area. See Plaintiffs' Exhibit F (Defendants' market expansion and contraction during the pertinent period). Prices of armored car services, See Part II, Infra, are functions of multiple variables rendering market-to-market and even customer-to-customer comparisons meaningless. Establishing damages might therefore require difficult temporal and individualized proof of injury. ***HN8***[] While damages need not be established with precision, they may not be merely speculated. *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*. The risk and expense in establishing damages must therefore also be countenanced in evaluation of the settlement.

[35]** 6. Risks of maintaining action as a class action : The questions of whether plaintiffs could have certified a nationwide class of customers and, if so, whether such certification could have survived the litigation are not easily answered. Assuming plaintiffs could satisfy the requirements of numerosity, commonality, typicality, and representativeness of *Rule 23(a)*, they would still face the rigorous test of demonstrating the predominance of common questions of law and fact in the action and the superiority of proceeding as a class rather than individually in the action, *Rule 23(b)(3), Fed.R.Civ.P.* The predominance of issues and the manageability of the action must be determined upon an application of relevant law to the unique circumstances presented in any action. In private antitrust actions charging price fixing in the trade of a fungible product, See e.g., *In re Sugar Antitrust Litigation, 73 F.R.D. 322 (E.D.Pa.1976)*, the superiority and manageability of the action as a class action may be more readily apparent. But in antitrust actions charging other violations, or involving nonfungible products, or concerning disparate consumers, the fitness of a class action becomes less **[**36]** certain. For example, in *Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977)* (en banc), the trial court's refusal to certify a class was held not abusive of discretion when it appeared that sales of various grades of tobacco at several markets over four marketing seasons would require minitrials or individualized proof of impact and **[*1372]** damage. See also *Chestnut Fleet Rentals, Inc. v. Hertz Corp., 72 F.R.D. 541 (E.D.Pa.1976)* (class certification denied as "fact of damage" would have to be established on an airport-by-airport basis); *In re Transit Co. Antitrust Litigation, 67 F.R.D. 59 (W.D.Mo.1975)* (class certification denied as five defendants and 1400 leasing agreements were involved). *Yet in In re Master Key Antitrust Litigation, 70 F.R.D. 23 (D.Conn.)*, Appeal dismissed, *528 F.2d 5 (2d Cir. 1975)*, the sale of building lock and key hardware to numerous government entities in variant markets did not pretermit class certification as generalized impact and injury could be presumed from the alleged overcharges. See also *Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34 (S.D.N.Y.1977)* (class certification granted in an antitrust action charging market **[**37]** allocation and bid-rigging of building maintenance services when court noted a fungibility of the providers, if not of the services, and a possibility of formulary damages). See generally Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1362-65 (1976).

Plaintiffs would attempt to draw analogies from the latter line of cases and to disassociate themselves from the former. This admittedly difficult task has recently been greatly encumbered. After the proposed settlement agreement had been executed and the court's first settlement order had issued, the Fifth Circuit reversed a trial court's certification of a class in a contagiously similar private antitrust action, *Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978)*. The plaintiffs in Blue Bird charged the defendants with violative price fixing and market allocation in the school bus manufacturing industry. The trial court had certified a nationwide and a statewide class of claimants. The appellate court reversed the nationwide certification and remanded the case, opining that the lack of any nationwide impact evidence precluded prosecution on such basis. In strikingly apt terms, the court described the peculiarities **[**38]** of the case and the affected industry:

> (T)his particular litigation might not fit into the category of a "classic" antitrust price-fixing conspiracy where all legal and factual issues relating to the conspiracy are uniformly related to all those allegedly harmed. Rather, in this case neither the products involved nor the purchasers appear to be standardized. The plaintiffs' class includes different sizes of governmental buyers, operating under different conditions throughout the United States, and the products involved, while commonly known as school bus bodies, apparently differ in many respects and have been marketed under various arrangements at different times. (footnote omitted)

573 F.2d at 322. In re Armored Car Litigation shares many of the peculiar attributes cited in Blue Bird. See Plaintiffs' Exhibits B (sample contracts), C (affidavits of defendants' officers), and D (schedules of defendants' revenues and profits). The plaintiffs would, of course, seek to distinguish the facts and holding in Blue Bird from the circumstances presented herein. They would argue that a nationwide conspiracy was practiced in the armored car industry and that its impact although **[**39]** sporadic and uneven was felt in all markets. The proof would be difficult, if not impossible as defendants portend.

The objectors have argued that if maintenance of the action as a class action would be so problematic then perhaps it should proceed in subclasses or separate individual actions. Perhaps this would, in fact, be the result if the litigation proceeded and did not stop short at settlement. But at this moment and upon all the arguments and facts presented, the court perceives no individual injustice if the action is settled on the basis of the nationwide class which was conditionally certified, Settlement Order No. 1, entered April 3, 1978. California as an objector claiming substantial injury had maintained that its recovery would be unfairly diminished by a forced sharing of the fund with less seriously injured class members. The court, however, has already found that the special plight of the State of California was more probably caused by an unrelated West Coast conspiracy. Order entered December 4, 1978, at 3. California's claims under such a conspiracy may **[*1373]** not be compromised by the settlement herein. Id. See *Zenith v. Hazeltine Research, Inc., **[**40]** 401 U.S. 321, 342-48, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. Upon all the foregoing considerations, it appears that plaintiffs' risks of maintaining the action as a class action throughout the litigation would be great and that settlement at this time would be opportune.

7. Range of reasonableness of the settlement fund in light of the best possible recovery : In order to assess the adequacy of a particular settlement fund, the court needs some idea of the relative bounds, first, of best possible recovery and, second, of probable recovery with regard to the risks inherent in the litigation. Measuring these bounds does not imply that they set the limits of permissible recovery in settlement.

> ***HN9***[] The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.

Grinnell I, 495 F.2d at 455. See Harry Lewis v. Great American Mortgage Investors, et al., C.A. No. 75-591 and W. R. Morgan, et al. v. Great American Mortgage Investors, et al., C.A. No. 75-769 (N.D.Ga. May 11, 1978) (Freeman, J.) (approving class action settlement paying 1% Of claims); **[**41]** *Helfand v. New America Fund, Inc., 64 F.R.D. 86 (E.D.Pa.1974)* (approving class action settlement granting payment of 5% Of claims); *In re Four Seasons Securities Laws Litigation, 58 F.R.D. 19 (W.D.Okla.1972)* (approving class action settlement affording approximately 8% Recovery on claims); Sunrise Toyota v. Toyota Motor Co., (1973-1) Trade Cases (CCH) P 74,398, at 93,821 (S.D.N.Y.1973) (approving class action settlement authorizing no damage award). Instead, these estimated ranges of possible recovery merely serve as reference points in the court's evaluation of the presented settlement offer.

The court requires reliable economic data in order to assay the fairness, adequacy, and reasonableness of the settlement proposal. ***HN10***[] No single formula of damage calculation is prescribed or possible in antitrust actions. What is necessary is " "a just and reasonable estimate of the damage(s) based on relevant data.' " *Hobart Brothers Co. v. Malcolm T. Gilland, Inc., 471 F.2d 894, 902 (5th Cir. 1973)* Quoting from *Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*. "The essential thing is that the plaintiff develop a theory about how the amount of injury can **[**42]** be measured and introduce the data necessary to make the estimate." L. Sullivan, Handbook of the Law of Antitrust 786 (1977).

Plaintiffs have now supplied and introduced into evidence reams of economic data; their economic expert has analyzed the data and has projected an estimate of damages. Plaintiffs postulate a range of $ 8,523,032 to $ 16,741,670 (with an average of $ 11,871,366) in damages for the statute of limitations period, June 21, 1973-August 31, 1975. The settlement fund of $ 11,800,000 falls comfortably within this projected possible damage range. The Atlantic Richfield Company, a class member, has indirectly objected to plaintiffs' damage projection by complaining that it is not grounded upon any "formal" discovery. The State of California objects: (i) to the use of profits rather than prices as a basis for plaintiffs' estimate of damages; (ii) to the methodology of the profit analysis; and (iii) to the computation employed in this analysis. Plaintiffs' estimates and the objectors' challenges have been thoroughly considered by the court; the estimates have been deemed reliable and the challenges have been found wanting. A brief overview of plaintiffs' derivation **[**43]** of the ranges of possible damage and of their answers to the objectors' charges, however, is warranted in this final order.

The plaintiffs' economic expert, Myer Rashish, perused sample contracts, Plaintiffs' Exhibit A, and purportedly representative price histories, Plaintiffs' Exhibit B, of defendants' customers. These contracts had been selected at random from categories of defendants' customers, the categories assigned by the size of the account, Plaintiffs' Exhibit C. Mr. Rashish concluded and the objectors concede that **[*1374]** this "price data" is meaningless and unuseable. Because of the very nature of the industry, a sale of an individualized service subject to local negotiations under variable market conditions, See Part II, Supra, a classic comparison of conspiracy and nonconspiracy prices to estimate damages was not practicable in plaintiffs' expert's opinion. [13.] The plaintiffs thereupon sought to determine whether an estimate of damages could be projected from a different base of information. Although plaintiffs conceded that price comparisons would be necessary in a proof of damages at trial, they theorized that some other analysis might provide the requisite **[**44]** range of damage estimates for settlement approval. Profit information was readily available and upon initial and continued examination, plaintiffs postulated that profit data could serve as the surrogate for the lacking price information. This hypothesis of a close but not exact relationship of profit and price assumes that anticompetitive conspiracies are entered into and maintained for the purpose of turning greater profits and that the increase in profits roughly reflects the injury suffered by a class of customers. The court finds the hypothesis sound and the assumption trustworthy in formulating an estimate of damages for review of a settlement proposal.

[45]** California objects and adamantly argues that only prices may form the basis for an estimate of damages. California unrealistically adheres to this objection in the face of insupportable odds. Meaningful price data have simply been unavailable in this industry. The objector proposes that the search for the data has been incomplete and suggests that a proper analysis might require collection and tabulation of price histories of every customer in every village, hamlet, and town. Testimony of Robert Springer, January 25, 1979, hearing, Tr. at 57. The objector predicts, however, that a thorough compilation of this data in a few cities may produce statistics that would suggest a pattern of price increase which could be extrapolated to other cities. But even a detailed collection of price histories for some cities would be a monumental and costly undertaking. It can only be assumed that a substantial portion, if not all, of the settlement fund would be consumed in such an effort. Common sense demands that a reliable substitute, if available as herein, must be pursued to ensure protection of the class of claimants. California's theoretical dissatisfaction with a profit study to estimate **[**46]** damages must be quelled in the best interests of the class. California's motion to reopen discovery on the issue of damages must accordingly be DENIED.

Proceeding then to a review of the profit study, plaintiffs' economist sought in four separate analyses to compare the during and post-conspiracy profit margins. [14.] In his four approaches, he sought to isolate that portion of the profit margin differential which could be attributed to the conspiracy rather than to unrelated variables. Plaintiffs' expert does not pretend that these analyses are precise but instead suggests that they will produce a reliable range of possible damages, the reliability commensurate with the roughness of the available data.

[47]** California, upon its own expert's review of the plaintiffs' four approaches, objects again to the use of profits rather than prices as a base, and also to the methodology and computation of plaintiffs' analyses. **[*1375]** The objector urges that profits will underestimate damages in a conspiracy because the costs of policing the conspiracy

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13. ***HN11***[] Damages conventionally would be estimated by internal comparisons of the conspirators' prices during and after the conspiracy or by external comparisons of the conspirators' prices with those of a nonconspiring competitor or in an unaffected market, See e.g., City of New York v. Darling-Delaware, Inc., 1976 Trade Cases (CCH) P 60,812 (S.D.N.Y.1976). Upon a review of the data compiled by defendants from random accounts and price histories, the plaintiffs' expert concluded that a classic study and projection of damages could not be done. The traditional internal and external comparisons were not possible and prices, the currency of comparisons, were not available in the instant litigation.

14. Plaintiffs' expert expressed the comparison of during and post conspiracy profits as a differential in profit margins, I. e., the percentage profit margin during the conspiracy minus the percentage profit margin after the conspiracy. These differentials were adjusted to isolate the effect of the conspiracy from other known market and economic variables.

will deflate profits and because noncompetitive trading is a "narcotic" to efficiency and profit-making, See *United States v. Aluminum Co., 148 F.2d 416, 427 (2d Cir. 1945)*. California's expert has opined that with these alleged errors damages may be twice (Objector's Response to the Economic Supplement, at 15), four times (Objector's Response to Plaintiffs' Reply, at 2), or even ten times (January 25, 1979 Hearing, Testimony of R. Springer, at Tr. 51) the $ 11.8 million reached by plaintiffs' analyses.

California asked the Court to appoint its own expert to review the analyses and criticisms. ***HN12***[] The Manual for Complex Litigation, Part 1, § 3.40 (rev.ed.1977), specifically allows court appointment of an expert when:

> the parties' experts have offered conflicting or irreconcilable opinions or when any well-recognized school of thought is not **[**48]** represented in the opinions proposed to be offered or when a court-appointed expert would facilitate understanding of the technical issues involved or under circumstances in which a court-appointed expert might be necessary or desirable.

See also *Rule 706, Fed.R.Evid.* The Manual suggests that although appointment of a court's expert should be "the exception rather than the rule . . .," the appointment exception may lie when the parties' experts disagree on the theory, as opposed to the factual basis, for their opinions. This exception, it is argued, is presented in the dispute at hand because while California may object to alleged errors of plaintiffs' profits analysis, it primarily assails plaintiffs' choice of profits as a measure to assay the settlement fund. The plaintiffs challenged California's request as unprecedented, Plaintiffs' Reply, at 4; defendant Purolator Security opposed the request as unnecessarily delaying, Purolator Memorandum, at 32.

The court concludes that a court-appointed expert will not be necessary or desirable in this instance. Although California has attempted to obscure simple calculations with clouds of algebra, our task is clear and is not **[**49]** complex. The court at this juncture need only be assured by reliable economic data that the settlement proposal is fair, adequate, and reasonable. The court has already rejected California's challenge to the use of price comparisons. The proponents need only supply an educated estimate of damage ranges. We are convinced that has been done and will not authorize decimation of the settlement fund in order to pinpoint the claimed injury. The objector's challenges to the method and calculation, See infra, are found similarly wanting. A court-appointed expert would not be helpful under these circumstances. California's request should therefore be DENIED.

The challenged approaches of plaintiffs' expert, Myer Rashish, may be briefly reviewed. In his study of profits, Mr. Rashish performed four different analyses of the profit data, Plaintiffs' Exhibit D, with each analysis stated in terms of a profit differential comparing conspiracy and post-conspiracy profits. Assuming, but not accepting, profits as the currency of the study, the objector has proceeded to challenge each of the four phases of plaintiffs' expert's analysis as both invalid in theory and flawed in execution.

Rashish **[**50]** Analysis # 1

An examination of the average profit margins of the three defendants in the fifty largest cities in the United States during the 1968-75 conspiracy years was compared with the similar average for the 1976-77 post-conspiracy years. The examiner noted a marked decline in the profit margin in the post-conspiracy years. The differential, expressed as a percentage of sales, was approximately 3.0, unweighted, and 6.0, weighted. "Weighting" considers each profit margin in light of the volume of business done by each conspirator in each of the fifty cities, that is, it determines whether the market was shared equally (1/3, 1/3, 1/3) or unequally by the three codefendants and then "weights" the profit according to the market share. The examiner selected the midpoint, 4.5, between the unweighted 3.0 and weighted 6.0 (not knowing which more **[*1376]** accurately reflected the profit differential in this industry) and multiplied 4.5 times $ 304,394,000, defendants' total sales to class members for the two year statute of limitations period June 21, 1973 August 31, 1975. The conclusion drawn from this approach estimates damages between $ 9,131,820 and $ 18,263,640, or at an **[**51]** average of $ 13,697,730. California challenges this result contending that only the 6.0% Weighted profit differential has meaning and that the unweighted figure will tend to understate damages. California, using this 6% Figure, estimates that damages for the statute of limitations period should be approximately $ 18,000,000.

Rashish Analysis # 2

The overall profits of the three defendants in the conspiracy and post-conspiracy years were studied, making an adjustment for any profit trend attributable to other variables, such as a predictable profit decline associated with a generally faltering national economy. The examiner identified a general downward trend in profits in 1972-75 during the conspiracy. He expressed this trend as an average decline for the years, -1.2%, and then projected this trend line for two years beyond the conspiracy, giving an expected profit margin of 8.9% In the non-conspiracy years. The actual average profit margin for the non-conspiracy years was 6.1%. Thus a differential of 2.8% Of sales might hypothetically represent profits due to the conspiracy alone. This differential was translated into an estimate of damages of $ 8,523,032 for the statutory **[**52]** period.

California complained that the data have been unfairly manipulated to leave out the peak year 1971. Using this year, the objector arrived at a differential of 4.9% And damages of $ 14,920,000. Mr. Rashish replied that he was not unjustly manipulating the figures but was instead attempting to spot trends. He reran his analysis using an average profit margin decline derived from a study of all the conspiracy years, 1968-75, and arrived at a differential of 2.7% Or damages of $ 8,228,638 for the limitations period.

Rashish Analysis # 3

A comparison was made between the armored car industry and the trucking industry, a close but not perfect analogy, to determine damages during the conspiracy period. To account for the differences in the industries, a comparison was first drawn between the average trucking profit margins, 5.0%, and the defendants' average profits in the post-conspiracy years, 7.5%, revealing a 2.5% Profits margin difference between the two industries. The expert then examined the average defendants' profit margin for the conspiracy years, 13.0%, subtracted the trucking industry profit margin, 5.0%, and adjusted this figure by the 2.5% Difference attributable **[**53]** to industry differences (I. e., (13%-5.0%) 2.5%) to arrive at 5.5% As a statement of defendants' ill-gotten gains during the conspiracy years. This percentage equalled an estimated $ 16,741,670 in damages for the fourteen-month period.

California challenged the choice of the trucking industry, a highly regulated business, as an analog for a comparative analysis. Further, the objector noted that the benefits of the conspiracy were not completely purged in the post-conspiracy years. Because all effects were not purged, these years would not provide a perfect competitive norm, and therefore use of profit margin differences for these years would arguably tend to understate damages. California suggested that the best use of a bad analog would be an unadjusted comparison of defendants' armored car conspiracy profits, 13%, and trucking industry profits, 5%. This comparison resulted in an 8% Profit margin differential and yielded estimated aggregate damages of $ 24,350,000.

Rashish Analysis # 4

A comparison was studied of conspiracy and post-conspiracy profit margins in markets in which defendants competed with each other and in markets where they did not. Such an analysis predicts **[**54]** that the profit margin differential will be greater in those categories of markets where more than one defendant did business because it **[*1377]** was in those markets where they could conspire to allocate routes and customers or to rig bids. Comparing the during and post-conspiracy profit margin differentials for the two categories of markets in which more than one defendant did business resulted in an average differential of 4.5% Or estimated damages of $ 13,697,730.

California challenged the meaning of this comparison, contending that weighted and unweighted data had been carelessly mixed. California made no estimate of damages of its own under this approach. Mr. Rashish replied, showing that only weighted averages were used, and then performed an additional calculation comparing profit margin differentials in markets with other defendants with those from markets with no competition from a codefendant. This calculation was an attempt to adjust the previous result for variables attributable to something other than the conspiracy. Comparing these sets of market categories resulted in a new identification of the profit margin due to the conspiracy, 2.9%, or an estimated $ 8,827,427 **[**55]** in damages for the statute of limitations period.

A tabular summary of the estimated damages for the statute of limitations period, using the four Rashish approaches, reveals:

TABLE

Plaintiffs' average estimated best possible recovery for the statute of limitations period equals approximately $ 13.7 million or approximately $ 11.8 million when Rashish Analysis # 4 is recalculated. The objector's range of estimates runs from $ 15 to $ 24 million. The settlement fund of the proposal is set at $ 11.8 million plus interest. If the plaintiffs' attempt to produce a reliable economic estimate of best possible recovery were accepted, the settlement proposal amount would fall comfortably within considerations of fairness, adequacy, and reasonableness.

The court concludes that plaintiffs have finally supplied reliable economic data justifying the settlement amount. We state no opinion as to whether these are the best available data and the most reliable analyses, only that they are acceptable and rational means of estimating damages under the circumstances presented. On the basis that these estimates of the optimum recovery coincide with the proposal offer, settlement of the litigation **[**56]** is clearly favored.

8. Range of reasonableness of the settlement fund in light of the risks posed in litigation : If the settlement fund falls comfortably within a range of estimates of the best possible recovery, it must A fortiori fall within or beyond the bounds of likely recovery under the circumstances of the litigation. ***HN13***[] In a review of a settlement proposal "(t)he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir. 1971)*. See *Protective Committee v. Anderson, 390 U.S. 414, 424-25, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968)*; *Young v. Katz, 447 F.2d 431, 434 (5th Cir. 1971)*; *Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960)*. We have previously determined that the risks of prosecuting this action, if not insurmountable, are at least severe. The estimates of likely recovery would therefore be mere fractions of the $ 8-16 million range of best possible recovery. If all of California's doomsaying were realized, that is, that plaintiffs' estimates understate damages two, four, or even ten-fold, the settlement fund **[**57]** of $ 11.8 million would still appear more than ample in the face of these substantial risks. The court again reminds that the test is of fairness, adequacy, and reasonableness of an amount offered today in the early stages of litigation, and that:

> there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

[*1378] *Grinnell I, 495 F.2d at 455 n.2*. Under such scrutiny, the settlement offer is certainly sufficient.

9. The ability of the defendants to withstand a greater judgment : The Second Circuit in Grinnell I explained the importance and underpinnings of this consideration.

> Appellants have cited no authority for the proposition that the defendants' ability to pay is an improper consideration when approving a settlement offer. Likewise, we are unable to find any such authority. Common sense seems to dictate the necessity, to say nothing of the propriety, of such a consideration. In fact, all available authority defies appellants' analysis. According to the United States Supreme Court: ***HN14***[] "Further, the judge should form an educated estimate of the **[**58]** complexity, expense and likely duration of such litigation, The possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Committee v. Anderson, supra, 390 U.S. at 424-25, 88 S. Ct. at 1163*.

495 F.2d at 467 (emphasis in original). A settlement amount which would plunge the defendants into immediate bankruptcy would not serve the best interests of the class of claimants. [15.] Although a defendant should be

[15.] If defendants were thrust into bankruptcy, plaintiffs would likely recover only a small part of their claimed damages when defendants' assets were apportioned among an array of scheduled creditors. Also if defendants, three of the largest suppliers in the trade, were forced out of business, the cost of armored car services predictably would climb. Either result would disserve the interests of the class of claimants.

compelled to disgorge his ill-gotten gains for violation of the federal antitrust laws, See *Liebman v. J. W. Petersen Coal & Oil Co., 73 F.R.D. at 536*, this mandate becomes less forceful when questions of violation and gain go unanswered. The court then looks to the defendants' ability to pay in weighing the strengths of the case and the potential bounds of injury.

[59]** An officer of defendant Brink's testified that the Brink's contribution to the settlement fund and the criminal fines previously imposed approximate its 1977 corporate earnings and equal one and one-half years' shareholders' dividends. Plaintiffs' Exhibit G, Affidavit of A. Tolan. The Wells Fargo contribution exceeds its 1977 net operating income. Plaintiffs' Exhibit G. Purolator Security's president declares that its share in the fund together with the costs of satisfying the civil and criminal charges greatly exceeds the company's net profit for 1975, 1976, and 1977 combined. Id., Affidavit of W. Steele. The codefendants' balance sheets, Plaintiffs' Exhibit G, affirm these declarations and suggest that the fund approaches the limit of their ability to pay.

10. Reaction of the class to the settlement proposal : A report and supplemental report on the interim administration of the proposed settlement relate that in response to the approximately 175,000 notices of settlement and to the ten national newspaper announcements, a total of 7,952 claims and 213 requests for exclusion from the class have been filed. Of the four objections originally lodged against the settlement, one, **[**60]** the objection of the State of Ohio, challenged only the attorneys' fee petition, and another, that of the Central Penn National Bank, was not renewed after the plaintiffs' submission of their economic supplement to their original memorandum in support of the settlement. Upon these reports, 99.975% Of the class of claimants may be viewed as supporting the settlement and thereby favoring the court's approval of the proposal. Cf. *Cotton v. Hinton, 559 F.2d at 1331* (settlement proposal approved although more than half of the class appeared to object to the proposal).

The court, however, must be reluctant to place undue reliance on the claimants' apparent acquiescence. In some cases, class acquiescence may be explained either as the individual members' unwillingness to expend the time and money necessary to file and pursue objections or as a failure of the settlement notice adequately to describe the terms and conditions of the proposal. The court finds that these explanations should not be presumed herein and that silence should be deemed consent.

[*1379] The members of the instant class, customers of armored car services, are predominately governmental subdivisions or large **[**61]** private corporations, such as banks, department stores, and grocery store chains. They are not private individuals, such as hotel guests or automobile or fuel purchasers. Compare *State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y.1970)*, aff'd, *440 F.2d 1079 (2d Cir.)*, cert. denied, *404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971)* (class composed of public and private institutions which purchased antibiotics) *With In re Hotel Charges, 500 F.2d 86 (9th Cir. 1974)* (class composed of hotel guests improperly surcharged for telephone calls); *In re General Motors Corp. Engine Interchange Litigation, 594 F.2d at 1106* (class claimants were individual car purchasers); *And Liebman v. J. W. Petersen Coal & Oil Co., 63 F.R.D. 684 (N.D.Ill.1974)* (class members were individual purchasers of coal in the Chicago area). The instant plaintiff class members are expected to be capable of marshalling the resources necessary for an objection. [16.] Failure to interpose objections may then be read as affirmance of the settlement proposal.

[62]** The court has already concluded that the notice published in this litigation was appropriate and adequate. Settlement Order No. 1, entered April 3, 1978, at 5. The notice described the foundations of the litigation, detailed the terms of settlement, and set the deadlines for claims and opt-outs. The timetable established in the notice (4-6 weeks for responses) was not inconsistent with the deadlines governing similar litigation. See e.g., *Miller v. Republic National Life Insurance Co., 559 F.2d at 429* (4 weeks); *Grunin v. International House of Pancakes, 513*

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16. The court does not deprecate the stern adversarial role which the State of California has assumed in this litigation. The state attorney general is charged with scrutinizing such settlements in the public interest. The objector has satisfied this weighty assignment herein. The court notes, however, that this is not an antitrust conspiracy directly affecting private individuals of modest means; rather it is a conspiracy which allegedly tended to injure large public and private institutions that had occasion to use armored car services. These behemoths need not rely upon one attorney general but may assert their own objections. Their silence in this case should therefore be read as acquiescence instead of inadequacy.

F.2d at 121 (19 days); United Founders Life Insurance Co. v. Consumers National Life Insurance Co., 447 F.2d 647, 652 (7th Cir. 1971) (25 days). The notice could have been more thorough and could have suggested an estimated range of damages and recovery; the settlement proposal could have been stalled, allowing more time for discovery. These possible faults are not fatal; the notice was adequate. The court therefore concludes that the class has tacitly but solidly affirmed the settlement proposal.

In similar manner the court finds that the conditional certification of a class of claimants for settlement purposes may now **[**63]** be granted final certification. The class is not unduly restrictive, Cf. *In re General Motors Engine Interchange Litigation, 594 F.2d at 1106* (certification of only a subclass of claimants for settlement purposes), but includes all customers of armored car companies except the Federal Reserve Banks. The class is not overly broad, as the allegation of a nationwide conspiracy has been reasonably posited. Although the effects of the conspiracy might have been felt intermittently in various markets, the fact of a nationwide conspiracy, adamantly denied by the defendants, has been adequately suggested by the proponents. [17.] Plaintiffs' Exhibit D (schedules of economic data tabulating or graphing defendants' revenues and profits on company-wide, local branch, and various competitive market bases). Plaintiffs' proof of a **[*1380]** nationwide conspiracy at trial would be demanding, if not impossible, but plaintiffs' proffer for purposes of class certification for settlement is adequate. Accord, *Wainwright v. Kraftco Corp., 58 F.R.D. 9, 12 (N.D.Ga.1973)*; *In re Four Seasons Securities Laws Litigation, 58 F.R.D. 19, 31, 39 (W.D.Okl.1972)*; *Philadelphia Housing Authority v. American Radiator* ***[**64]*** *& Standard Sanitary Corp., 323 F. Supp. 364, 372 (E.D.Pa.1970)*. The *Rule 23(a)* requirements of numerosity, commonality, typicality, and representativeness shall be deemed satisfied for the limited purposes of settlement of this litigation. The conditional class, *Rule 23(c)(1)*, as detailed in Settlement Order No. 1 entered April 3, 1978, and as published in the notice to class claimants, [18.] may now be deemed the final class for settlement.

[65]** Upon all of the foregoing, the review of the settlement in light of the ten chosen criteria, the court concludes that the proponents of the settlement have carried their burden. The settlement on behalf of the denominated class of armored car services purchasers may be APPROVED as fair, reasonable, and adequate. *Rule 23(e)*.

IV. ATTORNEYS' FEES AND EXPENSES

Having announced our final approval of the settlement, we may now consider the joint petition for attorneys' fees and expenses submitted by counsel for the named plaintiffs. ***HN15***[] The Clayton Act provides for the recovery of attorneys' fees and expenses upon successful prosecution of a treble damage action, *15 U.S.C. § 15*. No statute expressly allows for recovery of these amounts upon settlement of antitrust litigation and the only authority for reimbursement derives from the "equitable fund doctrine," See *Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1938)*; *Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885)*; *Trustees v. Greenough, 105 U.S. 527, 26 L. Ed. 1157 (1882)*. The doctrine recognizes that class members who have benefited from counsel's efforts to "create, **[**66]** increase, protect or preserve. . . ." *Lindy II, 540 F.2d 102 at 111*, a recovery fund should contribute toward the costs of counsel's services. Just compensation

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[17.] California objects that it has been more severely injured from the alleged conspiracy than other claimants yet must share with them in the fund. First, the court has already concluded that California's damages may have been aggravated by an unrelated conspiracy and that its rights against the West Coast conspirators are unaffected herein. Order entered December 4, 1978. See note 12, Supra. Further, any plan of distribution (a scheme of equal shares or weighted shares) has yet to be presented and argued. California may wish to renew its objections if a later proposed plan does not appear to satisfy its interests.

[18.] The notice did not offer a take-it-or-leave-it choice to potential class members. Instead the recipients were notified of the options: (i) of tendering claims to participate in the settlement proposal, (ii) of opting out of the class and pursuing individual remedies, or (iii) of remaining in the class but objecting to the settlement terms. No cognizable rights were compromised upon a decision to be excluded from the settlement class or upon the choice to remain in the class but object to the settlement. Compare *In re General Motors Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979)* (subclass members were compelled to waive their federal right of action upon a decision to opt out) *With Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 373 (E.D.Pa.1970)* (tentative class members' rights were not determined by the mere submission of the settlement proposal for approval as the proposal allowed opportunities for exclusion from class and objection to the settlement).

should thus be subtracted from the claimants' recovery fund. The court, while calculating reasonable compensation, must maintain vigilant oversight of the unnamed class members' interests. *Trustees v. Greenough, 105 U.S. at 536*; *Grunin v. International House of Pancakes, 513 F.2d at 123*. The tension that results is the subject of petitioning counsel's and the objectors' continuing argument.

The petitioners seek an award of $ 1,127,500 in aggregate attorneys' fees and more than $ 160,000 in disbursements. A single attorneys' fee award is sought upon the understanding that they will later apportion the award pursuant to an agreement among the twenty petitioning law firms here of record. [19.] Supplemental Memorandum of Objections of the State of Ohio, filed July 11, 1977, Exhibits A and B. The applicants contend that they have worked in concert as one law firm in this litigation **[*1381]** and thus a joint award is warranted. See Miller v. Fisco, (1978)Fed.Sec. (CCH) P 96,348 (E.D.Pa.1978). They argue in support of the **[**67]** amount of the fee request that it equals slightly less than 10% Of the principal, which would be substantially less than a contingent fee award. The amount reflects a multiplication of their customary fee (calculated as attorney hours times usual hourly rate) by a factor of approximately three, See *Wolf v. Frank, 555 F.2d 1213, 1218 (5th Cir. 1977)*; *Grinnell I, 495 F.2d at 471*; *Lindy II, 540 F.2d 102 at 118*. This multiplication produces an overall hourly rate for the petitioners of about $ 300 per hour.

Petitioners submit that considerations which should influence the court's **[**68]** evaluation of their request include: the generous result obtained, the contingent nature of the fee, the customary contingent fee, the unusual skill requisite to perform legal services so promptly, and counsel's experience, reputation, and ability. *Grinnell I, 495 F.2d at 470-71*; *Johnson v. Georgia Highway Express Co., 488 F.2d 714, 717-19 (5th Cir. 1974)*. They supply a narrative of their litigation efforts and claim that it is

> doubtful that any other set of lawyers would have been sufficiently imaginative to approach the litigation in this manner, or if they had been inclined to do so, would have had the standing and the ability to dispose of it in this fashion . . .

Joint Application for Counsel Fees, filed May 26, 1978, at 15-16, and that

> (t)his settlement was obtained only because plaintiffs' lead counsel had the experience, the ability and the standing and were known to the distinguished defense counsel . . . to be capable of conducting, and to be willing to conduct this litigation to a conclusion.

Id., at 18.

In addition to the narrative and argument, applicants have submitted summaries of individual counsel's experience and credits, schedules of attorney **[**69]** time and regular billing rates, schedules of out-of-pocket expenses, and affidavits of each firm's senior counsel attesting to the truth and veracity of the fees and expenses claimed. The schedules, they argue, afford the necessary detail of how many hours were devoted to which tasks by whom for the court's review and assessment. See *Lindy I, 487 F.2d at 167*. They note that the claims of the few objectors to the petition represent less than one-third of one percent of the claims to the fund and that the major claimants have interposed no opposition to the amount of the requested award. Similarly, they remark that their $ 1,127,500.00 fee request might be almost fully paid out of the interest which has and will accrue to the deposited fund. Upon all of these contentions and support, they urge that their joint application is eminently fair and reasonable.

Objections to the joint application have been filed by the States of California and Ohio (with the State of Arizona concurring) and the Penn Central National Bank. [20.] These challengers contend that the petitioners' request is excessive and that it is inadequately documented, overinclusive, and impermissibly calculated and presented.

[19.] Twenty law firms or groups have submitted claims in the joint application for attorneys' fees. The Office of Attorney General for the State of Connecticut has been listed among counsel of record in Connecticut v. Brink's, Inc., C.A. No. 77-1878, but seeks no share in the award. Counsel has been separately retained in Hillman's, Inc. v. Brink's, Inc., C.A. No. 77-1880; See Note 4, Supra, and has not joined the united petition.

[20.] The Atlantic Richfield Company appeared to second the objectors' complaints with the joint fee petition at the fairness hearing on January 25, 1979. Tr. at 82, 91.

[70]** The State of Missouri, a settling plaintiff, in an apparent stroke of conscience, has affirmed the objectors' charges before the court.

We announced at the fairness hearing on January 25, 1979 that a decision on the attorneys' fee request could be rendered upon the documentary evidence and written arguments which had been submitted by the petitioners and objectors. No opposition was voiced to this method of proceeding.

The court is now faced with what appears from all the circumstances of this litigation to be an embarrassingly exorbitant attorneys' fee request. We are disappointed and even sorely discouraged that an application of this magnitude has been tendered in the instant actions. The applicants have regretfully fulfilled the most dire predictions of wary courts and commentators. See *Grinnell II, 560 F.2d at 1098-99*; In re Sugar **[**71]** Industry Antitrust Litigation, M.D.L. No. 201, slip op. at 16 (N.D.Cal. May 10, **[*1382]** 1978); *Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 224 (N.D.Ill.1972)*; Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv.L.Rev. 849 (1975); Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines, 16 B.C.Ind. & Com.L.Rev. 630 (1975). What might be overlooked as naive exuberance among fledgling attorneys is not easily forgiven when accomplished in the name of such experienced officers of the court. Having thus commented, we will proceed with our review and will seek to determine a reasonable hourly rate and to identify reimbursable categories of time.

HN16[] The Supreme Court, in inaugurating the common fund doctrine, cautioned that these attorneys' fee awards must be "made with moderation and a jealous regard to the rights of those who are interested in the fund." *Trustees v. Greenough, 105 U.S. at 536*. Heedless of this warning, attorneys have requested and courts have granted seemingly "windfall" awards, *Grinnell I, 495 F.2d at 473*, and have suffered the criticism and scorn of the general public. See *Free World Foreign Cars, Inc. v. Alfa **[**72]** Romeo, 55 F.R.D. 26, 30 (S.D.N.Y.1972)*. The court's task, then, is difficult but unavoidable:

> We said in the beginning that the question was delicate and embarrassing and this is so not only because we recognize the ability of the attorney who rendered the services but also because of the high standing and character of the three lawyers who testified in support of the allowance. And we might also add this is so because of our respect for the ability and integrity of Judge Barnes, who fixed the allowance. Notwithstanding, the fabulous amount allowed is shocking to our sense of reason and justice.
>
> And we are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. More than that, the possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees.

Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 569-70 (7th Cir. 1951), Cert. denied, *342 U.S. 909, 72 S. Ct. 303, 96 L. Ed. 680 (1952)*, *Quoted in Grinnell II, 560 F.2d at 1099*.

There are two incidents **[**73]** which epitomize the cause for the court's impatience with petitioners' request: the first, self-revelatory and the second, disclosed by settling plaintiff, State of Missouri. At the time this court authorized settlement negotiations and again at the time we entered Settlement Order No. 1, counsel were put on the clearest, sternest notice that a settlement proposal would have to be solidly supported and roundly justified before settlement could be approved. Plaintiffs' counsel acknowledged our admonition, assured us that our demand would be met, and verified a schedule of briefing. On September 18, 1978, at the first hearing convened to determine the fairness, adequacy, and reasonableness of the settlement, the court had before us two submissions from plaintiffs and the filings of the four objectors. The two plaintiff submissions were: a 21-page memorandum in support of the settlement and an over 200-page (including exhibits and supplements) joint petition for attorneys' fees. The memorandum attached no evidentiary material but consisted solely of a recapitulation of the settlement terms, arguments, and the author's suggestion that price comparisons of the conspiracy and post-conspiracy **[**74]** years were inconclusive. The fee petition was neatly bound, carefully indexed, and professionally presented. It had been faithfully supplemented up to the moment of the hearing. The harmful presumption was clear.

The memorandum in support of the settlement was patently insufficient and counsel were dispatched with a list of economic analyses which might prove helpful to the court. Order entered September 20, 1978, at 1, 2. Counsel returned to a hearing on January 25, 1979 with the evidentiary support vital to the court's review of the settlement. The then proffered analyses and **[*1383]** arguments were thorough, instructive, and grounds for approval of the settlement. But the previous presumption could not be dispelled.

The second tainted incident was marked when the Attorney General for the State of Missouri objected to the fee petition as excessive and forwarded to the court a copy of a letter previously sent to lead counsel detailing Missouri's objections. The Attorney General charted the various firms' fee requests compared with the fee customarily earned. The chart revealed that while in some cases counsel expected fees based on the announced multiplier of 2.8-3.0, **[**75]** in other cases the award would be more than four, five, or even six times the hourly rate. The state's attorney urged that such recovery would be unfair and not in the best interests of the class.

At the January fairness hearing the State of Missouri renewed its objection to the form and the amount of the fee petition. The state's representative remarked that under the present scheme the Attorney General's Office would receive $ 15,000 for $ 4,000 worth of lawyer time, while its client, the State of Missouri, would receive no more than $ 6,000 from the claimants' fund. January 25, 1979 hearing, Tr. 97-98. Petitioners have never directly countered the force of these damaging comparisons.

These two incidents deny the petitioners' claim to a munificent award. ***HN17***[] A just award will only be entered after careful exercise of our role as overseer and after critical application of the factors for awarding attorneys' fees from an equitable fund.

Our charge is to continue as the "guardian of the rights of absent class members. . . . " *Grunin v. International House of Pancakes, 513 F.2d at 123*, and to be assured that the expenses claimed are for efforts to create, increase, or protect the **[**76]** settlement fund. See Manual for Complex Litigation, Part 1, § 1.47 (rev.ed.1977); Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv.L.Rev. 1597, 1626 (1974). The "touchstone" then is an evaluation of "the actual effort made by the attorney to benefit the class." *Grinnell II, 560 F.2d at 1099*. [21] The petitioners hold the burden of demonstrating that their billed time and expenses served to benefit the fund. *Johnson v. Georgia Highway Express, Inc., 488 F.2d at 720*. The court will measure the petitioners' efforts against the standards of Johnson, see also ABA Code of Professional Responsibility, DR2-106, and will assay the various categories of work according to recent guidelines.

[77]** In Johnson, the Fifth Circuit enunciated a series of twelve factors for the trial court's consideration in awarding attorney's fees. Although Johnson was a civil rights action, the factors have been adopted and applied in a multitude of other suits including antitrust treble damage actions, See e.g., *Wynn Oil Co. v. Purolator Chemical Corp., 391 F. Supp. 522 (M.D.Fla.1974)*. The Johnson factors, when coupled with the criteria for augmenting an award under exceptional circumstances, *Wolf v. Frank, 555 F.2d 1213, 1218 (5th Cir. 1977)*, parallel the process of determining a "lodestar" amount and a "multiplier" employed by other courts, See *Grinnell II, 560 F.2d at 1098*; *Lindy I, 487 F.2d at 167*. ***HN18***[] Johnson, Grinnell, and Lindy require a two-step review: first, the calculation of a customary fee from the identification and multiplication of an attorney's reasonable hourly rate times a compensable number of hours; and, second, the determination of whether an increase or reduction of these expenses is justified in light of the risk of litigation and the quality of work performed.

[*1384] As a predicate to this two-step review, the court must consider the propriety of petitioners' "joint" **[**78]** form of fee application. The joint application attempts to evade the necessary scrutiny of our review by disguising

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[21] Courts have also been guided in determining attorneys' fee awards by a need "to stimulate the motive for representation of classes . . . ." Manual for Complex Litigation, Part 1, § 1.47(a) (rev.ed.1977). This need has been apparent in some civil rights actions. See *NAACP v. Button, 371 U.S. 415, 443, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)*; *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974)*. Nationwide antitrust class actions appear more desirable among the organized bar and the need to stimulate representation is less evident. The court therefore will rely more heavily on the principle of benefit to class than upon consideration of encouraging class representation in fashioning this attorneys' fee award.

the rate, hours, and multiplier of individual attorneys in an undifferentiated mass. See Letter from Assistant Attorney General, State of Missouri, to the court, dated January 19, 1979. The applicants submit in support of this form of fee request that they have performed as a single law firm and that one award is justified. The schedules of hours, however, suggest such duplication of effort, that if they acted as a single firm, the firm stands as a monument to inefficiency. For example, out of a total of 85 attorneys from the 20 firms seeking reimbursement in this litigation, 54 attorneys worked on pleadings and 34 entered court appearances. No private law firm could survive on such redundancy. Treating petitioners as a single law firm entitled to an aggregate fee would reward inefficiency and duplication of effort and thus would be unfair to the class of claimants. A joint award will not be granted. The court, however, will seek to determine reasonable mixed hourly rates [22.] on a firm-by-firm basis. Instead of one large aggregate award or eighty-five separate **[**79]** fees, the court will grant twenty law firm awards. Having dispensed with these preliminaries, the court may now proceed with a review of the Johnson criteria, *488 F.2d 714 at 717-19*.

A. The Johnson Factors

(1) The time and labor required. The number of hours claimed by plaintiffs' counsel is the first area of review. We must not blindly accept the petitioners' statement of hours expended without reference to the time required for such tasks as seen from our experience and vantage point. *Id. at 717*; In re Sugar Industry Antitrust Litigation, slip op. at 28. We find the applicants' number of claimed hours generally overstated. Part of this overstatement derives from the severe duplication of effort endemic in this litigation. The court will attempt to correct for the petitioners' inefficiency by limiting the compensable time for court appearances **[**80]** and preparation of pleadings. Many of the hours charged are for tasks, such as settlement administration, which are more clerical than legal, and, while allowable, must be reimbursed at lesser rates. See *In re Penn Central Securities Litigation, 416 F. Supp. at 922*. Other hours claimed for repeated client conferences accorded limited, if any, benefit upon the class of claimants and must also be proportionally reduced.

(2) The novelty and difficulty of the questions. This litigation, settled at such an early stage of the proceedings, presented no questions of first impression. Had the actions gone to trial, plaintiffs would have encountered enormous difficulties of proof and of persuasion. But the actions did not proceed to trial and the attorneys' assignments and work were more mundane than masterful. The petitioners listed the techniques they pioneered in previous multidistrict antitrust litigation (E. g. "global" settlements; procedures for class certification by motion, memorandum, and affidavit with a minimum of discovery; the form and manner of class notice), Joint Application for Counsel Fees, at 18, and hoped that "(t)he novel settlement procedure developed in this litigation **[**81]** . . . may likewise become customary." *Id., at 19*. The court is left to speculate on what that novel procedure might be: settlement amount based on a percentage of sales, settlement proposed without any economic justification, or something else. We must simply conclude that novelty and difficulty were not encountered prior to settlement.

(3) The skill requisite to perform the legal service properly. ***HN19***[] "The trial judge should closely observe the attorney's work product, his preparation, and general ability before the court." *Johnson v. Georgia Highway Express, Inc., 488 F.2d at 718*. On the one hand, the pleadings and early motions in this litigation demanded little skill from the petitioners. The civil complaints merely rehearsed the charges of the criminal **[*1385]** indictments and the original discovery consisted of a review of the Grand Jury documents. The early pretrial proposals for case management and handling were adaptations of previous multidistrict litigation housekeeping rules and did not tax petitioners' legal prowess.

On the other hand, settlement at such an early juncture reflects forceful and effective use of bargaining skills. The lead counsel's experience and **[**82]** reputation may have influenced defendants' early capitulation. The petitioners' first attempt to support and seek approval of the settlement was woefully inadequate. Their second attempt has proven successful. The compilation and presentation of persuasive arguments and evidentiary support favoring a settlement are refinements of general case preparation and briefing skills. Balancing the first disaster with the second success, the court concludes that petitioners' labor and skill in this area were adequate.

[22.] The "mixed hourly rate" averages the reasonable rates of senior and novice attorneys and recognizes a variety of legal tasks, from complex to routine.

(4) The preclusion of other employment by the attorney due to acceptance of the case. We have no indication from any of the twenty law firms representing the class claimants that they were precluded from other work by this litigation. Lead counsel were heavily but not completely committed to the progress of these actions; adjunct counsel devoted even less substantial time to the proceedings.

(5) The customary fee. Courts have recently awarded these and similarly able lead counsel mixed hourly rates of $ 72/hour, *Entin v. Barg, 412 F. Supp. 508, 517 n. 18 (E.D.Pa.1976)*, $ 73/hour, Barr v. WUI/TAS, Inc., (1976-1) Trade Cases (CCH) P 60,725 at 68,119 (S.D.N.Y.1976), and $ **[**83]** 75/hour, *In re Penn Central Securities Litigation, 416 F. Supp. at 924 n. 52*. But see City of Detroit v. Grinnell Corp., (1976-1) Trade Cases (CCH) P 60,913 at 68,982 (S.D.N.Y.1976), rev'd, *560 F.2d 1093, 1102 (2d Cir. 1977)* (mixed hourly rate for Berger firm which we have calculated at $ 74/hour, allowed excessive individual fees and could not stand). [23.] **[**84]** The mixed hourly rate is an average computed from the reasonable hourly fees of senior and junior attorneys in a firm fulfilling a variety of legal tasks. The court concludes that a customary mixed hourly fee for lead counsel law firms should not exceed $ 80/hour. [24.] The customary fee for adjunct law firms should reflect a lesser degree of decision-making and a reduced level of responsibility. The court concludes that the mixed hourly fee for these firms should not exceed $ 65/hour to fall within community standards. [25.]

(6) Whether the fee is fixed or contingent. ***HN20***[] The calculation of an attorneys' award on a contingent fee basis in equitable fund cases has been resoundingly rejected. *Lindy II, 540 F.2d 102 at 119-20*; *Grinnell I, 495 F.2d at 470-71*. Determination of the amount of attorneys' fees to be subtracted from an equitable fund is a decision in equity in the nature of a proceeding in Quantum meruit, and it is not an action in contract for a percentage of the plaintiffs' recovery. Id. Petitioners appear to forget these principles when they urge in support of their $ 1,127,500 request that this aggregate fee "is substantially less than the customary contingent fee. . **[**85]** . . (and) is slightly less than ten percent of the principal amount of the settlement . . . ." Joint Application for Counsel Fees, at 10. The court will not review this request on a percentage basis of recovery, but only upon an evaluation of compensable benefit rendered **[*1386]** to the class of claimants. This sixth Johnson criterion is thus not pertinent to the instant review.

(7) Time limitations imposed by the client or circumstances. No deadlines were imposed by the class of claimants or by the factual circumstances of the action. The petitioners identified a procedural deadline, that settlement should be attempted before a class certification decision was rendered, in order to enhance their bargaining position. This deadline was one of strategy more than compulsion and did not constrain petitioners in the prosecution of the litigation.

(8) The amount involved and the results obtained. The settlement bargain, an $ 11.8 million fund in exchange for ten years of civil peace for the three codefendants, has been shown to be more than adequate in light of the risks of litigation. This generous amount was obtained early in the litigation, thus saving the expense and time **[**86]** of a prolonged antitrust debacle. The amount and speed with which it was obtained are to the credit of petitioners.

(9) The experience, reputation, and ability of the attorneys. The senior counsel of the lead and adjunct law firms have been distinguished members of the bar for many years. Their names appear repeatedly as counsel of record

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[23.] On remand from *Grinnell I, 495 F.2d 448 (2d Cir. 1974)*, the district court allowed an hourly rate of $ 125 for Mr. David Berger. On appeal, the Second Circuit set this award aside on grounds that the hourly rate was excessive. *Grinnell II, 560 F.2d 1093, 1102 (2d Cir. 1977)*. In the instant litigation 22 attorneys have claimed hourly rates of $ 125 and above. Lead counsel seek the following: David Berger, $ 250/hour; David I. Shapiro, $ 200/hour; Harold E. Kohn, $ 250/hour; and John E. Burke, $ 110/hour.

[24.] The finding of a mixed hourly lead law firm rate of $ 80/hour is calculated by setting senior counsel rates at $ 125/hour, proportionally reducing junior and associate counsel fees, and calculating a weighted average.

[25.] The mixed hourly adjunct law firm rate of $ 65/hour derives from setting senior counsel rates at $ 100/hour and scaling down junior personnel fees accordingly. A weighted average hourly rate is then computed.

in the annals of multidistrict antitrust and securities litigation. It is likely that the defendants weighed petitioner's reputation and experience in the settlement fund calculus.

The acknowledged experience of counsel, however, is a two-edged sword. On the one side, it may account in part for the admirable speed and terms of settlement. On the other, it renders most pretrial matters in this litigation routine and it pretermits any excuses for the first ill-prepared and undocumented memorandum in support of the settlement.

(10) The "undesirability" of the case. The court noticed nothing undesirable in the representation of this class of claimants. On the contrary, the fact of sixteen different actions with twenty-two different law firms as counsel of record and with some actions listing as many as four law firms in representation, attests **[**87]** to the financial attractiveness of nationwide antitrust class actions.

(11) The nature and length of the professional relationship with the client. This Johnson criterion is not applicable to the class representation undertaken in this litigation. Most of the claimants have simply acquiesced pursuant to the class notice in the petitioners' prosecution of their interests. No client-counselor relationship has ever been established.

(12) Awards in similar cases. A strict comparison of total awards in other cases would not be meaningful herein. This litigation was settled earlier in the proceedings than any multidistrict antitrust action we have studied. While the Grinnell litigation lasted for ten years and the various Lindy actions struggled for six to eight years before settlement, the instant parties reached an agreement within months of the original filings and transfer to this court. Settlement was proposed in Barr v. WUI/TAS, Inc., (1976-1) Trade Cases (CCH) P 60,725 (S.D.N.Y.1976), within fourteen months of initiation of the antitrust actions, but as the court noted:

> unquestionably, plaintiffs' attorneys have struggled long and hard against the determined opposition **[**88]** of defense counsel.

at 68, 119. Comparisons of awards in those lengthy and hard-fought cases with what might be requested in this short-lived and undemanding litigation must be cautiously approached. Mindful of this caution, examples of final attorneys' fee award include: Grinnell $ 333,000.00; In re Penn Central Securities, $ 1,295,000.00; and Barr v. WUI/TAS, Inc., $ 78,500.

More meaningful than a comparison of total awards is a comparison of hourly rates. Based on a consideration of all twelve Johnson criteria, placing heavy reliance on the limited time, labor, and skill required in the beginning stages of this well-mapped litigation and on the generous result which counsel are credited with effecting, we hold to our finding of a reasonable mixed hourly rate for lead counsel law firms as $ 80 per hour and for adjunct law **[*1387]** firms as $ 65 per hour. Upon this scale, paralegals and law students will be reimbursed at $ 20 per hour. We draw no distinction between private firm and public employer rates for attorneys, paralegals, and law students. Cf. In re Sugar Industry Antitrust Litigation, slip op. at 31. The court must now proceed to assay what lawyering **[**89]** tasks are compensable and must determine whether augmentation of the attorneys' fees is suggested.

B. Compensable Hours

Some categories of work are not reimbursable on general principles of equitable fund recovery and other categories should not be recompensed under the circumstances of this litigation. These two classes of hours must be identified and subtracted from the petitioners' request.

Included in the first categories of nonreimbursable time are the hours counsel have spent in preparation of the fee petition. *Grinnell II, 560 F.2d at 1102*; *Lindy II, 540 F.2d 102 at 111*; *Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339, 1350 (S.D.Tex.1976)*. The attorneys' efforts in preparation of the joint fee request neither created nor protected the settlement fund to the benefit of the class. This time was, if anything, antagonistic to the claimants' recovery and cannot be repaid under equitable fund theories.

Working hours identified in only vague and meaningless terms, such as "general," "miscellaneous," or "special services," should not be charged to an involuntary class of claimants. In re Sugar Industry Antitrust Litigation, slip.

op. at 28. Indefinite documentation might **[**90]** be acceptable in the understandings developed over years of extended lawyer-client relationships but may not be allowed under the equitable fund theory of this nationwide class action.

Similarly, time expended in client conferences reasonably benefited the individual named plaintiffs but could not greatly assist the passive members of the class. The court will allow a total of two hours consultation time per client to account for any generalized investigation which may have assisted the class. If several firms represented the same client and billed for client conference time the two hour maximum will be divided among them equally. If counsel are willing to detail their client conference time and to explain what benefits may have accrued to the class, the court will consider augmenting this category in individual cases. These details and explanations must be FILED with the court by May 1, 1979 to be considered.

Settlement administration hours will be reimbursed, but at a lower hourly rate. These hours were spent at more ministerial then legal tasks and should be compensated accordingly. "Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because **[**91]** a lawyer does it." *Johnson v. Georgia Highway Express, Inc., 488 F.2d at 717*. The court will reimburse settlement administration hours at the rate of $ 50 per hour. See *In re Penn Central Securities Litigation, 416 F. Supp. at 922*.

Finally, in an attempt to adjust for the severe duplication of effort in this litigation, the court will limit the total number of hours claimed by the twenty law firms for preparation of pleadings and briefs and for court appearances. There is no reason or excuse for penalizing the class claimants for counsel's inefficiency. The complaints filed were simple parrotings of the criminal indictment; the early briefs were mere arguments against extensions of time. The proposed Settlement Order No. 1 was an adaptation of clerical and management procedures devised and employed in prior similar multidistrict actions. The briefs in support of settlement were, at first, "patently insufficient," Order entered September 20, 1978, and only on a second try, proved persuasive. The "court, using its own firsthand knowledge of the nature of these tasks, has reduced and/or apportioned duplicative time." In re Sugar Industry Antitrust Litigation, slip op. at 28. See **[**92]** *Johnson v. Georgia Highway Express, Inc., 488 F.2d at 717*. The court finds that the pleadings and briefs filed in this action in aid of the class reflect approximately 280 hours of attorney work. The four lead counsel firms **[*1388]** shall recover no more than 50 hours each and adjunct firms no more than 5 hours each for these filings.

In like manner, the court will reduce the totals of court appearance time claimed. We have spent no more than 6 hours in court in this litigation and have cause to wonder how some individual petitioners propose to bill in excess of 92 hours for this category of work. Joint Application for Counsel Fees, Exhibit G-17 and Supplement. The court will grant lead counsel some time for preparation for appearances in court and will allow each firm to be reimbursed for 20 hours. We will limit adjunct firms to 6 hours each for these appearances. [26.]

[93]** C. Augmentation of the Fee

Once a reasonable hourly rate has been established and a compensable number of hours identified, the attorneys' fee can be calculated. In special circumstances courts have augmented or multiplied the calculated fee when the risks of undertaking the litigation were great and the quality of work evinced was superior. *Wolf v. Frank, 555 F.2d at 1218*; *Lindy II, 540 F.2d 102 at 117*.

> Perhaps the foremost of these factors is the attorney's "risk of litigation," I. e., the fact that, despite the most vigorous and competent of efforts, success is never guaranteed. The greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should serve to amplify the basic hourly fee. The tangible factors which compromise the "risks of litigation" might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successfully

26. The court may be overindulgent in allowing adjunct counsel who did not participate in the court proceedings to recover for this time. Counsel were more likely guarding their individual clients' interests than benefiting the class by attendance at these hearings. See In re Sugar Industry Antitrust Litigation, M.D.L. No. 201, slip op. at 28 and n.29 (N.D.Cal. May 10, 1978).

> concluded against the defendant; have related civil actions already been instituted by others; and are the issues novel and complex or straightforward and well worn?

Grinnell I, 495 F.2d at 471. Upon this analysis, no multiplier **[**94]** is suggested. The contours of this litigation were previously drawn by the Government's actions. Petitioners "could not have been in suspense for any appreciable length of time. . . ." Grinnell II, 560 F.2d at 1101, as settlement was reached with all three codefendants before the first pretrial conference. A notable risk of litigation, the obstacle to maintaining the action as a class action, was not felt, as the Court of Appeals did not announce Alabama v. Blue Bird Body Co., see Part III, supra, until after the settlement agreement was executed. No novel or complex issues were faced prior to settlement. The contingency factors which have justified a multiplier in other actions were absent from this litigation.

The second part of an augmentation consideration, that is, the exceptional quality of the work performed, is also lacking herein. Counsel will be duly rewarded for their experience, reputation, and ability in the mixed hourly rates that we have established. Enhancement of those rates is only authorized when the work is of a superior quality. Lindy II, 540 F.2d 102 at 118; Wolf v. Frank, 555 F.2d at 1218. As the court and, presumably, the class of claimants are still **[**95]** reeling from the grossly inadequate first attempt to support the settlement, we are not inclined to allow an extraordinary award. Upon both parts of the test, therefore, petitioners' request for a multiplier of their customary fees must be denied.

D. Expenses

The court will reimburse the out-of-pocket expenses of the petitioners from the settlement fund. The affidavits of expenses are sufficient for all but the travel, meals, and lodging requests. We find those claims to be excessive and will not authorize reimbursement without further documentation. As a premise the petitioners should **[*1389]** assume their class clients have agreed to pay modest to moderate travel and per diem costs when the trip served their beneficial interests. Petitioners should not expect to recover from their involuntary clients for unnecessary or extravagant travel and related expenses. Overstaffing at meetings, conferences, or court appearances will not be rewarded, See In re Sugar Industry Antitrust Litigation, slip op. at 28-29, lavish dining (E. g., $ 75 meal for one, Joint Application for Counsel Fees, Exhibit H-6) will not be underwritten. As time spent in conferences with individual clients **[**96]** has been reduced, so too will travel expenses to meet with these clients.

As documentation, the court will require a statement for each claimed trip of: when, where, why (E. g., meeting, conference, appearance), and with whom (with which attorneys from the same and from other law firms). The court will expect the submission: of copies of receipts for economy air fare, moderately-priced hotel rooms and meals; of statements of ground transportation costs; and of details of any related expenses. If counsel lacks the pertinent records, an explanation of their unavailability may be tendered along with an estimate of expenses for the court's review. All documented travel and attendant expenses incurred to date shall be FILED with the court on or before May 1, 1979 or they will be deemed abandoned.

E. The Petitioners' Award

The court has charted the requests, the reimbursable and nonreimbursable claims, and the presently payable expenses for the twenty petitioning law firms. The charts appear as the Appendix to this order. The petitioners' awards are summarized in the following table:

TABLE

[*1390] V. OUTSTANDING MATTERS

A. The Distribution Plan

Having approved the settlement **[**97]** and established the attorneys' fee award and partial expenses, the court may now schedule the sequence of distribution planning and presentation. Lead counsel shall FILE a plan for distribution of the settlement fund by May 8, 1979. The court will then review the plan and determine whether it is acceptable for submission to members of the class who filed claims against the fund. If deemed acceptable, the plan and notice of a hearing on distribution shall be mailed to all claimants by May 15, 1979. The notice shall announce that a hearing on the distribution plan is scheduled for 10:00 A.M., Monday, June 11, 1979, in the United States Courthouse, Room 324, 56 Forsyth Street, N.W., Atlanta, Georgia. The notice shall also state that anyone wishing to object to the proposed plan must file a written objection with the court by June 4, 1979 and must file a statement of an intent to appear at the hearing if the objector also wishes to present his arguments in person, by the same date.

B. The State of Maryland Civil Action

Because the court has approved the settlement of the sixteen civil actions, retention in this district of the seventeenth action, the recently transferred State of **[**98]** Maryland v. Brink's, Inc., C.A. No. 79-133, appears inadvisable. The convenience of the parties and witnesses and the interests of justice, See *28 U.S.C. § 1404(a)*, will be better served by retransfer of this seventeenth action to the site of original filing, the District of Maryland. Investigations of the alleged conspiracy's impact and damage will require discovery from state agency files and defendants' local branch offices. These and other pretrial matters can be better monitored in the home state, Maryland, than in this forum. Once settlement of the sixteen other actions was approved, most ties to this district were effectively broken and the reason for original transfer was lost. The court will RETRANSFER the State of Maryland action to the District of Maryland within ten (10) days of the date of this order. Any objections to retransfer must be filed within that period to be considered.

Accordingly, the court hereby: (1) APPROVES the settlement of In re Armored Car Antitrust Litigation, C.A. No. 78-139, and all the civil actions included therein with the exception of State of Maryland v. Brink's, Inc., C.A. No. 79-133; (2) DENIES the motion of the State of California to **[**99]** reopen discovery on the issue of damages; (3) DENIES the request of the State of California for a court-appointed expert; (4) GRANTS plaintiffs' counsel's application for attorneys' and paralegals' fees and for out-of-pocket expenses in the following amounts:

TABLE

[*1391] (5) ORDERS plaintiffs' counsel to file by May 1, 1979, the described documentation of any unrewarded client conference time and/or of any travel and related expenses; failure timely to file the ordered documentation will effectively waive these requests; (6) ORDERS lead counsel to file by May 8, 1979, a proposed plan of distribution of the settlement fund and a proposed notice to all claimants of the plan, hearing, and opportunity to file objections and statements of intended appearance; and (7) ORDERS RETRANSFER within ten (10) days of this date of State of Maryland v. Brink's, Inc., C.A. No. 79-133, to the District of Maryland, the district of original filing, subject to timely objection.

IT IS SO ORDERED, this 18th day of April, 1979.

End of Document

Caribe Trailers Systems, Inc. v. Puerto Rico Maritime Shipping Authority

United States District Court for the District of Columbia

April 19, 1979

Civ. A. No. 78-0435

Reporter

475 F. Supp. 711 *; 1979 U.S. Dist. LEXIS 12932 **; 1979-1 Trade Cas. (CCH) P62,576

Caribe Trailer Systems, Inc. and John R. Immer v. Puerto Rico Maritime Shipping Authority, et al.

Subsequent History: Affirmed by *Caribe Trailer Sys. v. P.R. Mar. Shipping Auth., 1980 U.S. App. LEXIS 21769 (D.C. Cir., July 3, 1980)*

Prior History: *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 1978 U.S. Dist. LEXIS 16725, 1978-2 Trade Cas. (CCH) P62133 (D.D.C., 1978)*

Core Terms

venue, immunity, anti trust law, transportation, exemption, state action, shipping, subsidiary, transaction of business, instrumentality, antitrust, vessels, ports, entities, antitrust liability, compulsion, acquiring, Sherman Act, facilities, displace, ocean, antitrust immunity, provisions, maritime, meetings, monopoly, courts, do business, acquisition, interstate

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Corporations

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN1[] **Clayton Act, Jurisdiction**

Venue over corporate defendants in antitrust actions may be established under the special antitrust venue provisions contained in the Clayton Act, *15 U.S.C.S. §§ 15*, *22*, or under the general federal venue provisions, *28 U.S.C.S. § 1391*.

Civil Procedure > Preliminary Considerations > Venue > Agents

Governments > State & Territorial Governments > Licenses

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN2[] Venue, Agents

The Clayton Act (Act), *15 U.S.C.S. §§ 15*, *22*, provides for venue in any district in which the defendant resides, is found, or has an agent. A corporation resides in a district only if it is incorporated or licensed to do business in the state in which the district lies, is actually doing business in that state, or has its principal place of business there. The Act permits venue in any district in which a corporation is an inhabitant, may be found, or transacts business. A corporation is said to be an inhabitant of the state of its incorporation. A corporation is found where it has presence and continuous local activities within the district.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Corporations

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN3[] Clayton Act, Jurisdiction

The Clayton Act, *15 U.S.C.S. §§ 15*, *22*, permits a corporation to be sued in any district in which it "transacts business." This standard was enacted to enlarge the jurisdiction of the federal courts with respect to venue by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted on the found present carrying-on-business sequence. "Transacting business" has a meaning independent of definitions which district courts have given the same phrase in construing other statutes. The test is whether the corporation is doing business in the district of any substantial character, even if its business is entirely interstate in character and is transacted by agents who do not reside within the district. Whether a defendant has transacted business is largely a factual question to be determined in each case. In making this determination, district courts look for tangible manifestations of doing business.

Business & Corporate Law > Foreign Corporations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Agents

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN4[] Business & Corporate Law, Foreign Corporations

When a parent and its subsidiary are joined as defendants in an antitrust action, venue over the parent may be based on the local activities of its subsidiary if the relationship between the parent and the subsidiary is such that the subsidiary may be considered the agent or the alter ego of the parent. When the subsidiary maintains a separate legal identity, its presence in the district will not be sufficient to bring the foreign parent corporation within the ambit of the Clayton Act, *15 U.S.C.S. §§ 15*, *22*. Mere ownership of stock in a subsidiary corporation transacting business in a district does not establish venue against the parent corporation. In order for the parent corporation to be amenable to suit, it must exercise a control relationship over its subsidiary. This concept of control is a method of determining whether the ownership of the subsidiary is a mere investment or is an alternative means of transacting business by the parent corporation.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN5[] Antitrust & Trade Law, Clayton Act

The essential element required before a district court can find that one corporate entity was transacting business through an alter ego is control over the conduct that allegedly violated the antitrust laws.

Admiralty & Maritime Law > ... > Jones Act > Procedural Matters > Venue

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Corporations

Admiralty & Maritime Law > ... > Jones Act > Procedural Matters > Choice of Law

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN6[] Procedural Matters, Venue

A method of establishing venue in antitrust actions is under *28 U.S.C.S. § 1391* of the general federal venue statutes. *28 U.S.C.S. § 1391(b)* is an important section for private antitrust plaintiffs because it allows them to establish venue in the judicial district in which the claim arose, a choice of venue not afforded under the venue provisions of the Clayton Act, *15 U.S.C.S. § 15*. In determining whether a particular jurisdiction is actually the district in which the claim arose, it is necessary to consider whether the parties had a significant relationship to the district. This depends upon the occurrence in the district of events such as sales, injury, conspiratorial meetings, or overt acts pursuant to such meetings. (These provisions are available absent contrary statutory restrictions.) In making this determination, a "weight of contacts" test should be used. This requirement can be satisfied if significant sales causing substantial injury to plaintiffs occurred in the district or if some other overt act took place that was a "significant and substantial" element of the offense.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

Real Property Law > Subdivisions > State Regulations

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

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

Municipalities, like other state instrumentalities, are not exempt from application of the antitrust laws simply by virtue of their status as governmental entities. The Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > Federal Government > US Congress

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN8[] **Scope, Exemptions**

There is a two-fold inquiry that must guide the district court in applying the Parker doctrine. The first consideration is whether the state, acting as sovereign, has required its agency or instrumentality to engage in the particular form of anticompetitive conduct. This is not to suggest that the Parker doctrine permits each state legislature to determine the extent to which a particular government agency under its control should be exempt from the antitrust laws. A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. 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.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

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

Governments > State & Territorial Governments > General Overview

HN9[] **Exemptions & Immunities, Parker State Action Doctrine**

In order for Parker to apply, it is not necessary for a state legislature to direct its instrumentality to perform a specific anticompetitive act. The threshold requirement for Parker immunity is satisfied if the legislature directs its instrumentality to engage in a particular type of activity. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN10[] **Antitrust & Trade Law, Sherman Act**

Sections 1 and *2* of the Sherman Act are applicable only to "trade or commerce among the several states." 15 U.S.C.S. § 1-2. *Section 3* of the Sherman Act applies to contracts, combinations, or conspiracies in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations. *15 U.S.C.S. § 3*.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

It is not enough that anticompetitive conduct is prompted by state action; rather, anticompetitive activities must be compelled by direction of the state acting as a sovereign.

Counsel: [1]** Elmer F. Bennett, Washington, D. C., for plaintiffs.

John T. Schell, Washington, D. C., for defendants PRMSA, PRPA, TTT, PRMMI and TKM.

Edward M. Shea, Washington, D. C., for defendants Reynolds, McLean, GPRL, and Sea-Land.

Gilbert E. Geldon, Washington, D. C., for defendant Sun Shipbuilding.

Richard S. Cornfeld, Washington, D. C., for defendants AUT and TOTEM.

Opinion by: GASCH

Opinion

[*713] MEMORANDUM

This is an action to recover treble damages for alleged violations of *sections 1*, *2*, and *3* of the Sherman Antitrust Act. [1.] The basis of the complaint is an alleged conspiracy by twelve private and governmental entities to create a monopoly in ocean transportation between the East Coast and Gulf ports of the United States and the ports of Puerto Rico. Presently before the Court are the motions of ten defendants to dismiss the complaint on grounds of improper venue and lack of personal jurisdiction, and the motions of nine defendants for summary judgment on the ground that their conduct is immunized from antitrust liability under the state action doctrine recognized in *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. For the reasons discussed below, the **[**2]** Court concludes that defendants' motions should be granted.

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1. *15 U.S.C. §§ 1-3 (1976)*.

FACTUAL BACKGROUND

Plaintiff Caribe Trailer Systems, Inc. ("Caribe") is a Puerto Rico corporation with its principal place of business in Washington, D. C. Plaintiff John R. Immer is the principal owner and chairman of the board of Caribe. Caribe was organized for the purpose of engaging in ocean transportation between East Coast and Gulf ports of the continental United States and the ports of Puerto Rico, but its activities never became operational. Plaintiffs contend that because of defendants' alleged antitrust violations, plaintiffs were unable to obtain financing to commence their operations and therefore were prevented from competing in the Puerto Rico trade. They seek a permanent injunction against defendants' activities as well as treble damages, costs, and attorneys fees.

Each defendant named in this lawsuit had some involvement in the creation or operation of the Puerto Rico Maritime Shipping Authority ("PRMSA"), **[**3]** a government agency organized by the Commonwealth of Puerto Rico in 1974 to operate Puerto Rico's maritime transportation system. Because of its small size, insular position, and limited natural resources, Puerto Rico has difficulty in maintaining a self-sufficient economy and is dependent on external trade for **[*714]** economic and social development. Ocean transportation carries more than ninety-eight percent of its external trade and as a result, ocean freight costs exert a potentially disruptive influence of all aspects of Puerto Rico's economy. Trade between East Coast and Gulf ports represents the major avenue of traffic between Puerto Rico and the mainland United States and accounts for approximately eighty-five percent of all dry cargo transported and over seventy percent of Puerto Rico's total external trade.

Because of the island's dependence on ocean transport, the Governor of Puerto Rico in 1973 established a commission to determine whether the Commonwealth should take steps to acquire the vessels then employed by commercial steamship companies in the Puerto Rico trade. This acquisition was intended to assure the availability of vessels and to maintain price stability **[**4]** with respect to transportation costs. Following negotiations with the three major carriers, the commission proposed legislation that would establish a nonstock public corporation to own or lease the vessels and equipment necessary to conduct the Mainland-Puerto Rico trade. On June 10, 1974, the Commonwealth legislature enacted this proposal as Act 62 and created the Puerto Rico Maritime Shipping Authority as a governmental instrumentality to operate Puerto Rico's maritime transportation system. [2.]

PRMSA, which is incorporated in Puerto Rico, consists of a governing board of seven members, all of whom are residents of Puerto Rico, appointed by the Governor with the advice and consent of the Puerto Rico Senate. Its operations are exempt from taxation and from all fees required for the prosecution of judicial proceedings. The Statement of Motives contained **[**5]** in Act 62 expresses the intent of the Puerto Rico legislature that PRMSA acquire and operate shipping lines and terminal facilities as a public service and, in doing so, that it not be subject to the antitrust laws or any other limitations that would hinder its legislative goal. [3.]

Following its organization, PRMSA acquired the rights to eleven ships and to various marine transportation facilities from the three major carriers that served the Puerto Rico trade: Seatrain, Inc., [4.] and defendants Sea-Land Service, Inc. ("Sea-Land"), and Transamerican Trailer Transport, Inc. ("TTT"). The acquisition of these assets occurred in the following manner. Defendant American Union Transport, Inc. ("AUT"), a 63.3% Shareholder in TTT, and defendant Sun Shipbuilding & Dry Dock Co. ("Sun Ship"), a 30% Shareholder, directly conveyed their interests in TTT to PRMSA. TTT has since become a dormant **[**6]** corporation because PRMSA operates its assets under PRMSA's own name and its officers and directors are the same as PRMSA's.

The vessels owned by Sea-Land were transferred through a similar transaction. Sea-Land and Gulf-Puerto Rico Lines ("GPRL") are both wholly owned subsidiaries of defendant McLean Industries, Inc. ("McLean"). McLean is a holding company which in turn is wholly owned by defendant R. J. Reynolds Industries ("Reynolds"). McLean and Reynolds conveyed their interests in Sea-Land to PRMSA.

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2. Act of Puerto Rico Maritime Shipping Authority, Act No. 62 (June 10, 1974), See Exh. A in Appendix to Puerto Rico Defendants' Motion to Dismiss the Complaint.

3. Id. See also Affidavit of Roberto Jugo D'Acosta in support of Puerto Rico Defendants' Motion to Dismiss the Complaint, at P 2.

4. Seatrain is not named as a defendant to this action.

Before these transfers were effected, the Commonwealth of Puerto Rico sought a business review letter from the Antitrust Division of the Department of Justice with respect to PRMSA and the proposed acquisition. [5.] **[**7]** Although the acquisition would give PRMSA control over ninety percent of then-existing ocean shipping services, the **[*715]** Antitrust Division granted favorable clearance on July 22, 1974. [6.]

PRMSA has an ongoing contractual relationship with defendant Puerto Rico Marine Management, Inc. ("PRMMI"), a Delaware corporation that provides operational direction for PRMSA's vessels and is responsible for manning, husbanding, docking, loading and unloading, and booking and soliciting cargo. PRMMI is paid a management fee for these services. PRMMI was organized in 1974 as a wholly owned subsidiary of McLean. On January 15, 1976, McLean entered into a stock purchase agreement with defendant TKM Corporation (TKM) under which TKM acquired all the stock of PRMMI. Defendant Trans Ocean Transportation Executive Management, Inc. ("TOTEM") also has managed cargo vessels on behalf of PRMSA.

The final defendant named in this action is the Puerto Rico Ports Authority ("PRPA"), an agency of the Puerto Rico government with broad responsibility for maritime matters. [7.] One of the major functions of the PRPA is to supervise the port of San Juan, the second largest containership port in the **[**8]** world, by assigning vessels to suitable berths, entering into terminal leases with steamship operators, and managing dock facilities. A director of PRPA headed the commission that recommended creation of PRMSA.

On March 13, 1978, plaintiffs instituted the present lawsuit, charging each of the twelve defendants with conspiracy, monopoly, and restraint of trade in violation of *sections 1*, *2*, and *3* of the Sherman Antitrust Act, *15 U.S.C. §§ 1-3*. Specifically, plaintiffs allege that defendants secretly discussed and determined that maritime transportation between Puerto Rico and the mainland should be operated as a monopoly and devised a plan **[**9]** for achieving this goal, which included formation of PRMSA. [8.]

Presently before the Court are motions to dismiss for improper venue and lack of personal jurisdiction filed by defendants, Reynolds, McLean, GPRL, PRMSA, PRPA, TTT, PRMMI, TKM, AUT, and TOTEM. All defendants with the exception of Reynolds, McLean, and GPRL have joined in a motion to dismiss, or in the alternative for summary judgment [9.] originally filed by PRMSA, PRPA, and TTT (the "Puerto Rico defendants"). The governmental entities seek dismissal on the ground that their actions were immune from liability for antitrust violations under the Parker doctrine. The private defendants have moved to dismiss on the ground that their actions were compelled by the Commonwealth of Puerto Rico and therefore also exempt from liability under Parker.

[10]** VENUE

Although this complaint alleges that the defendants have engaged in a "combination and conspiracy" in violation of the Sherman Act, plaintiffs must establish venue as to each defendant separately. 15 Wright, Miller & Cooper, Federal Practice & Procedure § 3818, at 116 (1969); See *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 262 (C.D.Pa.1968)*. In the present case, plaintiffs attempt to establish venue in the District of Columbia on the alternative grounds that defendants transacted business in this district and that the cause of action arose in this district.

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5. Motion of Defendant Sun Shipbuilding & Dry Dock Co. to Dismiss Complaint, Exh. B.

6. Id., Exh. C, Letter of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice.

7. PRPA was created by an act of the Puerto Rico Legislature on May 7, 1942. ***P.R.Laws Ann. tit. 23, §§ 331 Et seq.*** (1955). Its purpose, as set out in its enabling statute, is ". . . to develop and improve, own, operate, and manage any and all types of transportation facilities and air and marine services in, to, and from the Commonwealth of Puerto Rico . . .." Id. § 336.

8. See More Definite Statement of Paragraph 22 of Plaintiffs' Complaint.

9. Because the motions to dismiss are supported by affidavits and other exhibits, the Court will treat them as motions for summary judgment under *Fed.R.Civ.P. 56*.

HN1[] Venue over corporate defendants in antitrust actions may be established under the special antitrust venue provisions contained **[*716]** in sections 4 and 12 of the Clayton Act [10.] or under the general federal venue provisions. [11.] Each of the moving defendants claims that none of the bases for venue contained in these statutes are satisfied in the present case.

[11]** *HN2*[]

Section 4 provides for venue in any district in which the defendant resides, is found, or has an agent. A corporation resides in a district only if it is incorporated or licensed to do business in the state in which the district lies, is actually doing business in that state, or has its principal place of business there. 14 Von Kalinowski, Antitrust Laws and Trade Reg. § 104.04(4) (1978). The affidavits submitted by the moving defendants in support of their motions to dismiss establish that none of these defendants are incorporated or licensed to do business in the District of Columbia, nor do they directly conduct business or have their principal place of business here.

Section 12 permits venue in any district in which a corporation is an inhabitant, may be found, or transacts business. A corporation is said to be an inhabitant of the state of its incorporation. *Aro Mfg. Co. v. Automobile Body Research Corp., 352 F.2d 400, 404 (1st Cir. 1965)*, Cert. denied, *383 U.S. 947, 86 S. Ct. 1199, 16 L. Ed. 2d 210 (1966)*. A corporation is found where it has "presence and "continuous local activities' within the district." *Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., 338 F. Supp.* ***[**12]*** *812, 815 (E.D.Pa.1972)*. The moving defendants do not satisfy either of these requirements.

HN3[] Section 12 also permits a corporation to be sued in any district in which it "transacts business." This standard was enacted to enlarge the jurisdiction of the federal courts with respect to venue by substituting "practical, business conceptions for the previous hair-splitting legal technicalities encrusted on the "found' "present' "carrying-on-business' sequence . . .." *United States v. Scophony Corp., 333 U.S. 795, 808, 68 S. Ct. 855, 862, 92 L. Ed. 1091 (1948)*. "Transacting business" for the purpose of section 12 has a meaning independent of definitions which courts have given the same phrase in construing other statutes. The test is whether the corporation is doing business in the district of any substantial character, even if its business is entirely interstate in character and is transacted by agents who do not reside within the district. *Id. at 807, 68 S. Ct. 855*; *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 372-73, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*.

Whether a defendant has transacted business is largely a factual question to be determined in each case. In making **[**13]** this determination, courts look for tangible manifestations of doing business. [12.] **[**14]** Such manifestations are absent here. None of the moving parties has officers, employees, or agents within the district. [13.] None has offices or owns property here, nor do they maintain corporate records, telephones, telephone listings, or

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10. *15 U.S.C. §§ 15*, *22 (1976)*.

11. *28 U.S.C. § 1391 (1976)*.

12. E.g., *Brandt v. Renfield Importers, Ltd., 278 F.2d 904, 909-11 (8th Cir.)*, Cert. denied, ***364 U.S. 911, 81 S. Ct. 274, 5 L. Ed. 2d 226 (1960)*** (being subject to state regulation, licensing, or taxes constitutes doing business); *Frey & Son v. Cudahy Packing Co., 228 F. 209, 212-13 (D.Md.1915)* (maintaining tangible property within the state, such as real estate, inventory, bank accounts, or corporate records constitutes doing business); *Magnetic Eng'r & Mfg. Co. v. Dings Magnetic Separator Co., 86 F. Supp. 13, 16 (S.D.N.Y.1949)*, *Modified, 178 F.2d 866 (2d Cir. 1950)* (employing persons within the district constitutes doing business).

13. Plaintiffs argue that various defendants retained economic and marine consultants, attorneys, and law firms in Washington, who assisted in the creation of PRMSA. The Court concludes that these independent contractors were not employees or agents for venue purposes and contracting for legal and economic consultation services does not constitute "transacting business" in a jurisdiction. *Control Data Corp. v. Carolina Power & Light Co., 274 F. Supp. 336 (S.D.N.Y.1967)* (North Carolina corporation's engaging engineering and technical consultants in New York, negotiating with investment houses, and retaining legal counsel did not constitute "doing business").

bank accounts. Plaintiffs' complaint does not suggest any other **[*717]** activity of a similar nature that might bring defendants within the transacting business standard.

Some courts have held that a corporation may be found to be transacting business for venue purposes in the district in which coconspirators were found and where the conspiracy had its impact. [14.] In Giusti v. Pyrotechnic Industries, Inc., [15.] the United States Court of Appeals for the Ninth Circuit held that because all conspirators are agents for each other, the presence of one defendant in a district can subject his coconspirators to suit **[**15]** in that district as their agent. This theory, however, has been rejected by other courts [16.] and this Court concludes that its application here would be contrary to the principle that venue must be established for each defendant separately. See 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3818.

[16]** With respect to defendants Reynolds, McLean, and GPRL, plaintiffs do not contend that these entities directly transact business in this district but instead argue that venue is properly laid against them here because of their relationship with defendant Sea-Land. There is no dispute that venue exists in the District of Columbia for Sea-Land because it is licensed to do business here. Sea-Land and GPRL are wholly owned subsidiaries of McLean, a holding company, which in turn is wholly owned by Reynolds. Plaintiffs allege that the management and business operations of these four defendants are so commingled and integrated that venue laid against Sea-Land lies against the moving defendants. In support of this argument, plaintiffs have attempted to detail the various degrees of participation by Reynolds, Sea-Land, McLean, and GPRL in the sale of Sea-Land's assets to PRMSA. [17.]

[17]** ***HN4***[]

When a parent and its subsidiary are joined as defendants in an antitrust action, venue over the parent may be based on the local activities of its subsidiary "if the relationship between the parent and the subsidiary is such that the subsidiary may be considered the agent or the alter ego of the parent." Audio Warehouse Sales, Inc. v. U.S. Pioneer Electronics Corp., 1975-1 Trade Cas. P 60,213 (D.D.C.1975). Generally when the subsidiary maintains a separate legal identity, its presence in the district will not be sufficient to bring the foreign parent corporation within the ambit of section 12. *Phillip Gall & Son v. Garcia Corp., 340 F. Supp. 1255, 1259 (E.D.Ky.1972)*.

It is also generally accepted that mere ownership of stock in a subsidiary corporation transacting business in a district does not establish venue against the parent corporation. See, e.g., *O. S. C. Corp. v. Toshiba America, Inc., 491 F.2d 1064, 1066 (9th Cir. 1974)*. In order for the parent corporation to be amenable to suit, it must exercise a control relationship over its subsidiary. See *Tiger Trash v. Browning-Ferris Indus., Inc., 560 F.2d 818, 822 (7th Cir. 1977)*, Cert. denied, *434 U.S. 1034, 98 S. Ct. 768, 54 L.* ***[**18]*** *Ed. 2d 782 (1978)*. This concept of control is a method of determining whether the ownership of the subsidiary is a mere investment or is an alternative **[*718]** means of transacting business by the parent corporation. [18.]

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14. E.g., *Ross-Bart Port Theatre v. Eagle Lion Films, Inc., 140 F. Supp. 401, 402 (E.D.Va.1954)*; *DeGolia v. Twentieth Century-Fox Film Corp., 140 F. Supp. 316, 318 (N.D.Cal.1953)*; *Don George Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458, 462 (W.D.La.1951)*, Mod. on other grounds, *145 F. Supp. 523 (W.D.La.1956)*.

15. *156 F.2d 351, 354 (9th Cir.)*, Cert. denied, ***356 U.S. 936, 67 S. Ct. 355, 91 L. Ed. 675 (1958)***.

16. E.g., ***Bertha Bldg. Corp. v. National Theatres Corp., 248 F.2d 833, 836 (2d Cir. 1957)***, Cert. denied, ***356 U.S. 936, 78 S. Ct. 777, 2 L. Ed. 2d 811 (1958)***; *Redmond v. Atlantic Coast Football League, 359 F. Supp. 666, 672 (S.D.Ind.)*, Aff'd mem., ***478 F.2d 1405 (7th Cir. 1973)***; *Occidental Petroleum Corp. v. Buttes Gas & Oil Corp., 331 F. Supp. 92, 96-97 (C.D.Cal.1971)*, Aff'd per curiam, ***461 F.2d 1261 (9th Cir.)***, Cert. denied, ***409 U.S. 950, 93 S. Ct. 272, 34 L. Ed. 2d 221 (1972)***. See also *Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384, 74 S. Ct. 145, 98 L. Ed. 106 (1953)*.

17. See Plaintiffs' Opposition to Motion to Dismiss Complaint filed by R. J. Reynolds Indus., Inc., McLean Indus., Inc., and Gulf Puerto Rico Lines, Inc., at 4-7 and Exh. A-B.

18. See *Hitt v. Nissan Motor Co., 399 F. Supp. 838, 841 (S.D.Fla.1975)* (100% Ownership by parent, exchange of officers and employees, and common directors supported finding that parent controlled subsidiary for venue purposes).

Plaintiffs here have alleged that Reynolds, McLean, Sea-Land and GPRL represent an integrated and interlocked management scheme so that the three moving defendants were transacting business in this jurisdiction through their relationship with Sea-Land. Applying the principles discussed above to the facts of this case makes it clear that the transacting business requirement is not satisfied. ***HN5***[] The essential element required before a court can find that one corporate entity was transacting business through an alter ego is control over the conduct that allegedly violated **[**19]** the antitrust laws. *Call Carl, Inc. v. B. P. Oil Corp., 391 F. Supp. 367, 371 (D.Md.1975)*; See *Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 131 (S.D.N.Y.1975)*. With respect to GPRL, which along with Sea-Land is a cosubsidiary of McLean, there has been not even a suggestion of how GPRL could exercise the required control relationship.

Even though Sea-Land is a wholly owned subsidiary of McLean, which is owned by Reynolds, the separate identities of the subsidiaries are maintained and the evidence indicates that each carries on its activities without having daily business affairs controlled by the parent. See *In re Chicken Antitrust Litigation, 407 F. Supp. 1285 (N.D.Ga.1975)*. There has been no evidence that the parent exerted the required degree of control over its subsidiary or was involved directly in its operations and policy decisions. See Dobbins v. Kawasaki Motors Corp., 1974-1 Trade Cas. P 75,100 (D.Or.1974). Although there is some interlocking management between the three entities, [19.] the Court concludes that the control relationship is absent and venue over GPRL, McLean, and Reynolds cannot be predicated on the existence of venue in this jurisdiction over **[**20]** Sea-Land.

The final ***HN6***[] method of establishing venue in antitrust actions is under *section 1391* of the general federal venue statutes. *Section 1391(b)* is an important section for private antitrust plaintiffs because it allows them to establish venue in the judicial district in which the claim arose, a choice of venue not afforded under the venue provisions of the Clayton Act. [20.] In determining whether a particular jurisdiction is actually the district in which the claim arose, it is necessary to consider whether the parties had a significant relationship to the district. This depends **[**21]** upon the occurrence in the district of events such as "sales, injury, conspiratorial meetings, (or) overt acts pursuant to such meetings." *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F. Supp. 1053, 1056 (E.D.Pa.1969)*.

In making this determination, a "weight of contacts" test should be used. 14 Von Kalinowski, Antitrust Laws & Trade Reg. § 104.04(2) (1978). This requirement can be satisfied, for example, if significant sales causing substantial injury to plaintiffs occurred in the district or **[**22]** if some other overt act took place that was a "significant and substantial" element of the offense. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 261 (E.D.Pa.1968)*.

[*719] Plaintiffs attempt to satisfy the weight of contacts test by alleging that a number of conspiratorial meetings took place in the District of Columbia and that certain legal documents relating to the sale of assets to PRMSA were drafted here. [21.] Some courts have held that conspiratorial meetings may be sufficient to establish venue under *section 1391* as to each defendant who was present there. See *Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F.*

[19.] For example, Malcolm McLean, the president of McLean, also serves as Chairman of the Board of Sea-Land and as a member of the Board of Directors of Sea-Land. Stock ownership and interlocking directorates, however, have been found insufficient to establish venue under the transacting business standard when control over daily business activities is lacking. See *Hayashi v. Sunshine Garden Prod., Inc., 285 F. Supp. 632 (D.Wash.1967)*.

[20.] Although there has been some judicial uncertainty whether the general federal venue statute expands special venue provisions, it is now generally recognized that these provisions are available absent contrary statutory restrictions. See *Pure Oil Co. v. Suarez, 384 U.S. 202, 207, 86 S. Ct. 1394, 16 L. Ed. 2d 474 (1966)* (Jones Act venue provision expanded by later general venue statute *28 U.S.C. § 1391* so that corporation may also be sued in district where it does business).

[21.] See affidavit of John R. Immer, Exh. C to Plaintiffs' Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment. Plaintiffs also describe meetings and other contacts between various defendants and the Federal Maritime Commission but such governmental contacts by federally regulated industries do not constitute "transacting business" in the *District of Columbia. Fandel v. Arabian American Oil Co., 120 U.S.App.D.C. 193, 345 F.2d 87 (1965)*.

Supp. 139 (N.D.Ill.1977). Before such a rule can be applied, however, it is necessary to find that such meetings took place, that they involved a violation or an attempted violation of the antitrust laws, and that each of the moving defendants participated in them. *ABC Great States, Inc. v. Globe Ticket Co., 310 F. Supp. 739, 743 (N.D.Ill.1970)*.

[23]** Such findings cannot be made here. Although some defendants met with counsel in this jurisdiction and had other contacts here, the Court concludes that such meetings, even if viewed in the light most favorable to plaintiffs, did not represent a violation or attempted violation of the antitrust laws. To the extent that such meetings sought to achieve the passage of Act 62, they were exempted from antitrust liability under the Noerr-Pennington doctrine. [22.] To the extent they were related to the sale of assets to PRMSA, the state action exemption discussed below would preclude liability.

As a final argument, plaintiffs urge that their claim arose within the meaning of *section 1391* because they suffered financial injury in this jurisdiction. At least one court has rejected the weight **[**24]** of the contacts test and held that venue can be established under *section 1391* in the judicial district in which the injured plaintiff operated. *Iranian Shipping Lines, S. A. v. Moraites, 377 F. Supp. 644 (S.D.N.Y.1974)*; *Albert Levine Assoc. v. Bertoni & Cotti, S.P.A., 314 F. Supp. 169 (S.D.N.Y.1970)*.

To hold that a cause of action necessarily arose in the district in which the plaintiff was injured is a "simplistic rationale to which antitrust actions are not susceptible." *Redmond v. Atlantic Coast Football League, 359 F. Supp. 666, 669 (S.D.Ind.)*, Aff'd mem., *478 F.2d 1405 (7th Cir. 1973)*. The Court agrees with this conclusion and holds that plaintiff's allegations of injury in this district will not support a finding of venue here. To hold otherwise would be tantamount to extending venue under *section 1391* to any district in which the plaintiff resides, a result clearly not contemplated by the rules. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 260 (E.D.Pa.1968)*.

After careful review of the facts of this case, the Court concludes that, despite their vigorous efforts, plaintiffs have failed to establish that venue exists in this **[**25]** jurisdiction over defendants Reynolds, McLean, and GPRL. Although venue is also probably deficient with respect to the other moving defendants, in the interests of judicial economy and achieving a resolution on the merits, the Court will not address these motions but will instead consider the alternative motions for summary judgment based on the state action exemption to the antitrust laws.

STATE ACTION EXEMPTION

The governmental and remaining private defendants have moved for summary judgment [23.] on the ground that the conduct at **[*720]** issue in this lawsuit is immune from liability under the state action exemption to the antitrust laws. Because the immunity of private parties derives from a determination that the conduct of the state entities is so immunized, it is first necessary to consider the applicability of the state action exemption to Puerto Rico defendants.

[26]** The principle that state action is beyond the scope of federal antitrust laws stems from the decision of the *Supreme Court in Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In Parker the Court rejected a producer's claim that a state agricultural marketing program established pursuant to statute violated the Sherman Act. Noting that the state had adopted the program to restrict competition and maintain prices, the Court held that Congress intended the Sherman Act to restrain private anticompetitive conduct and not actions taken by a state or its agencies in furtherance of a legislative mandate. There is no dispute that Puerto Rico is a state for purposes of applying the Parker doctrine. *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F. Supp. 1153, 1229 (D.Hawaii 1972)*, Mod. on other grounds, *518 F.2d 913 (9th Cir. 1975)*.

[22.] *Eastern R. R. Presidents Conference v. Noerr Motor Freight, 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)*; See page 725 infra.

[23.] Defendant Sea-Land has moved for partial summary judgment on any issues of antitrust liability arising out of its sale of certain operational assets to PRMSA.

Defendants argue that the actions of a state instrumentality mandated by clear legislative authority are immune from antitrust liability under Parker. [24.] They note that in this case the Puerto Rico legislature specifically mandated its instrumentality, PRMSA, to take over and operate the shipping trade between the East Coast **[**27]** and Gulf ports of the United States and Puerto Rico. PRMSA carried out the mandate by acquiring and operating ships in this trade, and defendants argue that as a result, the PRMSA acquisition and operation of the steamships are immune from antitrust liability.

A. State Instrumentalities.

After a long period of silence, the Supreme Court in recent years has given renewed attention to the scope of the Parker doctrine **[**28]** [25.] **[**29]** and its decisions have been the subject of extensive legal commentary. [26.] The most recent case involving the doctrine is *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*, in which the Court held municipalities could not invoke the Parker doctrine in a suit for antitrust violations allegedly committed by them in connection with ownership of public utilities.

In refusing to find antitrust immunity, a plurality of the Court held that ***HN7***[] municipalities, like other state instrumentalities, are not exempt from application of the antitrust laws simply by virtue of their status as governmental entities. *Id. at 413, 98 S. Ct. 1123, 1137*. The plurality stated: "We therefore conclude that the Parker doctrine **[*721]** exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." Id. [27.]

[30]** City of Lafayette thus establishes ***HN8***[] a two-fold inquiry that must guide the Court in applying the Parker doctrine. The first consideration is whether the state, acting as sovereign, has required its agency or instrumentality to engage in the particular form of anticompetitive conduct. This is not to suggest that the Parker doctrine permits each state legislature to determine the extent to which a particular government agency under its control should be exempt from the antitrust laws. As the Court in Parker indicated, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *317 U.S. at 351, 63 S. Ct. at 314*. The decision did recognize, however, the overriding policy of federalism, namely, that "(i)n a dual system of government in which, under the Constitution, the states are sovereign, save only as

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[24.] The terms "state action exemption" and "antitrust immunity" are frequently used to refer to the Parker doctrine, but these terms are less than accurate in view of the Supreme Court's statement that "(t)he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action." *317 U.S. at 351, 63 S. Ct. at 313*, See *Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 587 n.5 (7th Cir. 1977)* (Sherman Act was not intended to apply to state-mandated activities but courts nonetheless utilize single-word shorthand references of "exemption" or "immunity").

[25.] See *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*; *Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*; *Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*; *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*. Prior to these decisions there had been a 32-year period in which the Supreme Court consistently declined to review cases involving the Parker doctrine. See, e.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.)*, Cert. denied, *400 U.S. 850, 91 S. Ct. 54, 27 L. Ed. 2d 88 (1970)*; *E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.)*, Cert. denied, *385 U.S. 947, 87 S. Ct. 320, 17 L. Ed. 2d 226 (1966)*.

[26.] E.g., Handler, The Current Attack on the Parker v. Brown State Action Doctrine, 76 Colum.L.Rev. 1 (1976); Kennedy, Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Doctrine under the Antitrust Laws, 74 Nw.U.L.Rev. 31 (1979); Verkuil, State Action Doctrine, Due Process and Antitrust: Reflections on Parker v. Brown, 75 Colum.L.Rev. 328 (1975); Note, Anti-Trust Law and Municipal Corporations, 65 Geo.L.J. 1547 (1977).

[27.] Chief Justice Burger, who provided the fifth vote for affirmance of the Fifth Circuit's decision in City of Lafayette, did not join in this portion of the opinion but his concurrence indicates that he regarded the plurality's approach as the minimum to be required of a state instrumentality, which he felt should demonstrate that it is acting in a proprietary capacity before it is allowed the protection of *Parker. 435 U.S. at 418, 98 S. Ct. 1123* (Burger, C. J., concurring); See *Star Lines Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F. Supp. 157, 165 (S.D.N.Y.1978)*.

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.

HN9[] In order for Parker to apply, it is not necessary for a state legislature to direct its instrumentality to **[**31]** perform a specific anticompetitive act. The threshold requirement for Parker immunity is satisfied if the legislature directs its instrumentality to engage in a particular type of activity. As the plurality opinion in City of Lafayette stated:

> While a subordinate governmental unit's claim to Parker Immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

435 U.S. at 415, 98 S. Ct. at 1138.

In this case, there is no dispute that PRPA and PRMSA are agencies of the Commonwealth of Puerto Rico. [28.] The Statement of Motives of Act 62, which established PRMSA, contains a clear expression of legislative intent:

[32]**

> The Legislature of Puerto Rico intends that this instrumentality acquires and operates shipping lines and terminal facilities as a public service, and that in doing so, it shall not be subject to the antitrust laws nor any other limitation that could hinder the effective discharge of the endeavor that this act has imposed on the public instrumentality hereby established.

In addition, section 25 of the Act repeats the intention of the legislature that PRMSA, in carrying out its mandate to provide efficient, reliable, and economic maritime services, not be subject to antitrust laws:

> Conflicting Laws Inapplicable. Insofar as the provisions of this act are in conflict with the provisions of any other law, or parts thereof, the provisions of this act shall prevail. Specifically, and without otherwise limiting the generality of the foregoing, it is intended by this act that the Antitrust Laws shall not be applicable to any action of the Authority taken pursuant to the provisions hereof.

A recent case construed this statute under the criteria set out by the Supreme Court in City of Lafayette. In *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority,* ***[*722]*** ***[**33]*** *451 F. Supp. 157 (S.D.N.Y.1978)*, a Liberian corporation sued PRMSA for alleged antitrust violations arising from the short-term lease of a PRMSA vessel not needed in the Puerto Rico trade to plaintiff's competitor in the Persian Gulf. In denying PRMSA's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the district court held that the transaction in question leasing a ship to others to operate in foreign trade unrelated to Puerto Rico was not performed pursuant to any governmental policy to displace competitive market forces in the area. *Id. at 166*. It found that "the connection between the legislative grant of power to PRMSA and its use of that power under the facts of this case is simply "too tenuous to permit the conclusion that the entity's intended scope of activity included such conduct.' " *Id. at 167* (Quoting *City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)*, *Aff'd 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978))*.

The Court noted, however, that if the challenged conduct were such that it could reasonably have been contemplated by the legislature as necessary to ensure complete and reliable carrier **[**34]** service or proper maintenance of port facilities, it could withstand attack under the antitrust laws. It stated:

> Certainly if the conduct being challenged here were that PRMSA had reduced competition in the Puerto Rican-East Coast trade by acquiring a majority of those vessels suitable for engaging in that trade, or that PRMSA had contracted with a single private company to control Puerto Rico's port facilities, PRMSA's claim to antitrust immunity would be on much stronger ground.

Id. (footnotes omitted).

[28.] See ***P.R. Laws Ann., tit. 23, § 333(b)*** (1955); Act, Supra note 2, § 4.

Plaintiffs do not deny that the Puerto Rico legislature not only intended, but in fact authorized and mandated, state control of all shipping lines operating between Puerto Rico and the Eastern and Gulf ports of the United States. Neither do they dispute that the legislature intended to immunize the acquisition and operation of the shipping lines from federal antitrust laws. [29.] Instead they urge that the Parker doctrine is inapplicable to this situation because the immunized state conduct consisted of acts outside the territory over which the state had legislative jurisdiction.

[35]** In support of this argument, plaintiffs rely on one of the few cases to raise this issue, *Ladue Local Lines, Inc. v. Bi-State Development Agency, 433 F.2d 131 (8th Cir. 1970)*. Ladue involved a political entity created by the legislatures of Illinois and Missouri to acquire and operate a public transit system in eastern Missouri and western Illinois. Plaintiff, a private company that engaged in bus transportation in the same area, brought an antitrust action alleging that defendant's monopolistic control of the public transportation market had destroyed its business by precluding it from bidding on and servicing schools and school systems. *Id. at 132*.

Affirming the district court's dismissal of the action, the court of appeals held that when a political body created by the legislatures of Illinois and Missouri was acting under Congressionally-approved authorization [30.] to operate bus transportation facilities and that authorization was granted pursuant to a legislative policy that public interest would best be served by a unified public transportation system, the activity was not subject to the antitrust laws even though a monopoly was created. *Id. at 137*. Plaintiffs urge that in **[**36]** the absence of such interstate agreement, any unilateral attempt by one sovereign to displace competition **[*723]** in another jurisdiction will not survive scrutiny under federal antitrust laws and seek to apply this argument to the situation here.

To the extent that plaintiff's argument suggests that a state's immunity under the antitrust laws is limited to its own territory, it ignores a central truth of the Parker doctrine. A necessary element of any violation of the federal antitrust laws is an effect on interstate commerce. [31.] As commentators have noted, in **[**37]** a unitary economic system such as ours, jurisdiction under the Sherman Act should be presumed on the ground that every restraint "has the inherent tendency to affect interstate resource allocation and the interstate movement of goods and services in our national economy." [32.]

The exemption created in Parker v. Brown for state **[**38]** action must be coextensive with the scope of the Sherman Act, and thus is applicable to the interstate effects of a particular form of state action. Parker v. Brown itself supports this analysis, for that case involved action by the State of California to raise and stabilize the price of raisins, ninety-five percent of which were sold outside the state. *317 U.S. at 345, 63 S. Ct. 307*. Plaintiffs' "extraterritoriality" argument is in direct conflict with the fundamental message of Parker that the entire Sherman Act, including its extraterritorial coverage, was never intended to restrain state action undertaken pursuant to a proper legislative mandate to displace competition.

In summary, the most recent judicial interpretations of the state action doctrine require that the anticompetitive conduct engaged in by a state instrumentality be undertaken pursuant to a governmental policy to displace competition with regulation or monopoly public service. Here the Puerto Rico legislature, in an attempt to ensure

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29. See Plaintiffs' Opposition to the Motion to Dismiss the Complaint by the Puerto Rican Defendants, at 2.

30. Bi-State was organized pursuant to a compact entered into by the states of Illinois and Missouri. The consent of Congress to such compacts is required by *Article I, Section 10, Clause 3 of the Constitution*, which states in part: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." The Bi-State compact was approved by the Act of August 31, 1950, Pub.L.No.81-743, 64 Stat. 568.

31. ***HN10***[] *Sections 1* and *2* of the Sherman Act are applicable only to "trade or commerce among the several States." *15 U.S.C. §§ 1*, *2*. *Section 3* of the Sherman Act applies to contracts, combinations, or conspiracies "in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations . . . ." *15 U.S.C. § 3*.

32. P. Areeda and D. Turner, 1 ***Antitrust Law*** P 232a, at 229-30 (1978).

adequate carrier and passenger service between Puerto Rico and the mainland, specifically mandated its instrumentality PRMSA to take over and operate the shipping trade. PRMSA carried **[**39]** out that mandate by acquiring and operating the steamships in such trade. This conduct, which is the subject of plaintiffs' complaint, is immune from antitrust liability under the state action doctrine.

PRPA acted under a similar legislative mandate to operate the transportation facilities of Puerto Rico and to establish rules and regulations for their use. This conduct was also undertaken in the exercise of a valid governmental function and is similarly immune from antitrust liability. See *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52, 55 (1st Cir.)*, Cert. denied, *385 U.S. 947, 87 S. Ct. 320, 17 L. Ed. 2d 226 (1966)*.

B. Private Defendants.

The issue of the antitrust immunity of private parties did not arise in Parker because that case involved an equity suit against state officials. *317 U.S. at 344, 63 S. Ct. 307*. Although there has been some judicial uncertainty regarding the reach of the Parker doctrine, it seems clear that a majority of the present Supreme Court believes that Parker is equally applicable to suits against private parties whose actions are compelled or regulated by the state. [33.] The correctness of this interpretation becomes apparent **[**40]** by considering the facts of the original Parker case. In that instance, **[*724]** if the federal government or a private litigant could have enforced the antitrust laws against the raisin producers, effectuation of state policy would have been thwarted just as if the state action immunity were never granted. P. Areeda & D. Turner, 1 ***Antitrust Law***, P 212b, at 69 (1978); See Trans-World Assoc. v. Denver, 1974-2 Trade Cas. P 75,293 (D.Colo.1975).

In the present action the nongovernmental defendants maintain that their conduct is immune from antitrust liability because of the state action immunity applicable to PRMSA. The Court agrees with this interpretation, for it would be anomalous to hold that PRMSA, the state-sanctioned **[**41]** mechanism for acquiring control of the island's ocean transportation, was immune as the buyer of the assets of certain carriers and simultaneously to withhold such immunity from the selling carriers. Similarly defendants PRMMI, TKM, and TOTEM, whose involvement in this lawsuit arises from their operation and management of cargo vessels on behalf of PRMSA, cannot be held liable under the antitrust laws if PRMSA's conduct in operating the ships was immunized.

A similar conclusion regarding the immunity of private parties engaged in business enterprises with state instrumentalities has been reached by other courts. In Trans-World Assoc., Inc. v. Denver, supra, plaintiff sought to operate a rent-a-car concession at the city airport, but its application was denied on the ground that it was city policy to permit only five concessionaires to operate at any one time. The city and the existing concessionaires were named as defendants in an action alleging conspiracy and attempt to monopolize the airport car rental business. The Court dismissed the causes of action involving the city of Denver on the basis of the state action exemption and further held that "since the city is privileged to **[**42]** enter into negotiations and agreements, which might otherwise violate the Sherman Act, those with whom the cities contract are similarly entitled to anti-trust immunity." Id. at 97,900. [34.]

Plaintiffs also appear to suggest that the actions of the private defendants in lobbying and advising the Puerto Rico government and legislature regarding the desirability and organization of a state shipping authority precludes any claim that their actions were compelled and that, in the absence of such compulsion, defendants cannot claim

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[33.] *Cantor v. Detroit Edison Co., 428 U.S. 579, 603, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)* (Burger, C. J., concurring in part); *Id. at 605, 613 n.5, 97 S. Ct. 2691* (Blackmun, J., concurring in judgment); *Id. at 614-15, 97 S. Ct. 2691* (Stewart, Powell and Rehnquist, JJ., dissenting).

[34.] See also *Padgett v. Louisville & Jefferson City Air Bd., 492 F.2d 1258 (6th Cir. 1974)* (per curiam); *Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973)*; *E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.)*, Cert. denied, ***385 U.S. 947, 87 S. Ct. 320, 17 L. Ed. 2d 226 (1966)***; *Metro Cable Co. v. CATV of Rockford, 375 F. Supp. 350 (N.D.Ill.1974)*.

immunity under Parker. Two recent Supreme Court cases have raised the possibility that a **[**43]** private party's right to antitrust immunity may depend upon whether the challenged actions were compelled by a state. In Goldfarb v. Virginia State Bar, the Court refused to extend antitrust immunity to Bar Association minimum fee schedules and offered as one of its reasons: ***HN11***[] "It is not enough that . . . anticompetitive conduct is "prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *421 U.S. 773, 791, 95 S. Ct. 2004, 2015, 44 L. Ed. 2d 572 (1975)*. Similar sentiments were expressed in *Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*. A program for providing light bulbs was originally proposed by the utility but was made mandatory by the state utility commission. Concluding that the option to have the program was the utility's and was not imposed by the commission, the Court determined that the defendant "exercised sufficient freedom of choice" for the Court to find that compulsion was absent. *Id. at 593, 96 S. Ct. 3110*.

The role that compulsion should play in determining antitrust immunity is left unclear by these cases, which involve different forms of state action than **[**44]** the ones presented here. In Goldfarb and Cantor the Court recognized that neither adequate supervision nor state intent to displace antitrust **[*725]** enforcement could be demonstrated. It has been suggested that the presence or absence of compulsion is important because it provides evidence of state intent. [35.] Compulsion establishes that the state intends to displace the antitrust laws for otherwise the compulsion would be without purpose and effect. Similarly lack of compulsion suggests that intent to provide immunity does not exist. In this case there is clear independent evidence in Act 62 itself that antitrust immunity is intended. It is therefore unnecessary to look to the presence or absence of compulsion as evidence of intent.

Earlier Supreme Court decisions also establish that a court cannot require the absence of initiative or lobbying by a defendant before granting him immunity. The Parker case itself is proof to the contrary, for there, **[**45]** raisin producers initiated the procedure leading to state restrictions. Their representatives formulated the plan reviewed and approved by the California legislature and the plan took effect only upon a favorable referendum among raisin producers.

Plaintiffs' argument that compulsion is required is also refuted by the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, in which the Court held that, regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws. This decision is based on two principles. The first is that a contrary holding would impede the communication between citizens and their lawmakers, without which a representative democracy could not function. The second element is the threat to the constitutionally protected right of petition that would result from a contrary construction. *Id. at 137-38, 31 S. Ct. 523*. [36.] Thus the actions of some private defendants in lobbying the Puerto Rico government prior to the formation **[**46]** of PRMSA does not preclude their claim to exemption from antitrust liability under the state action exemption.

[47]** PRMSA and PRPA have established that they are governmental agencies acting pursuant to a legislative mandate to displace competition with a public monopoly. As such, their actions in acquiring vessels and operating them in the United States-Puerto Rico trade, which form the basis of this complaint, are exempt from antitrust liability under the Parker doctrine. The conduct of the private defendants in selling vessels to PRMSA or in

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[35.] P. Areeda & D. Turner, Supra note 32, P 215b, at 96.

[36.] See also *United Mine Workers v. Pennington, 381 U.S. 657, 669-72, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. Pennington held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying the Secretary of Labor for legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying the TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack. Cases subsequent to Pennington have emphasized that any contrary construction would pose a serious threat to *first amendment* freedoms. See *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-08, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 516, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* (Stewart, J., concurring in judgment).

operating them on behalf of PRMSA is similarly immunized. Accordingly, the moving parties' motions for summary judgment are granted and this action is dismissed.

United States v. Foley

United States Court of Appeals for the Fourth Circuit

October 5, 1978, Argued ; April 19, 1979, Decided

Nos. 78-5013 to 78-5019

Reporter
598 F.2d 1323 *; 1979 U.S. App. LEXIS 15304 **; 1979-1 Trade Cas. (CCH) P62,577

United States of America, Appellee, versus John P. Foley, Jr., and Jack Foley Realty, Inc., Appellants; United States of America, Appellee, versus Bogley, Inc., Appellant; United States of America, Appellee, versus Colquitt-Carruthers, Inc., and John T. Carruthers, Jr., Appellants; United States of America, Appellee, versus Robert L. Gruen, Inc., Appellant; United States of America, Appellee, versus Schick & Pepe Realty, Inc., Appellant; United States of America, Appellee, versus Shannon & Luchs Co., Appellant; United States of America, Appellee, versus Robert W. Lebling, Appellant

Prior History: **[**1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

Core Terms

percent, listings, conspiracy, interstate commerce, dinner, brokers, interstate, charts, realtors, reasonable doubt, vice president, out-of-state, complain, brokerage, houses, sellers, participated, commerce, lawyers, felony, cases, multiple listing service, character evidence, protective order, sufficient nexus, commission rate, specific intent, integral part, higher rate, real estate

LexisNexis® Headnotes

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

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **US Department of Justice Actions, Criminal Actions**

A court reviewing convictions under *15 U.S.C.S. § 1* is to determine whether, within applicable principles of law, the evidence was sufficient, when viewed in the light most favorable to the Government, to support the jury's finding that defendants' activities were proven to be sufficiently related to interstate commerce to support convictions under the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

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

HN2[] **Sherman Act, Defenses**

A sufficient relationship to interstate commerce is both a critical jurisdictional fact and an element of the substantive offense charged under the Sherman Act, *15 U.S.C.S. § 1*. Facts sufficient for the one are sufficient for the other, and vice versa. Existence of the jurisdictional fact may be attacked independently, or in conjunction with the defense on the merits.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Real Property Law > Encumbrances > Adjoining Landowners > Oil & Gas

Transportation Law > Interstate Commerce > Federal Powers

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

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

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

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

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

HN3[] **Interstate Commerce, Prohibition of Commerce**

Jurisdictional reach of the Sherman Act, *15 U.S.C.S. § 1* is coterminous with Congress' power to regulate interstate commerce. Where conspiracy is charged, it must be shown that it has a sufficient nexus with interstate commerce, but this does not require proof that each charged defendant's activities had the requisite effect. The existence of a sufficient nexus is to be determined on a practical rather than theoretical basis. This means that the determination involves not only raw fact finding but evaluation of the facts by the trier of fact. Accordingly, the results in particular cases are likely to turn on their peculiar facts rather than on legal standards generally applicable to particular categories of business, professional, or trade activities.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

There are two general lines of inquiry in analyzing the requisite nexus with interstate commerce. One inquires whether activities alleged to be under illegal restraint lie directly in the flow of interstate commerce; the other, whether though intrastate in nature, they nevertheless have so great an impact on interstate commerce that they substantially affect it. These are not bright line, mutually exclusive tests. Particular activities may fall within both patterns. Activities directly in flow of interstate commerce need have but minimal impact upon commerce to affect it, since by definition they are a very part of the stream. Activities not in flow of interstate commerce, i.e., intrastate in basic nature, may only be found to affect interstate commerce if their impact upon it is substantial. Under either test, impact must be upon an identifiable stream of commerce, and not simply upon particular business that may be engaged in interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

A test of interstate commerce relationship simply is whether as a matter of law or practical necessity the services were an integral part of an interstate transaction.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN6[] **US Department of Justice Actions, Criminal Actions**

Proof of a conspiracy under the Sherman Act, *15 U.S.C.S. § 1* need not be direct. Acceptance by competitors of an invitation to participate in a plan, the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act, where each competitor knew that cooperation was essential to successful operation of the plan. While such evidence does not compel a finding of conspiracy, it does permit such a finding.

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

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

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

HN7[] **US Department of Justice Actions, Criminal Actions**

The agreement itself, not its performance, is the crime of conspiracy.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN8[] Criminal Actions, Sherman Act

A criminal conspiracy prosecution under the Sherman Act, *15 U.S.C.S. § 1* must include proof that the defendants acted with knowledge that their conduct would affect prices.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

HN9[] Fundamental Rights, Procedural Due Process

In the area of commercial regulation due process does not require more at the outside than that a defendant shall have acted with knowledge of the anticipated consequences of his action.

Criminal Law & Procedure > Defenses > General Overview

Evidence > Admissibility > Character Evidence

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Reasonable Doubt

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Theory of Defense

HN10[] Criminal Law & Procedure, Defenses

In a proper case where a defendant who puts on substantial evidence of good character, the circuit courts have split on whether the defendant is entitled to an instruction that such evidence alone may create reasonable doubt. Two circuits hold that the word "alone" must be included. The United States Court of Appeals for the Tenth Circuit holds that "alone" must be included if good character is the only defense raised and perhaps in other circumstances, but does not require it in all cases. The other circuits do not require that the word be included in the charge, at least where good character is not the only defense. The United States Court of Appeals for the Fourth Circuit holds that the word "alone" need not be included in a charge.

Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN11[] Search & Seizure, Fruit of the Poisonous Tree

The government is not precluded from introducing improperly obtained evidence so long as it did not participate in the impropriety.

Evidence > Types of Evidence > Documentary Evidence > Summaries

Evidence > Types of Evidence > Documentary Evidence > General Overview

HN12[] Documentary Evidence, Summaries

See *Fed. R. Evid. 1006*.

Evidence > Types of Evidence > Demonstrative Evidence > Computer-Generated Evidence

Evidence > Types of Evidence > Documentary Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN13[] **Demonstrative Evidence, Computer-Generated Evidence**

Computer printouts qualify as duplicates of diskettes within the meaning of *Fed. R. Evid. 1006*. *Fed. R. Evid. 1001(4)*.

Evidence > Relevance > Relevant Evidence

Evidence > General Overview

HN14[] **Relevance, Relevant Evidence**

The decision to strike testimony on grounds of lack of relevance is committed to the district judge.

Counsel: Richard A. Hibey, Washington, D. C. (Robert J. McManus, Surrey, Karaski & Morse, Washington, D. C., William W. Cahill, Jr., Weinberg & Green, Baltimore, Md., on brief), for appellants Colquitt-Carruthers, Inc. and John T. Carruthers, Jr.

James P. Mercurio, Washington, D. C. (Salvatore A. Romano, Lewis E. Leibowitz, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D. C., on brief), for appellant Shannon & Luchs Co.

John Henry Lewin, Jr., Baltimore, Md. (James K. Archibald, Venable, Baetjer & Howard, Baltimore, Md., on brief), for appellants Jack Foley Realty, Inc. and John P. Foley, Jr.

Raymond W. Bergan, Washington, D. C. (Robert P. Watkins, Williams & Connolly, Washington, D. C., E. Austin Carlin, Murphy & Carlin, Bethesda, Md., on brief), for appellants Bogley, Inc. and Robert W. Lebling.

William O. Bittman, Washington, D. C. (George R. Clark, Pierson, Ball & Dowd, Washington, D. C., on brief), for appellant Robert L. Gruen, Inc.

Charles N. Shaffer, Peter I. J. Davis, Shaffer & Davis, Rockville, Md., on brief, for appellant Schick & Pepe **[**2]** Realty, Inc.; Catherine G. O'Sullivan, Dept. of Justice, Washington, D. C. (John H. Schenefield, Asst. Atty. Gen., Robert B. Nicholson, Charles S. Stark, Gary L. Halling, Dept. of Justice, Washington, D. C., on brief), for United States of America.

Judges: Before WINTER, Circuit Judge, COWEN *, Senior Judge and PHILLIPS, Circuit Judge.

Opinion by: PHILLIPS

Opinion

* Honorable Wilson Cowen, Senior Judge, United States Court of Claims, sitting by designation.

[*1326] Six corporate and three individual defendants appeal their felony convictions for conspiracy to fix real estate commissions in Montgomery County, Maryland in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. Finding no error, we affirm.

[*1327] During the critical period in question all the defendants were realtors engaged as competitors in the business of "reselling" houses. When a person desired to sell his house in Montgomery County he listed it with a realtor, provided he did not decide to attempt to sell it directly. The listing provided that when the house was sold a fixed percentage of the sales price would be paid as a commission to the realtor. This commission was divided **[**3]** among the firms involved in the sale, a portion going to the firm that obtained the listing, another portion to the firm that produced the buyer. To facilitate the operation of this shared commission arrangement, each of the defendants belonged to the Montgomery County Board of Realtors, a trade association that operated a multiple listing service. In the case of almost all houses listed with a member realtor, the member sent a card to the listing service containing a picture of the house and certain pertinent information, including the commission. Thus all member realtors had available a fairly comprehensive list of houses on the market in the county.

During the summer of 1974, and for some time before, the prevailing commission rate in Montgomery County was six percent of the sales price. A few houses were listed at seven percent, but additional services were apparently provided for the higher rate. At this time the real estate brokerage business in the county was in difficult straits. While the number of houses listed with brokers for resale had continued to rise as it had for several previous years, the number of sales had fallen, mortgage funds were in short supply and increasing **[**4]** costs of stationery, telephone service, advertising and gasoline had reduced the profit margin.

On September 5, 1974, defendant John Foley, the president of defendant Jack Foley Realty, Inc., hosted a dinner party at the Congressional Country Club in Bethesda, Maryland. The guests were nine of the leading realtors in Montgomery County, including each of the three individual defendants and one representative of each of the corporate defendants in this appeal. [1] Following the meal, Foley arose and, after making some other remarks, announced that his firm was raising its commission rate from six percent to seven percent. A discussion about the rate change ensued. Within the following months each of the corporate defendants substantially adopted a seven percent commission rate.

[5]** A United States grand jury for the district of Maryland indicted the nine defendants on April 1, 1977. Following a number of preliminary motions, the only one of which is of interest to this appeal being the denial of a motion to dismiss for lack of subject matter jurisdiction, a nine day jury trial was held in September 1977 before Judge Stanley Blair. All defendants were found guilty and this appeal ensued.

Several issues are presented by the appeals. Part I of the opinion addresses the contention that the district court lacked subject matter jurisdiction because of an insufficient nexus between defendants' conduct and interstate commerce. Part II evaluates the sufficiency of the evidence that a conspiracy was formed and that each defendant participated in it. Part III deals with several objections to the jury instructions. Finally, Part IV discusses a number of evidentiary issues. Additional facts will be developed as pertinent to the several issues.

I. INTERSTATE COMMERCE

The defendants contend that their activities were not proven to be sufficiently related to interstate commerce to support their convictions under *15 U.S.C. § 1*. **[**6]** ***HN1***[] Our review is to determine whether, within applicable principles of law, the evidence was sufficient, when viewed in the light most favorable to the *Government, United*

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[1] Defendant Colquitt-Carruthers, Inc. was represented by defendant John T. Carruthers, Jr.; defendant, Shannon & Luchs Co. was represented by William Ellis; defendant Schick & Pepe Realty, Inc. was represented by Allyn Rickman; defendant Bogley, Inc. was represented by defendant Robert W. Lebling; and defendant Robert L. Gruen, Inc. was represented by Robert L. Gruen.

States **[*1328]** v. Sherman, 421 F.2d 198, 199 (4th Cir. 1970) (per curiam), to support the jury's finding on this issue. [2]

[7]** We start with the applicable legal principles. **HN3**[] Jurisdictional reach of the statute is coterminous with Congress' power to regulate interstate commerce. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974); United States v. South-Eastern Underwriters Association, 322 U.S. 533, 558 & n.46, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974). Where conspiracy is charged, it must be shown that it has a sufficient nexus with interstate commerce, but this does not require proof that each charged defendant's activities had the requisite effect. E. g., United States v. Wilshire Oil Co., 427 F.2d 969, 974 (10th Cir. 1970). The existence of a sufficient nexus is to be determined on a practical rather than theoretical basis. E. g., Swift & Co. v. United States, 196 U.S. 375, 398, 25 S. Ct. 276, 49 L. Ed. 518 (1905). This means that the determination involves not only raw fact finding but evaluation of the facts by the **[**8]** trier of fact. Accordingly, the results in particular cases are likely to have turned, quite appropriately, on their peculiar facts rather than on legal standards generally applicable to particular categories of business, professional, or trade activities. Thus, the cases that have considered the relationship of particular real estate brokerage activities to commerce are in hopeless disarray so far as their raw results are concerned. See McLain v. Real Estate Board of New Orleans, Inc., 583 F.2d 1315, 1319-20 (5th Cir. 1978), cert. granted, -- - U.S. -- , *99 S. Ct. 2159, 60 L. Ed. 2d 1043 (1979)* (collecting cases). This means that the guiding legal principles must be sought at a more general level than any keyed to the particular nature of the real estate brokerage business, and that detailed efforts to reconcile the disparate results in particular real estate brokerage cases are likely to be bootless.

HN4[] The traditional mode of analysis seeks the requisite nexus along one or both of two general lines of inquiry unrelated in terms to particular categories of **[**9]** commercial activities. One inquires whether the activities alleged to be under illegal restraint lie directly in the flow of interstate commerce; the other, whether though intrastate in nature, they nevertheless have so great an impact on interstate commerce that they substantially affect it. See, e. g., Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d at 395 (articulating and discussing the two tests). Obviously these are not bright line, mutually exclusive tests and it is quite possible to analyze a particular pattern of activities without express reliance upon either. [3] Each, after all, strives **[*1329]** for answers to the more general question, whether the activities under alleged restraint have a sufficient nexus with interstate commerce. Particular activities may fall within both patterns. Activities directly in the flow of interstate commerce need have but minimal

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[2] **HN2**[] A sufficient relationship to interstate commerce is both a critical jurisdictional fact and an element of the substantive offense charged under 15 U.S.C. § 1. Facts sufficient for the one are sufficient for the other, and vice versa. Existence of the jurisdictional fact may be attacked independently, or in conjunction with the defense on the merits. Cf. McLain v. Real Estate Board of New Orleans, Inc., 583 F.2d 1315, 1323-24 (5th Cir. 1978), cert. granted, -- - U.S. -- , ***99 S. Ct. 2159, 60 L. Ed. 2d 1043*** (discussing comparable procedures in civil actions). In this case, all the defendants but Schick & Pepe Realty, Inc. made a jurisdictional attack by pre-trial motion to dismiss the indictments under Fed.R.Crim.P. 12. The district court denied this motion, assessing the facts as charged in the indictments. When the case then proceeded to trial, the substantive interstate commerce issue was submitted to the jury and found against the defendants. Defendants' attack is therefore upon the jury's finding on this issue as it was necessarily subsumed within the general verdict of guilty. No challenge having been made to the district court's instruction on the issue, we assume its correctness. The only remaining basis for challenge is therefore to the sufficiency of the evidence to support the implicit jury finding on this issue, and it is this we review. Because there is no suggestion of variance between indictment and proof, review of the sufficiency of the evidence on the substantive issue necessarily reviews the sufficiency of the facts as found to support the court's jurisdiction. The jury's findings on the evidence thus in effect supersede the district court's jurisdictional finding on raw factual averments in the indictments.

[3] It may be questioned whether, in any event, these two "tests" will withstand logical scrutiny as discretely different frameworks for close legal analysis. Courts quite frequently conduct searching interstate commerce relationship analyses without express reliance upon them. See, e. g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). Significantly on the point, while both sides and the district judge in this case assumed that Goldfarb was a "local but affecting" case, a distinguished constitutional scholar in a recent analysis assumed without elaboration that it was an "in-commerce" type. Strong, Court vs. Constitution: Disparate Distortions of the Indirect Limitations in the American Constitutional Framework, 54 N.C.L.Rev. 125, 137-40 (1976).

impact upon the commerce to "affect" it, since by definition they are a very part of the stream. See, e. g., *Swift & Co. v. United States, 196 U.S. at 398-99, 25 S. Ct. 276, 49 L. Ed. 518* . Activities not in the flow of interstate commerce, I. e., intrastate in basic nature, **[**10]** may only be found to affect interstate commerce if their impact upon it is substantial. Compare, e. g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (substantial), With, e. g., *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)* (unsubstantial). Under either test and in all events, the impact must be upon an identifiable stream of "commerce," and not simply upon a particular business that may be engaged in interstate commerce. See *McLain v. Real Estate Board of New Orleans, Inc., 583 F.2d at 1318-19*.

[11]** In *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*, on facts closely analogous in many respects to those presented in the instant case, the Supreme Court articulated a test of interstate commerce relationship in which these two traditional tests may be thought to have coalesced, although neither was drawn upon in express terms. Because both sides on this appeal and the district judge in his rulings below perceived as we do the critical relevance of Goldfarb to this case, the test there stated bears emphasis here before the evidence is analyzed. In finding a sufficient nexus between the title search activities of certain Virginia lawyers and an identifiable stream of interstate real estate financing transactions, the Goldfarb Court stated the ***HN5***[] test simply as "(whether) as a matter of law or practical necessity (the) services (were) an integral part of an interstate transaction." *Id. at 785, 95 S. Ct. at 2012*. Certain critical aspects of the context in which the lawyers were observing a minimum fee schedule for their services **[**12]** were emphasized by the Court. These were that lending institutions routinely required title insurance as an incident to making mortgage loans in the Virginia county in question; that this in turn required title examinations; that state regulatory authority required that this service be performed only by licensed lawyers; that the lawyers thus favored were observing a minimum fee schedule promulgated by their professional association; and that a considerable volume of the loans involved were funded by out-of-state lending institutions, insured by out-of-state insurance companies, and guaranteed by out-of-state federal agencies. From this combination of factors, the Court concluded that the title examination service for which fixed fees were being charged was "an integral part of an interstate transaction," and that "(g)iven the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions . . . interstate commerce has been substantially affected. *Id. at 785, 95 S. Ct. at 2012* (footnote omitted).

In this case, as in Goldfarb, the evidence was quite sufficient to permit the trier **[**13]** of fact to determine that the activities in question, here those of real estate brokers, were as a matter of practical necessity an integral part of an identifiable stream of interstate real estate transactions. The charged conspirators here were shown to be engaged in a business that consisted essentially of bringing together prospective buyers and sellers of residences in Montgomery County, Maryland, and then facilitating in various ways the consummation of resulting sale-purchase agreements between sellers **[*1330]** and buyers. Montgomery County is a suburban area contiguous to the District of Columbia, and the brokers in question consciously and understandably capitalized upon the highly transient nature of this particular real estate market. A quite considerable volume of the total of brokered sales in which they participated involved purchasers coming into the state and sellers leaving the state. [4] **[**16]** Extensive advertising of the brokerage services was placed by various ones of the defendants in out-of-state media, including military and civil service personnel journals. [5] Some of the brokers participated in national "relocation" services [6] and

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[4] Distinguishing this case factually from those wherein real estate brokerage activities were not shown to have involved any considerable volume of out-of-state buyers and sellers. E. g., *Diversified Brokerage Services, Inc. v. Greater Des Moines Board of Realtors, 521 F.2d 1343, 1346 (8th Cir. 1975)*. While it may generally be correct to say that "the mere movement of individuals from one state to another in order to utilize particular services does not transform those services into interstate services within the meaning of the Sherman Act," Id., that hardly describes the factual situation presented here. A more apposite principle for the facts of this case is the congressional determination upheld in *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1969)*, that even "local" businesses that provide services to substantial numbers of persons traveling across state lines may affect interstate commerce. Here, as the analysis in the body of our opinion shows, there was much more of an interstate character to defendants' activities than merely awaiting passively the chance descent of out-of-state customers and then providing these with purely "local" services.

extensively used interstate **[**14]** channels of communications [7] in developing and servicing the out-of-state clientele. A considerable amount of the financing for brokered purchases came from out-of-state lending institutions and substantial numbers of the purchase loan mortgages were guaranteed by federal agencies headquartered in the District of Columbia. [8] While the charged brokers did not participate directly in the interstate lending and loan guarantee transactions incident to their brokered sales, they clearly held out as part of their brokerage services their ability to facilitate these. [9] The overall picture that emerges is one of a substantial stream of interstate commerce in which these brokers' activities were not only an "integral part," but in practical effect the dominant factor in first creating a substantial interstate market by utilizing interstate advertising and referral services, and then drawing in interstate funding and loan guarantees for the resulting purchase money mortgages. While there are of course differences between the lawyers' activities in Goldfarb and the brokers' in the instant case, most suggest a more, not less, substantial impact on interstate commerce for the brokers' activities **[**15]** than for the lawyers'. Defendants emphasize that the brokers' services here were not undergirded by legal compulsion as were those of the lawyers in Goldfarb. While that is true, the practical necessity for utilizing a local broker's services, particularly for out-of-state purchasers and sellers, was substantially equal on the evidence presented, hence quite as integral and "inseparable **[*1331]** " a part in the final analysis. And on the other hand, while the lawyers in Goldfarb took no specific part in creating the critical interstate market of specific buyers and sellers necessary to generate their fees, the brokers in the instant case played a dominant part in creating the specific interstate market that ultimately provided their commissions.

[17]** The impact of the charged restraint on the brokerage services demonstrably had a substantial effect on interstate commerce. Since the conspiracy as charged raised the price of the critical service of bringing together the home sellers and buyers, this affected the need for financing "as a matter of practical economics." *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 745, 96 S. Ct. 1848, 1852, 48 L. Ed. 2d 338 (1976)*; See *id. at 744-47, 96 S. Ct. 1848*. Similarly, increased prices resulting from increased brokerage commissions must, as a matter of practical economics, confront every purchaser wishing to buy a Montgomery County residence. Therefore, as in Goldfarb, the numerous out-of-state purchasers of these residences could not as a practical matter escape the effect of these commissions.

Whether analyzed as being in the flow of interstate commerce, as local but substantially affecting interstate commerce, or as being by practical necessity an "integral part" of identifiable interstate transactions, the evidence here adequately supported the jury's finding of a sufficient nexus between the brokers' activities and interstate commerce, **[**18]** and of a substantial effect of the restraint charged upon that commerce.

II. CONSPIRACY AND PARTICIPATION

Defendants next contend that there was insufficient evidence, although considered in the light most favorable to the government, to allow a jury to find the existence of a conspiracy and the participation of each defendant in it beyond a reasonable doubt. Their related contention that guilt beyond a reasonable doubt can only exist if all other

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[5] This included advertising in Washington, D.C., newspapers and radio stations (App. 111, 998, 1003), the Foreign Service Journal, and the Army, Navy, Air Force Times (App. 1020-21). At least one defendant advertised its use of a "Military Transfer Department" and a "Corporate Referral Department" which enabled it to identify potential buyers and sellers among military and business transferees (App. 1042-43); offered to military personnel a "Free Relocation Kit" (App. 187-88); and invited collect telephone calls from prospective home purchasers coming into the Washington, D.C., area (App. 1039).

[6] Incident to which they paid commissions directly to out-of-state brokers who found purchasers for their listings, and received commissions directly from out-of-state brokers to whom they referred clients. (App. 998-99, 1004, 1014, 1020).

[7] See *American Power & Light Co. v. SEC, 329 U.S. 90, 98-99, 67 S. Ct. 133, 91 L. Ed. 103 (1946)*; *North Am. Co. v. SEC, 327 U.S. 686, 694-95, 66 S. Ct. 785, 90 L. Ed. 945 (1946)*.

[8] App. 970-95, 997-99, 1003-04, 1019-23, 1062.

[9] One advertised that potential purchasers should consult a broker because he could "guide you in getting a loan," and will "be able to negotiate the best available financing." (App. 1046).

reasonable hypotheses are negated has been rejected. United States v. Bobo, 477 F.2d 974, 989 (4th Cir. 1973). A final suggestion that our review on this point should be more stringent because this is a felony, rather than a misdemeanor, prosecution is also without merit. Neither the classification of the offense nor the extent of the possible punishment in any way affects the question whether there was sufficient evidence of each element of an offense. Our review of the evidence leads to the conclusion that under applicable standards of review the evidence was sufficient to sustain the jury findings on these issues.

A. The Evidence of Conspiracy

HN6[] **[**19]** Proof of a § 1 conspiracy need not be direct. "Acceptance by competitors of an invitation to participate in a plan, the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act, where each competitor knew that cooperation was essential to successful operation of the plan." 3 P. Areeda & D. Turner, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application P 841a, at 361-62 (1978). While such evidence does not compel a finding of conspiracy, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*, it does permit such a finding, *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*; *Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965)*. Within this principle, we find ample evidence to permit the finding of a conspiracy involving each of the defendants.

In the months preceding the September 5 dinner, several of the defendants were contemplating a change in commission rate, but were concededly afraid to undertake such a move for fear **[**20]** that they would be unable successfully to compete with firms still at six percent. Schick & Pepe had previously attempted to go to a seven percent rate and had failed because of competition. It was in this general climate of concern about competitive constraints that **[*1332]** Foley called the meeting of September 5. At the dinner Foley rose, made some prefatory remarks and then stated that his firm was in dire financial condition. Saying that he did not care what the others did, he then announced that his firm was changing its commission rate from six percent to seven percent. Testimony as to what was said by various persons in the ensuing discussion is greatly in conflict, but there was evidence from which the jury could find that each of the individual defendants and a representative of each corporate defendant not represented by one of the individual defendants expressed an intention or gave the impression that his firm would adopt a similar change. The discussion also included reference to the earlier unsuccessful effort by Schick & Pepe to adopt a seven percent policy, from which the jury could conclude that defendants knew that their cooperation was essential. Evidence presented **[**21]** in the form of detailed charts with explanation by an economist qualified as expert witness showed that in the months following each defendant did in fact begin to take substantial numbers of seven percent listings. Moreover, the jury heard testimony of a number of instances in which members of the conspiracy sought after the September 5 dinner to hold their fellows to the "agreement." Details of these events will be developed more fully in the following discussion of the connection of each defendant to the conspiracy.

B. Connection of Each Defendant to the Conspiracy

(1) Jack Foley Realty, Inc. and John P. Foley, Jr.

Jack Foley hosted the September 5 dinner, inviting in addition to a few realtors who were close personal friends, those he regarded as the most active members of his profession. He had previously announced the commission change to his staff and on September 15 mailed a notice concerning it to all local realtors. By early October, Foley, Inc. had thirty percent of its listings at the higher rate; by December, the figure was in excess of seventy percent and remained in that neighborhood throughout 1975.

Allyn Rickman, vice president of Schick & Pepe and a guest at the **[**22]** September 5 dinner, testified that after Schick & Pepe took some six percent listings, Foley called him and told him that was a "mistake" because if they all did not hold the line none of them could get seven percent.

Before the policy change, Foley's firm had accepted a house at a six percent listing. When the listing was renewed after the policy change, still at six percent, Foley, Inc. sent a card to the listing service which was in turn distributed to all the local realtors. A listing card was then received anonymously in the mail by Foley with a question mark on it. When the house was again relisted, the contract and the listing with the service were both at seven percent. John O'Keefe, a vice president at Foley, Inc., however, wrote a letter to the homeowner/seller informing him that Foley would reimburse him for the extra one percent. [10] The letter contained the following explanation:

> "The reason I don't want **[**23]** (the listing) to go through showing 6% Is our Firm was one of the leading Firms in changing from 6% To 7% And with Mr. Foley being the President of the Board of Realtors, I just don't want any unjust criticism of him or our Company for taking your listing at less than 7%."

(2) Colquitt-Carruthers, Inc. and John T. Carruthers, Jr.

John T. Carruthers of Colquitt-Carruthers, Inc. attended the dinner. The testimony conflicts on whether he said he was already at seven percent, or whether he was going to go to seven percent. His accountant testified that a policy change occurred between September 10 and September 24. Effective September 24, all listings other than at seven percent had to be accompanied by explanation; after November 1, they would not be accepted at less than **[*1333]** seven percent. By October 1974, Colquitt-Carruthers had sixty percent of its listings at the new rate and through the end of 1975 the figure was generally in excess of eighty percent.

There was testimony that Carruthers made several attempts to ensure the cooperation of other firms. William Ellis, vice president of Shannon & Luchs Co., a firm that delayed implementation of the seven percent policy, **[**24]** testified that Carruthers called him on three occasions. Around January 1, 1975, Carruthers called and asked about Ellis' "considerations." Ellis replied "You know I can't make the decision." Carruthers then offered to call the man who could make the decision. Later in January, Carruthers again called, this time explicitly asking about the change. Upon being told that Shannon & Luchs had adopted a seven percent policy, but had set no date for its implementation, Carruthers "threatened" Ellis with the loss of his job. In April when Shannon & Luchs' Gaithersburg, Maryland office took some six percent listings, Carruthers again called Ellis to complain.

Allyn Rickman, vice president of Schick & Pepe Realty, Inc., also testified that Carruthers called him to complain about some six percent listings that Schick & Pepe had accepted. [11] He quoted Carruthers as saying "if we do not stay at seven percent, then it would be a slide back and . . . no one could get seven percent, because the competition would hurt us." There was also testimony that Carruthers complained to Robert Dorsey, a vice president at Bogley, Inc., about that firm having taken more six than seven percent listings.

[25]** (3) Bogley, Inc. and Robert W. Lebling

Robert Lebling, the president and seventy percent owner of Bogley, Inc., attended the September 5 dinner. The testimony is in conflict whether he said he would go to a seven percent rate, or that he would do so if it were to his advantage. On September 27, Bogley, Inc. adopted a policy of seeking seven percent but not losing any listings over the attempt. At least one version of the meeting at which that decision was made places the initiative for the proposal with Lebling. Bogley, Inc. had no seven percent listings from June through September 1974, but nearly fifty percent of the listings in October and November 1974 were at the higher rate and in December seventy percent were at the new rate. The percentage of seven percent listings fluctuated between forty and sixty-five percent until April, then settled at around thirty percent. Since ***HN7***[] the agreement itself, not its performance, is the crime of conspiracy, *United States v. Trenton Potteries Co., 273 U.S. 392, 402, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*; *Plymouth Dealers' Association v. United States, 279 F.2d 128, 132 (9th Cir. 1960)*, **[**26]** the partial non-performance of Bogley does not preclude a finding that it joined the conspiracy.

(4) Schick & Pepe Realty, Inc.

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[10] Foley and Foley, Inc. object to the admissibility of that letter. See Part IV Infra.

[11] Carruthers and Colquitt-Carruthers contend this testimony should not have been allowed. See Part IV Infra where we conclude that there was no error in its admission.

Allyn Rickman, vice president of Schick & Pepe Realty, attended the dinner. He testified that he stated at that time that his firm would adopt a seven percent policy. On October 4, 1975, it did adopt such a policy and by November had well over eighty percent of its listings at the higher rate. Rickman testified that but for the dinner the firm would not have changed its policy. In August, the firm had considered such a change, but decided against it because of fear that it would be unable to compete for listings. There was also evidence that Rickman complained to Robert Dorsey, vice president of Bogley, Inc., about Bogley's failure to take only seven percent listings.

(5) Shannon & Luchs Co.

Shannon & Luchs did not officially adopt a seven percent policy until January 1975. At the dinner, its vice president, William Ellis, stated that they should not be discussing a rate increase and said that his firm was always the first to be investigated **[*1334]** when something like this happened as it was the county's largest. He also stated that Shannon & Luchs **[**27]** would probably go to seven percent at a later date; Allyn Rickman remembered a possible mention of the first of the year. On September 9, Ellis told his managers not to turn down any seven percent listings they had an opportunity to get. In fact, the percentage of seven percent listings taken by Shannon & Luchs crept toward thirty percent by January 1975. Early in January, John T. Carruthers called Ellis and asked about his "considerations." Ellis told him that he, Ellis, did not make those decisions and Carruthers then offered to telephone the man who did; Ellis replied that he did not need help. On January 15, at Ellis' suggestion, Shannon & Luchs adopted a policy of taking seven percent listings unless some other rate were beneficial to the firm or otherwise appropriate. Although the new policy was not implemented until March 1, by that time forty percent of Shannon & Luchs' listings were at seven percent. By early April, the figure was about sixty-five percent and throughout 1975 it stood between eighty and ninety. In response to a comment from Carruthers in April, Ellis acknowledged that he had a "problem" in his Gaithersburg, Maryland office in implementing the policy. Shannon **[**28]** & Luchs did not adopt a seven percent policy for its offices in northern Virginia because of the threat of competition.

(6) Robert L. Gruen, Inc.

Robert Gruen attended the Congressional Country Club dinner. While Allyn Rickman's testimony is in conflict as to Gruen's statements at that dinner, on more than one occasion he testified that Gruen said he was going to go to seven percent. Louise Lewis, a Gruen sales agent, testified that the Gruen policy as early as June 1974 was at least to seek seven percent listings, but acknowledged that she sought no seven percent listings before September.

Gruen had one listing at seven percent out of a total of seven in August 1974 and none in September, but took three of eleven at the higher rate in October. By early 1975, the firm consistently had eighty percent or more of its listings at seven percent.

Gruen makes much of the fact that it had seven listings at seven percent from March to August 1974 and also had seven such listings from September to December. Put in percentages, however, that apparent continuity evaporates: the March to August figure represents only ten percent of Gruen's listings; there were no seven percent listings in September; **[**29]** and from October to December, Gruen had thirty-five percent at a seven percent commission. These figures are sufficient to allow the jury, in connection with Rickman's testimony, to conclude that Gruen also adopted a higher commission rate following the September 5 dinner and that that adoption was part of the alleged conspiracy.

C. Conclusion

We conclude that this evidence, here merely summarized and highlighted from a much more detailed body of proof adduced by the Government, was sufficient to permit the jury to find as it did against each of the defendants on the conspiracy issue. Defendants of course offered explanatory and exculpatory evidence, and on this appeal urge that the proper inferences to be drawn from all the evidence relieve their actions of criminal implications. Among these arguments is the interesting one that only by graceless refusals to accept Foley's invitation to dinner or by equally graceless withdrawals from it once its purpose was revealed could they have avoided the factual inferences required to implicate them in the conspiracy, and that to sustain their convictions will impose intolerable burdens on businessmen confronted with like dilemmas. This, with **[**30]** other arguments about the proper inferences to be drawn from the evidence, was undoubtedly presented to the jury by able counsel for the defendants. A properly composed jury of defendants' peers rejected this factual argument as well as others in reaching its verdict of guilty. That to sustain the jury finding on this issue may have the inhibitory effect on the **[*1335]** conduct of others that is urged by defendants does not speak to the force of the evidence supporting the jury's finding in this case.

III. JURY INSTRUCTION

Defendants complain that the court failed to instruct the jury that it had to find that defendants acted with specific intent before it could find them guilty beyond a reasonable doubt. While this contention is none too plainly developed, it apparently comes to the suggestion that to be convicted of a felony violation of *§ 1* they had to conspire with the specific intent to accomplish a restraint of trade. [12]

[31]** *Section 1* had traditionally been interpreted to define a strict liability offense, E. g., *United States v. Patten, 226 U.S. 525, 543, 33 S. Ct. 141, 57 L. Ed. 333 (1913)*, until in June 1978, the Supreme Court held that ***HN8***[] a criminal conspiracy prosecution under *§ 1* must include proof that the defendants acted with knowledge that their conduct would affect prices. *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 2877, 57 L. Ed. 2d 854 (1978)*. Gypsum involved a misdemeanor case, the indictment having been brought prior to the effective date of the 1974 amendment making *§ 1* a felony provision. From this, defendants contend that the scienter requirement imposed in Gypsum is not necessarily as stringent as that required for the now felony offense. [13]

[32]** While certain conduct may not be made criminal without including as an element of the offense a certain degree of scienter, we do not believe the 1974 amendment of the Sherman Act, Antitrust Procedures and Penalties Act, Pub.L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974), mandates that specific intent in the sense apparently suggested by defendants be made an element of a *§ 1* conspiracy. Although in most cases particular scienter requirements seem to be based simply on statutory construction, See *Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)*, there are undoubtedly due process restrictions on the legislature's power to define certain conduct as criminal absent particular scienter requirements. E. g., *Lambert v. California, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957)*; *Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960)* (Blackmun, J.). We think neither the amended statute nor the Constitution require the specific intent apparently contended for by defendants here.

In increasing the penalties for violating *§ 1* and redefining the offense as a felony, Congress did not intend to change the **[**33]** elements of the offense. E. g., 120 Cong.Rec. 36,340 (1974); See *United States v. Continental Group, Inc., 456 F. Supp. 704, 717 (E.D.Pa.1978)*; United States v. Noll Manufacturing Co., 1977-2 Trade Cas. P 61,712 (N.D.Cal.1977). Hence, we consider the Gypsum rule, so far as statutory interpretation is concerned, still to apply to *§ 1* offenses.

Neither do we find merit in the argument that constitutional considerations require proof of "specific intent" in the sense urged by defendants. While intent of the specificity apparently urged by defendants may be constitutionally mandated with respect to offenses impinging highly protected realms of conduct such as speech, See *Smith v. California, 361 U.S. 147, 154, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959)* (reserving question), ***HN9***[] in the area of commercial regulation due process does not require more at the outside than that a defendant shall have acted with knowledge of the anticipated consequences of his action. *United States v. United States Gypsum Co., 98 S. Ct. at 2878*.

[*1336] We thus **[**34]** find no error in Judge Blair's instructions in which he told the jury in substance that it must find beyond a reasonable doubt that defendants must have known that their agreement, if effectuated, would have

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[12] Some defendants may contend for an even more specific intent: to denigrate or mock the law in the sense apparently of intending specifically to violate the Sherman Act. Because we find even the less stringent requirement without support, we do not address this one.

[13] Gypsum also involved a rule of reason offense rather than a per se violation of *§ 1* such as the price fixing here alleged. While the Court's analysis is in part dependent on the relative lack of notice provided by rule of reason offenses, the rule announced is framed in terms of all *§ 1* criminal prosecutions.

an effect on prices; that they knowingly joined a conspiracy whose purpose was to fix prices; and that in joining they intended to further that purpose.

Defendant Shannon & Luchs also complains of the following instruction, asserting that it required too little connection with the conspiracy:

> (The requirement that the evidence show beyond a reasonable doubt that the Defendants knowingly participated in the unlawful plan with the intent to further or advance some object or purpose of the conspiracy) is satisfied if the evidence shows beyond a reasonable doubt a knowing assistance of any kind in effectuating the objective of the conspiracy.

Without deciding whether this particular portion of the charge required too little connection, we conclude that the charge as a whole did require a sufficient involvement by each defendant. For example, within paragraphs of the allegedly deficient instruction, the following was charged:

> A Defendant may be found guilty of a conspiracy **[**35]** only if the Defendant understood that he had joined the single overall conspiracy that is charged. If any Defendant was not a party to that overall agreement or conspiracy, you must find that Defendant not guilty even if he participated in isolated or subsidiary actions or events which aided the ends of the conspiracy.

Robert Lebling, Bogley, Inc., John T. Carruthers and Colquitt-Carruthers, Inc. complain that the court failed to instruct that proof of good character Alone can create reasonable doubt. Judge Blair gave substantially the charge requested, but refused to include the word "alone." Defendants rely on *Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948)*, for the proposition that this refusal was error.

Michelson, an opinion dealing with the admissibility of character evidence, does include dictum that ***HN10***[] in a proper case a defendant who puts on substantial evidence of good character is entitled to an instruction that such evidence alone may create reasonable doubt, *Id. at 476, 69 S. Ct. 213*, but the Circuits have split on **[**36]** whether such an instruction must be given. Two circuits hold that the word "alone" must be included. *United States v. Lewis, 157 U.S.App.D.C. 43, 482 F.2d 632, 637 (1973)*; *United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950)*. The Tenth Circuit holds that "alone" must be included if good character is the only defense raised and perhaps in other circumstances, *Oertle v. United States, 370 F.2d 719, 726-27 (10th Cir. 1966)*, but does not require it in all cases, *Swingle v. United States, 389 F.2d 220, 222 (10th Cir. 1968)*; See *United States v. Tijerina, 407 F.2d 349, 356 (10th Cir. 1969)* (semble). The other circuits do not require that the word be included in the charge, at least where good character is not the only defense. *United States v. Fontenot, 483 F.2d 315, 323 (5th Cir. 1973)*; *United States v. Lachmann, 469 F.2d 1043, 1046 & n. 3 (1st Cir. 1972)*; *United States v. Fayette, 388 F.2d 728, 737 (2d Cir. 1968)*; *United States v. Brown, 353 F.2d 938, 939-40 (6th Cir. 1965)*; *Carbo v. United States, 314 F.2d 718, 746-47 (9th Cir. 1963)*; **[**37]** *Black v. United States, 309 F.2d 331, 343-44 (8th Cir. 1962)*; See *United States v. Klass, 166 F.2d 373, 378-80 (3d Cir. 1948)*. In 1944 this Circuit held that the word "alone" need not be included in a charge. *Mannix v. United States, 140 F.2d 250, 253-54 (4th Cir. 1944)*.

In Michelson, the Supreme Court relied on the case of *Edgington v. United States, 164 U.S. 361, 366, 17 S. Ct. 72, 41 L. Ed. 467 (1896)*. That case disapproved an instruction to the effect that character evidence should be considered only if the other evidence created doubt. It did not hold that character evidence is so highly probative that it must always be singled out as potentially exculpatory standing "alone." *Carbo v. United States, 314 F.2d at 746*. We believe the better view, which we think **[*1337]** not foreclosed by Michelson, continues to be that expressed by this court in Mannix and followed by a majority of the circuits. We need not hold that an "alone" instruction could in no circumstances be a matter of right to find it not required in this case. Here defendants did not rely on character evidence alone for their defense. The instructions **[**38]** properly allowed the jury to consider it along with other evidence, and clearly did not suggest that the jury might not find in the character evidence "alone" a basis for reasonable doubt.

IV. EVIDENTIARY ISSUES

Defendants John Foley and Jack Foley Realty, Inc. assert that the district court erred in admitting into evidence a letter written from a Foley vice president, John O'Keefe, to a homeowner whose house had been relisted at seven percent. [14]

During the grand jury investigation some of the records of Foley, Inc. were subpoenaed. While this letter was covered by the subpoena it was not produced. Shortly before trial, an attorney in a civil suit involving the same conspiracy called the United States Attorney and told him about the letter. The government asked the attorney for a copy of the letter, but since it was subject to a protective order in the civil suit, the attorney asked that the government obtain the letter directly from defendants. The letter was then **[**39]** so obtained. In ruling on the objection to the admission of the letter, Judge Blair assumed that it had been obtained in violation of the protective order. We make the same assumption.

HN11[] The government is not precluded from introducing improperly obtained evidence so long as it did not participate in the impropriety. *Burdeau v. McDowell, 256 U.S. 465, 476, 41 S. Ct. 574, 65 L. Ed. 1048 (1921)*; *United States v. Francoeur, 547 F.2d 891, 893 (5th Cir. 1977)*. [15] Judge Blair found that the government had not participated in the assumed violation of the protective order; that finding is not clearly erroneous.

[40]** Defendants seek to analogize the protective order to *47 U.S.C. § 605*, a provision of the Federal Communications Act which they assert has been interpreted to prohibit the admission of communications seized in violation of its terms even absent government complicity. Assuming that defendants' construction were correct, a proposition which we do not accept save for the purposes of argument, See *Bubis v. United States, 384 F.2d 643 (9th Cir. 1967)* (allowing admission of communication seized in violation of *§ 605*), we reject the analogy. *Section 605* was obviously intended to further broader policies than is a protective order of the type here involved. No suggestion is made that the government has engaged in impermissible discovery, that defendants' privilege against self-incrimination has been violated [16] or that the admission of the letter occasioned prejudicial publicity. The letter was subject to a subpoena and should have been produced during the grand jury investigation. To allow its admission in a situation where the government did not act improperly would not frustrate any valid policy.

[41]** Defendants object to the admission of a series of charts, designated Government Exhibits Numbers 39 through 51. Numbers 39 through 50 summarized the number of listings filed by each realtor with the multiple listing service and portrayed the percentage of those listings which were at the higher, seven percent **[*1338]** commission rate. These charts were compiled by a Justice Department economist from data obtained from the multiple listing service. Defendants were apprised that the government intended to use a compilation of such data well before trial and the documents were available for inspection at the Justice Department throughout May and June 1977. Defendants complain, however, that the charts themselves were not made available until the weekend before trial.

HN12[] *Fed.R.Evid. 1006* provides: "The contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place." The **[**42]** data upon which these charts were based came from defendants' own listing service, the documents were made available to defendants at the Justice Department well before trial and the charts themselves were

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[14] See text accompanying note 4 Supra.

[15] This rule has developed in cases involving alleged constitutional improprieties so it may be said to be predicated on a lack of state action. On the other hand, the notion that the mere fact of impropriety should preclude admissibility has not been accepted. See *Burdeau v. McDowell, 256 U.S. at 476-77, 41 S. Ct. 574* (Brandeis, J., dissenting). If impropriety of a constitutional dimension does not preclude admissibility absent Government complicity, a more stringent rule in a non-constitutional setting would be inappropriate.

[16] The letter was neither the personal property of nor in the possession of Mr. Foley; Foley, Inc. has no privilege against self incrimination. *United States v. White, 322 U.S. 694, 698-99, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944)*.

provided the weekend before trial. Defendants complain that the charts should have been made available longer in advance of trial, relying on the last sentence of *Rule 1006*. That sentence refers to making available the original documents, not the charts themselves. 5 J. Weinstein & M. Berger, Weinstein's Evidence P 1006(04), at 1006-8 (1975). The charts themselves are not misleading and we cannot say Judge Blair abused his discretion in allowing their admission.

Government Exhibit No. 51 summarized the percentage of houses sold by each defendant that were purchased with loans guaranteed by the Veterans Administration or the Federal Housing Administration. Defendant Foley and his firm complain that the base data for this chart was never made available to them. The chart was compiled from data contained in machine-readable "diskettes" provided by the multiple listing service. The diskettes were not made available to defendants, but a computer print-out of the information they contained **[**43]** was and the diskettes themselves only contained data that was provided to defendants themselves by their multiple listing service in the normal course of business. The ***HN13***[] computer print-outs qualify as duplicates of the diskettes within the meaning of *Rule 1006*. *Fed.R.Evid. 1001(4)*. In any event, defendants conceded that substantial out-of-state funds were used to purchase houses they brokered. Thus, the admission of the chart, if erroneous, would seem to be harmless error.

Father Henry O'Meara testified to a number of versions of a conversation he had with John T. Carruthers concerning Robert Lebling's reluctance to take seven percent listings. Carruthers and Colquitt-Carruthers, Inc. contend that the trial court erred in failing to strike the testimony, apparently on the ground that the potential for confusion, due to the inconsistencies in the several versions as to what actually was said, outweighed any relevance the testimony had. ***HN14***[] The decision to strike testimony on grounds of lack of relevance **[**44]** is committed to the district judge. We cannot say he abused that discretion in this instance.

The same two defendants also object to the trial court's allowing Allyn Rickman to refresh his recollection concerning a conversation he had with Carruthers with a transcript of his previous grand jury testimony. [17] We cannot say that Judge Blair abused his discretion in concluding that Rickman's memory was exhausted, that the grand jury transcript would be helpful in refreshing it or that it was in fact refreshed.

Finally, Robert L. Gruen, Inc. complains that the government interfered with its cross-examination of Rickman by withholding discoverable information. Gruen was provided with the information that Rickman had told the government that he could not recall Robert Gruen saying at the dinner that his firm would go to seven percent. Gruen was not given the notes **[*1339]** taken by a government attorney of the interview nor was it told that Rickman had said that he had **[**45]** the Impression from the dinner that Gruen would go to seven percent. When Rickman testified that Gruen had said his firm would go to seven percent, Gruen attempted to impeach him with the prior inconsistent statement. Rickman stated that he could not recall having made the statement to the government. Gruen then sought production of the interview notes, but the government refused to allow the statement that Rickman could not recall Gruen saying he would go to seven percent to be used unless the statement that Rickman had the impression Gruen would go to seven percent was also admitted. In the end, the jury was apprised of both statements.

The interview notes were not verbatim nor had they been approved by Rickman. Thus they were not discoverable under the Jencks Act, *18 U.S.C. § 3500*. Without reaching the question whether the failure to make a full disclosure of Rickman's statements violated the principle of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, we conclude that under the circumstances any error in this regard was harmless beyond a reasonable doubt. In the trial court's final working out of the awkwardness, **[**46]** the jury was apprised of the possibility that Rickman had given different versions of his recollection on the critical point. The essential impeachment purpose was thus served, and defendant's hurt is thus reduced essentially to tactical discomfiture of limited duration and impact. While even this could have been avoided by a more fully forthcoming disclosure by the Government, we cannot find in it error requiring reversal of these convictions.

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[17] See text accompanying note 5 Supra.

Having carefully considered the record, the briefs and the oral arguments of all the parties we conclude that no reversible error has been made in the trial of this difficult and complicated case. The convictions of the nine defendants therefore are affirmed.

AFFIRMED.

Industrial Inv. Dev. Corp. v. Mitsui & Co.

United States Court of Appeals for the Fifth Circuit

April 25, 1979

No. 78-1775

Reporter
594 F.2d 48 *; 1979 U.S. App. LEXIS 15161 **; 1979-1 Trade Cas. (CCH) P62,586

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd., Plaintiffs-Appellants, v. MITSUI & CO., LTD. and Mitsui & Co. (U.S.A.), Inc., Defendants-Appellees.

Subsequent History: [1]** Rehearing and Rehearing En Banc Denied July 6, 1979.

Prior History: Appeal from the United States District Court for the Southern District of Texas.

Core Terms

act of state doctrine, Forestry, license, plaintiffs', conspiracy, defendants', venture, motivation, relations, sovereign, cutting, Sisal, district court, Sherman Act, expropriation, cancellation, antitrust, timber, foreign government, anti trust law, anticompetitive, regulating, rights

LexisNexis® Headnotes

International Law > Dispute Resolution > Act of State Doctrine

International Law > Dispute Resolution > General Overview

International Law > Dispute Resolution > Tribunals

HN1[] **Dispute Resolution, Act of State Doctrine**

The act of state doctrine is a means of determining the appropriateness of adjudicating in a United States court a dispute which in some manner involves a foreign government. Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

International Law > Dispute Resolution > Act of State Doctrine

International Trade Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Torts > Public Entity Liability > Immunities > Judicial Immunity

HN2[] **Dispute Resolution, Act of State Doctrine**

The instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Dispute Resolution > Act of State Doctrine

HN3[] **International Aspects, International Application of US Law**

Foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade.

International Law > Dispute Resolution > Act of State Doctrine

International Law > Individuals & Sovereign States > General Overview

HN4[] **Dispute Resolution, Act of State Doctrine**

The touchstone of the act of state doctrine, the potential for interference with U.S. foreign relations, is the crucial element in determining whether deference should be accorded in any given case. American courts wish to avoid passing on the validity of foreign acts. Similarly, American courts do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, the less important the implications of an issue are for U.S. foreign relations, the weaker the justification for exclusivity in the political branches

Counsel: Fitzhugh H. Pannill, Jr., R. Hayden Burns, Houston, Tex., for plaintiffs-appellants.

Fulbright & Jaworski, Rufus Wallingford, B. J. Bradshaw, Jerry E. Smith, Houston, Tex., for defendants-appellees.

Judges: Before JONES, CLARK and INGRAHAM, Circuit Judges.

Opinion by: CLARK

Opinion

[*49] The sole issue in this appeal is whether the act of state doctrine precludes a trial of plaintiffs' antitrust action. [1] Plaintiffs claim damages from Mitsui & Co., Ltd., a Japanese corporation, and its American subsidiary, Mitsui & Co. (U.S.A.), Inc., for violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1* & *2*, and *Section 73* of the Wilson Tariff Act, *15 U.S.C.A. § 8*. The complaint appended state law claims of tortious interference with contractual relations against these defendants and a breach of contract charge against the Indonesian defendant, P. T. Telaga Mas Kalimantan Co. Following extensive discovery, the district court granted defendants' motion for summary judgment. Defendants **[**2]** urged their motion on five grounds: (1) plaintiffs lack standing since they

[1] The named plaintiffs in this action are Industrial Investment Development Corporation (an American Corporation) and its two Hong Kong corporate subsidiaries, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd. They are collectively referred to as Industrial Investment or plaintiffs throughout this opinion.

have incurred only derivative damage as shareholders; (2) the extraterritorial reach of American antitrust laws cannot grasp this case; (3) plaintiffs are not within the "target area" of ***antitrust law*** protection; (4) forum non conveniens; (5) act of state doctrine. The district court's decision was based solely on the ground that the act of state doctrine prevented judicial review of the federal claims. [2.] Because of its ruling on the federal claims, the district court exercised its discretion to dismiss the pendent state claims. [3.]

[3]** The district court's invocation of the act of state doctrine in this case was in error. Although the regulations of a foreign state, Indonesia, formed part of the background to the activities alleged, neither the validity of those regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability for conduct which might prove to be prohibited by our antitrust laws.

The present dispute evolves from plaintiffs' desire to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. Late in the 1960's, the government of Indonesia began developing a plan for encouraging and regulating foreign private capital investment. The consequent Foreign Capital Investment Act provided for restrictions of private investment in certain fields, required the development of Indonesian manpower, and required opportunities for Indonesian co-ownership. Thus a foreign company could not conduct business within that country until it joined with a local company, and they together organized an independent limited **[**4]** liability company under Indonesian law. Known as P.T.'s (Perseroan Terbatas), these companies, which are closely analogous to American corporations, must have their organization approved by the government before they become effective.

Land use is also subject to regulation under the Act. A properly organized P.T. cannot harvest timber from the state-controlled land until it has been granted a concession and cutting license by the Department of Forestry pursuant to an application for forestry exploitation rights. The procedure contemplates preliminary surveys and negotiations between the applicant and the Director General of Forestry resulting in tentative concession rights embodied in a Forestry Agreement. The Agreement, accompanied by an Application Letter drafted by the P.T., is then to be submitted to the Minister of Agriculture within one month. Delay in submitting the Application Letter is considered grounds for revoking the Forestry Agreement. The Agreement and Letter must be channeled through the Department. **[*50]** Following approval and payment of a concession fee, the Director General of Forestry issues a formal concession decree and a license which establishes the new **[**5]** company and authorizes its logging operations, subject to revocation for failure to carry out its obligations under the Forestry Agreement. Harvesting cannot begin until the license has been issued. [4.]

In 1970 Industrial Investment [5.] signed a joint venture agreement with Telaga Mas to harvest logs from a timber concession which had been granted to Telaga Mas in a government forest in Borneo. Under the agreement, Industrial Investment was to provide equipment, capital requirements and management, and supervisory and technical personnel. In exchange, Telaga Mas expressly agreed to cooperate in obtaining the necessary approvals for establishing the P.T. and securing the formal concession decree and cutting license.

[6]** Throughout the first six months of 1971 plaintiffs and Telaga Mas jointly negotiated with the Indonesian government for its approval of the proposed business. As a result, a Forestry Agreement was signed by the two companies and the Director General of Forestry on July 1, 1971. The Agreement set forth the capital, organization, and administrative requirements to be completed by the two firms before payment of the concession fee to the government and issuance of the cutting license to the newly formed P.T. The Agreement also contained provisions

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2. We express no opinion on the merits of assertions (1)-(4).

3. Plaintiffs argue that independent diversity jurisdiction exists for the state claims. Because we find the federal claims justiciable, we need not resolve the dispute over the proper interpretation of the federal diversity statute, *28 U.S.C.A. § 1332*.

4. See generally, Republic of Indonesia, Invest in Indonesia (January 1972).

5. Forest Products Corporation of Delaware, a predecessor company of Industrial Investment, conducted the initial negotiations. For clarity we refer to the American company as Industrial Investment throughout.

relating to the operation of the joint concession. More importantly, it reserved to the Department of Forestry the right to cancel for failure of the joint venture partners to cooperate or carry out their duties, and provided that cancellation of the joint venture agreement prior to the issuance of the license certificate would automatically terminate any rights of the parties to conduct lumbering operations. No license ever issued.

The district court refused to consider plaintiffs' allegations of a Sherman Act conspiracy since in its opinion the absence of an authorizing license governed the disposition of the case. Plaintiffs allege that **[**7]** the Mitsui defendants infiltrated and usurped control of the Telaga Mas management for the purpose of destroying plaintiffs' interest in the proposed logging concession. The complaint intricately details a plot, spawned from a 1972 increase in the price of timber, in which the Mitsui companies, past purchasers and creditors of Telaga Mas, decided first to eliminate Industrial Investment and then to protect its competitive edge by secretly taking direct supervision and control of the Telaga Mas operations for its own profit. Implementation of the scheme began when a shareholder group led by Harianto, a Telaga Mas official who was secretly backed by Mitsui, challenged the authority of Telaga Mas official, Sadjarwo, to execute the Forestry Agreement on behalf of Telaga Mas. Separate competing shareholder meetings were held by Harianto and Sadjarwo, each affirming the corporate authority of the leader of its respective faction. Eventually an Indonesian court declared Harianto's group to be properly in power and nullified the joint venture agreement.

When the news reached the Director General of Forestry, he sent a letter to plaintiffs and to Telaga Mas in which he "cancelled and affirmed **[**8]** invalid" the Forestry Agreement. In the same letter, he invited plaintiffs and Telaga Mas under its newly declared leadership to execute a new agreement. The cancellation, plaintiffs argue, was the natural operation of the Agreement's automatic termination provisions.

In a separate action, a second Indonesian court subsequently held that Industrial Investment was not bound by the nullification order since it was not a party to that action. Harianto continued to rule Telaga Mas, however, and refused to honor or participate in the joint venture with plaintiff.

[*51] Industrial Investment contends that defendants' poisoning of the joint venture caused the cancellation of the Forestry Agreement which in turn caused the government to deny the concession. The district court found that the act of state doctrine prohibited such a "two-step inquiry." It concluded: "Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind the act, no matter how unscrupulous, is beyond judicial review."

HN1[] The act of state doctrine has arisen as a means **[**9]** of determining the appropriateness of adjudicating in a United States court a dispute which in some manner involves a foreign government. As classically stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill v. Hernandez, 168 U.S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897).

Early application of this doctrine was often muddled with the doctrine of sovereign immunity or principles of conflicts of law. [6.] **[**12]** Since *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)*, however, the doctrine has emerged as independently based on concerns of separation of powers. The Sabbatino Court, cautious of judicial interference in executive affairs, refused to adjudicate the validity of expropriation by the

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6. In Underhill, for instance, the defendant Hernandez was acting as an agent for the sovereign in which the alleged torts occurred. Thus the result could be said to rest on the personal immunity of foreign sovereigns. Note, The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978). See *Oetjen v. Central Leather Co., 246 U.S. 297, 38 S. Ct. 309, 62 L. Ed. 726 (1918)*; *American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909)*. See also, *Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 705 n. 18, 96 S. Ct. 1854, 1866-67 n. 18, 48 L. Ed. 2d 301 (1976)*. There is some authority that the doctrine still reflects conflicts of laws principles. This position assumes the validity of a foreign state's acts under the laws of that state. Applying the foreign laws to those acts, therefore, precludes an inquiry by American courts into their validity. See Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977).

Cuban government of property within its own territory owned by American nationals. [7] Its decision was based on several factors which pointed to the executive branch as the more appropriate tribunal to deal with the sensitive political issues. All **[**10]** related to the possible adverse consequences of an American court attempting to resolve the validity of title to property not within its jurisdiction or to judge a foreign state's power to expropriate the property of aliens. Of significance is the Court's express refusal to lay down "an inflexible and all-encompassing rule" of judicial abstention in every case not totally isolated to this country. *376 U.S. at 428, 84 S. Ct. at 940*. Instead, it declared a less brittle doctrine, one with the "capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *376 U.S. at 427-28, 84 S. Ct. at 940*. Relying on traditional political question reasoning, it found that the doctrine was not constitutionally compelled but that it rested on " "constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." *376 U.S. at 423, 84 S. Ct. at 938*. [8] Sabbatino's **[*52]** "proper distribution" depended on several factors, which concerned the ramifications of judicial intervention on executive **[**11]** conduct of international relations or of inconsistent judicial and executive behavior.

The Supreme Court has recently reaffirmed this policy of balancing executive and judicial **[**13]** concerns in *Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976)*. Because the Court "decline(d) to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations," Dunhill has become known as the "commercial exception" to the act of state doctrine. Dunhill had mistakenly made an overpayment to Cuba for cigars purchased from expropriated cigar businesses. The Court permitted adjudication of his claim of debt against Cuba:

> Subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. . . . Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04, 96 S. Ct. at 1866 (footnote omitted). Industrial Investment has urged application of this "commercial exception" to the Indonesian **[**14]** licensing structure. We need not reach the merits of this contention. [9]

Situations have arisen in which the Supreme Court has found the involvement of a foreign state to be too insignificant to invoke the act of state doctrine. For instance, ***HN2***[] the instigation of foreign governmental involvement **[**15]** does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts. In *United States v. Sisal Sales Corp., 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1926)*, a conspiracy which affected United States commerce was held not to be immune from judicial review of Sherman Act claims even though its success was due in part to procurement of discriminatory foreign legislation. The Court

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[7] Although Sabbatino's bar against claims based on the asserted invalidity of Cuban confiscations has been legislatively overruled by the "Hickenlooper Amendment," Foreign Assistance Act § 301(d)(4), *22 U.S.C.A. § 2370(e)(2) (1970)*, the case is still the leading authority on the act of state doctrine.

[8] Recently this circuit refused to rule on an act of state defense in a suit presenting conflicting claims to oil extracted from the Persian Gulf. Occ. of Umm al *Qaywayn v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978)*. Because the action required a determination of sovereignty over the well area, the case was dismissed as a non-justiciable political question. In a brief discussion of the source of the act of state doctrine, we noted that the "better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive." *577 F.2d at 1200-01 n. 4*.

[9] A majority of the Court never supported a broad "commercial act" exception to the act of state doctrine. Justice Stevens specifically omitted this part in his concurrence to Justice White's majority opinion, and it was rejected by the four dissenters. However, the Second Circuit, at least in dictum, has treated a commercial exception as firmly established. *Hunt v. Mobil Oil Co., 550 F.2d 68* (2d Cir.), Cert. denied, ***434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977)***. See Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions, 46 Fordham L.Rev. 295 (1977).

distinguished an earlier antitrust case, *American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909)*, in which the act of state doctrine was held to bar adjudication of claims that defendants had influenced Costa Rica to seize plaintiff's property. American Banana also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the *United States. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; *United States v. Sisal Sales Corp., supra, 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042*; **[**16]** *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)*.

The conspiracy in American Banana took place outside the United States and resulted in Costa Rica's seizure of plaintiff's property there. The seizure was valid in costa Rica and the Court held that its validity could not be challenged in American courts. The Sisal conspiracy, by comparison, allegedly destroyed plaintiff's sisal exportation business, not by government expropriation, but by the American corporate defendants' takeover aided by foreign legislation. The Sisal Court was not interested in the validity of the legislation but was concerned with redressing the anticompetitive effects on American commerce caused by the conspiracy.

HN3[] **[*53]** Similarly, a stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade. In *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*, defendants were charged with conspiring to monopolize the American vanadium industry **[**17]** by currying the favor of a private Canadian corporation designated as exclusive purchasing agent of vanadium by the Canadian government. Drawing from the authority of Sisal, the Court rejected the defense that the Canadian law permitted discriminatory purchasing by the authority having power to designate purchasing agents. It was enough that plaintiff claimed that the loss of its business was caused by defendants' actions. The Court was careful to note that the Canadian government itself was not a defendant in the action and that the validity of its legislation was not in issue.

The participation of the Indonesian government in the context of the present analysis cannot prevent Industrial Investment from having its claims adjudicated by the district court. There are no special political factors which outbalance this country's legitimate interest in regulating anticompetitive activity both here and abroad. [10] As in Sisal and Continental Ore, the complaint charges parties subject to the court's jurisdiction with conduct occurring within this country and elsewhere which violates United States law. To determine whether there has been a violation of American ***antitrust law*** it is not necessary **[**18]** to resolve the propriety of Indonesia's failure to issue a cutting license. To protect American antitrust policies, an American court need not embark on an adjudication of the validity of that government's behavior. The Ninth Circuit recently stated:

> ***HN4***[] **[**19]** The touchstone of Sabbatino the potential for interference with our foreign relations is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. *Sabbatino, 376 U.S. at 423, 84 S. Ct. 923, 11 L. Ed. 2d 804* . Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of Sabbatino, *id. at 428, 84 S. Ct. at 940*, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 607 (9th Cir. 1976).

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[10] In cases dealing with the enforcement of antitrust laws in the face of state action, we note that the approach of the courts has been to weigh the relative interests of the state and federal governments to determine whether the anticompetitive harm of the activity outweighs the benefits of state regulation. *Bates v. State Bar of Ariz., 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*; *Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*; *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*; *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

The government of Indonesia is not a named co-conspirator here. Its right to withhold a cutting license is not questioned. This is the major factor distinguishing this case from right to ownership cases such as American Banana and Sabbatino. For instance, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (D.C.Cal.1971)*, *Aff'd, 461 F.2d 1261 (9th Cir. 1972)*, **[**20]** the plaintiffs, holders of a Middle East oil concession from one of the Trucial States, charged the defendants with inducing an adjacent sheikdom in the Persian Gulf, Sharjah, to grant them a conflicting concession covering the same area. The court invoked the act of state doctrine to avoid having to adjudicate which of the two competing sheikdoms had superior authority to grant the concession. It was found that, to establish their claim as pleaded, plaintiffs had to prove that Sharja's concession was fraudulently issued. Passing upon such foreign governmental acts was considered more appropriate for the executive branch in its handling of foreign relations. By comparison, resolution of the charges made by Industrial Investment does not require a determination of plaintiffs' right **[*54]** to receive a cutting license from the Indonesian government. Unlike Occidental where plaintiffs' asserted claim arose through rights granted by a foreign government, Industrial Investment's interest in its business venture with Telaga Mas may be protected from disruptive conduct of competitors by United States antitrust laws.

The only connection which the government of Indonesia has with this **[**21]** action is through application of its Foreign Investment Act, the validity of which is not questioned. The challenge is that a commercial endeavor failed by virtue of external disruptive forces acting on the contractual relationship between private citizens. We need not decide whether, had Telaga Mas not refused to cooperate, the license would have issued as a certainty. It is enough that plaintiffs have offered proof to show that defendants conspired to cause its potential to exploit the Borneo concession to die aborning. *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*; *H & B Equipment Co., Inc. v. International Harvester, 577 F.2d 239 (5th Cir. 1978)*; *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964 (5th Cir. 1977)*, Cert. denied, *434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978)*. Whether the Indonesian government would have issued a cutting license is relevant only to the value of the destroyed joint venture, not to liability for its destruction.

But the Mitsui defendants argue (and the district court agreed) that the damage complained of stems directly from **[**22]** the denial of the government concession to cut timber. In order to establish therefore that defendants' behavior caused the injury, it would be necessary for the court to investigate the Director of Forestry's motivation in cancelling the agreement. This they say amounts to a prohibited inquiry into the validity of governmental activity. However, plaintiffs' complaint does not limit their allegation of injury from the antitrust cause of action to the inability to harvest Indonesian timber. They assert: "The wrongful acts of Defendants and their co-conspirators have deprived it of its contract and concession rights, of its ability to enter and compete in the market, and of the profits it would have derived from such operations." They insist here that even before it was known whether a license would issue, these rights had a substantial value which they could have proven. Plaintiffs are entitled to recover damages for injury to these "business or property" interests if they are caused by antitrust violations. *15 U.S.C.A. § 15*. All the injuries contended for may potentially satisfy that description. *North Texas Producers Association v. Young, 308 F.2d 235 (1962)*, **[**23]** Cert. denied, *372 U.S. 929, 83 S. Ct. 874, 9 L. Ed. 2d 733 (1963)*. See *Hunt v. Mobil Oil Corp., 410 F. Supp. 10 (S.D.N.Y.1976)*, Rev'd on other grounds, *550 F.2d 68* (2d Cir.), Cert. denied, *434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977)*.

The authority asserted to support Mitsui's position is *Hunt v. Mobil Oil Corp., 550 F.2d 68* (2d Cir.), Cert. denied, *434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977)*, and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D.Cal.1971)*, *Aff'd, 461 F.2d 1261 (9th Cir. 1972)*. Both cases involved expropriation by a foreign state of plaintiffs' properties. This distinction alone is of major significance. The Hunt court itself, refusing to apply the precedent of Sisal, stated:

> (Sisal) considered the assistance of the sovereign through the mechanism of favorable legislation engineered by the defendants to be of considerably less moment than the expropriation by the state of the plaintiff's properties in (American Banana).

550 F.2d at 75. Furthermore, separation of powers consideration in **[**24]** Hunt strongly counselled against the court's interference. [11.] Despite these distinctions, the Hunt **[*55]** opinion broadly states that in order to prove damages an antitrust plaintiff must show that But for the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the foreign state and "that inevitably involves its validity." 550 F.2d at 77.

[25]** This broad language in Hunt has been criticized for encouraging use of the act of state doctrine as a shield by private conspirators who are able to include some foreign governmental act in their anticompetitive scheme. [12.] We do not agree that, in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's acts were the sole cause of the injury. Of course, plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered. *Radiant Burners, Inc. v. Peoples Gas, 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961)*. However, inquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571, 23 L. Ed. 2d 129 (1969)*; *Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544*; *E & B Equipment Co., Inc. v. International Harvester, supra, 577 F.2d 239*; *Heatransfer v. Volkswagenwerk, A.G., supra, 553 F.2d 964*. **[**26]** Furthermore, we disagree that motivation and validity are equally protected by the act of state rubric. See, e. g., *Continental Ore Co. v. Union Carbide & Carbon Corp., supra, 370 U.S. 705, 82 S. Ct. 1404*; *Timberlane Lumber Co. v. Bank of America, supra, 549 F.2d 597*. Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action. Industrial Investment must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine.

[27]** The objective sought by passage of the Sherman Act is preservation and maintenance of effective competition in this country. *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)*. To provide an act of state shield to business entities whose activities happen to reach beyond United States soil would thwart this objective. The courts are an important forum for protection against competitive restraints. Although the act of state doctrine is a vital rule of judicial abstention in the **[*56]** field of foreign relations, it does not apply in this case.

REVERSED and REMANDED.

[11.] The complaint by Hunt, an independent oil producer holding oil concessions in Libya, charged defendants, the seven major oil companies, with fraudulently inducing Hunt to be uncooperative in pricing negotiations with Libya. Hunt did so, and Libya retaliated by nationalizing Hunt's properties thus totally eliminating Hunt from the field of competition. Libya was incensed. It loudly proclaimed its purpose to give the United States "a big hard blow in the Arab area on its cold, insolent face." *550 F.2d at 73* Quoting Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-17 (1974). In response, the United States government wrote the Libyan government and characterized the expropriation as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya." *550 F.2d at 73*, Quoting, A. Rovine, Digest of United States Practice in International Law 1973 at 335. The Second Circuit refused to upset the executive's identification of Libya's motivation by another inquiry which "could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue." *550 F.2d at 77-78*.

The court found that, even if the Department of State had not openly expressed its position, the political and diplomatic dimensions were too burdensome for resolution by the judiciary: "The action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." *550 F.2d 78*. No such "implications and complications" hinder a resolution of Industrial Investment's antitrust claims here.

[12.] Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977); Note, the Act of State Doctrine: Anti-Trust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978).

Dissent by: JONES

Dissent

JONES, Circuit Judge, dissenting:

The district court's decision as succinctly and accurately stated in the majority opinion, is "that the damage complained of stems directly from the denial of the government concession to cut timber." I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

In re Uranium Antitrust Litig.

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

April 30, 1979

MDL 342, No. 76 C 3830

Reporter

473 F. Supp. 393 *; 1979 U.S. Dist. LEXIS 12706 **; 204 U.S.P.Q. (BNA) 449 ***

In re URANIUM ANTITRUST LITIGATION. WESTINGHOUSE ELECTRIC CORPORATION, Plaintiff, v. RIO ALGOM LIMITED, Rio Algom Corporation, Rio Tinto Zinc Corporation Limited,RTZ Services Limited, Rio Tinto Zinc Corporation, Conzinc Rio Tinto of Australia Limited, Mary Kathleen Uranium Limited, Pancontinental Mining Limited, Queensland Mines Limited, Nuclear Fuels Corporation, Anglo-American Corporation of South Africa, Limited, Engelhard Minerals and Chemicals Corporation, Denison Mines, Limited, Denison Mines (U.S.) Incorporated, Noranda Mines Limited, Gulf Oil Corporation, Gulf Minerals Canada Limited, Kerr-McGee Corporation, the Anaconda Company, Getty Oil Company, Utah International Inc., Phelps Dodge Corporation, Western Nuclear, Inc., Homestake Mining Company, Atlas Corporation, Reserve Oil and Minerals Corporation, United Nuclear Corporation, Federal Resources Corporation, and Pioneer Nuclear, Inc., Defendants

Core Terms

uranium, counterclaimants, fuel, reactors, fabricated, Nuclear, monopolize, markets, yellowcake, competitors, sales, misrepresentations, antitrust, allegations, tied product, tying product, prices, products, tying arrangement, electric utility, manufacturers, assemblies, tie-in, trademark, antitrust violation, purchasers, motion to dismiss, contracts, suppliers, cases

LexisNexis® Headnotes

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

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

HN1[] **Private Actions, Standing**

The scope of antitrust protection extends to those persons who are either directly or indirectly injured by antitrust violations, and whose injury is of the kind the antitrust laws were written to guard against.

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

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

HN2[] **Private Actions, Standing**

The standing doctrine narrows this class of injured persons to a subclass of plaintiffs who are best situated, because of their market position, to serve the twin goals of providing compensation for injuries and preserving a competitive market structure.

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

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is the sale of one item (the tying product) only on condition that the buyer take a second item (the tied product) from the same source. Such arrangements are Per se unreasonable, and therefore violative of the antitrust laws, if 1) the tie-in involves two distinct products, 2) the defendant has sufficient economic power in the tying market to impose significant restraints in the tied product market and 3) a "not insubstantial" amount of commerce in the tied product market is affected.Once those elements are demonstrated, plaintiff need not specifically show that defendants' practices produced an unreasonably anticompetitive effect.

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**

The doctrine of Per se illegality is only applied to those agreements or practices which have a pernicious effect on competition and lack any redeeming virtue.

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

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant tying product, resulting in economic harm to competition in the tied market.

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

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

Tying arrangements are an object of anti-trust concern for two reasons they may force buyers into giving up the purchase of substitutes for the tied product, and they may destroy the free access of competing suppliers of the tied product to the consuming market.

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

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where the major or exclusive use of the tying product is in connection with the tied product, and the defendant possesses overwhelming power in one of those markets, control of one can lead to control of the other.

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN8[] Federal Unfair Competition Law, Lanham Act

Section 43(a) of the Lanham Trademark Act provides, in pertinent part, that: Any person who shall use in connection with any goods or services any false description or representation and shall cause such goods or services to enter into commerce shall be liable to a civil action by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN9[] Federal Unfair Competition Law, Lanham Act

Despite its broad language and arguably catholic scope, §43 (a) of the Lanham Trademark Act does not have unlimited application to all deceptive trade practices or to all claims of unfair competition. Instead, it is directed only against a certain kind of advertising false representation of goods or service in interstate commerce.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Palming Off

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

HN10[] False Designation of Origin, Palming Off

The § 43 of the Lanham Trademark Act is not limited to false advertising which compares a defendant's product to a plaintiff's. It proscribes misrepresentations about the quality of defendant's own goods, even where the misrepresentations do not tend to confuse (his) goods with those of a competitor or otherwise misstate the origin of the goods.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

HN11[] Federal Unfair Competition Law, Lanham Act

Section 43(a) of the Lanham Trademark Act reaches a seller who exaggerates the scope of his patents, thereby creating a false impression that it is the exclusive source of a product, even though there is no misbranding or mislabelling of the article and no misrepresentation of its inherent attributes.

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

***HN12*[ ] Federal Unfair Competition Law, Lanham Act**

§ 43(a) of the Lanham Trademark Act covers a publisher of a controlled circulation magazine who falsely inflates the size of his audience and thereby causes reduced advertising revenues to a competing publisher, even though the misrepresentations did not refer in any way to plaintiff's magazine or otherwise expressly take aim at an identifiable competitor.

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

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

***HN13*[ ] Similarity of Marks, Appearance, Meaning & Sound**

The Lanham Trademark Act should be read, at minimum, to protect competitors from misrepresentations which a defendant makes about its own products and which relate to the principal bases of competition among sellers.

Counsel: [1]** Roger Pascal, Schiff, Hardin & Waite, Chicago, Ill., for the Anaconda co.

Gregory A. Adamski, Winston & Strawn, Chicago, Ill., Michael V. Corrigan, Simpson, Thacher & Bartlett, New York City, for Atlas Corporation.

Richard L. Blatt, Peterson, Ross, Schloerb & Seidel, Chicago, Ill., Laurence V. Senn, Jr., Mudge, Rose, Guthrie & Alexander, New York City, for Denison Canada and Denison U. S.

Kenneth R. Gaines, Altheimer & Gray, Chicago, Ill., Raymond L. Falls, Jr., Cahill, Gordon & Reindel, New York City, for Englehard Minerals.

Richard K. Decker, Lord, Bissel & Brook, Chicago, Ill., Leonard J. Lewis, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Federal Resources Corp.

James W. Hathaway, Burditt & Calkins, Chicago, Ill., Brenton F. Goodrich, Overton, Lyman & Prince, Los Angeles, Cal., for Getty Oil Co.

Jonathan G. Bunge, Keck, Cushman, Mahin & Cate, Chicago, Ill., Richard T. Colman, Howrey & Simon, Washington, D. C., for Gulf Oil Corporation and Gulf Minerals Canada, Ltd.

J. Craig Busey, McDermott, Will & Emery, Chicago, Ill., David M. Balabania, McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., for Homestake Mining Co.

Thomas W. Johnston, Chadwell, **[**2]** Kayser, Ruggles, McGee & Hastings, Chicago, Ill., for Kerr-McGee Corp.

Joseph S. Wright, Jr., Rooks, Pitts, Fullagar & Poust, Chicago, Ill., for Noranda Mines Ltd.

John H. Hall, Debevoise, Plimpton, Lyons & Gates, New York City, for Phelps Dodge Corp. and Western Nuclear, Inc.

Thomas D. Allen, Wildman, Harrold, Allen & Dixon, Chicago, Ill., Andrew Barr, Locke, Purnell, Boren, Laney & Neely, Dallas, Tex., for Pioneer Nuclear, Inc.

Richard P. Campbell, McConnell & Campbell, Chicago, Ill., for Reserve Oil & Minerals Corp.

Paul G. Gebhard, Vedder, Price, Kaufman & Kammholz, Chicago, Ill., Richard E. Sherwood, O'Melveny & Myers, Los Angeles, Cal., for RTZ Corp. of America.

Robert T. Johnson, Jr., Bell, Boyd, Lloyd, Raddad & Burns, Chicago, Ill., W. Perry Pearce, Bigbee, Stephenson, Carpenter & Crout, Santa Fe, N. M., for United Nuclear Corp.

Watson B. Tucker, Mayer, Brown & Platt, Chicago, Ill., for Utah International, Inc.

Keith F. Bode, Jenner & Block, Chicago, Ill., for Rio Algom Corporation.

Lee A. Freeman, Jr., Freeman, Rothe, Freeman & Saltzman, Chicago, Ill., Raymond F. Scannell, Asst. Gen. Counsel, Westinghouse Electric Corporation, Pittsburgh, Pa., George S. Leisure, **[**3]** Jr., Donovan, Leisure, Newton & Irvine, New York City, for Westinghouse.

Opinion by: MARSHALL

Opinion

[*451]** **[*396]** MEMORANDUM DECISION

Plaintiff Westinghouse Electric Corporation has moved to dismiss various counterclaims filed by seven defendants Atlas Corporation, Anaconda Company, Kerr-McGee Corporation, Homestake Mining Company, Western Nuclear, Inc., Getty Oil Company, and Utah International, Inc. Westinghouse's motions fall into three categories. First, it challenges the standing of five counterclaimants Atlas, Anaconda, Kerr-McGee, Getty and Homestake to allege that Westinghouse has violated Section 2 of the Sherman Act by unlawfully monopolizing, attempting to monopolize or conspiring to monopolize markets for nuclear steam supply systems ("NSSS" or "reactors") and nuclear fuel assemblies ("fabricated fuel") for those systems. Second, it attacks the standing of all seven counterclaimants to allege that Westinghouse has violated Section 1 of the Sherman Act and Section 3 of the Clayton Act by unlawfully offering predatorily low-priced uranium as a tying product to induce electric utilities to purchase Westinghouse's fabricated fuel and reactors the tied products. Both of these **[**4]** motions are based on the theory that the counterclaimants have suffered no legally **[*397]** cognizable injury since they neither buy fabricated fuel or reactors, nor compete with Westinghouse in those markets. Third, Westinghouse has moved to dismiss Utah's counterclaim under Section 43(a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*, which alleges that Westinghouse deceived its utility customers by falsely representing "that it had the capability to carry through its commitments to make future deliveries of uranium to the utilities." Westinghouse contends that this claim is beyond the scope of § 43(a), which only prohibits trademark misuse or similar misconduct. This argument raises a question of statutory construction, and can be evaluated independently of the other motions. To analyze the standing arguments surrounding the tying and monopolization claims, we must make a detailed inquiry into the alleged market position of each of the parties, and then apply the tests of antitrust standing to the peculiar factual matrix which is presented.

All the antitrust counterclaimants complain that Westinghouse utilized various anticompetitive practices, including predatory pricing, **[**5]** short-selling, fraudulent representations, tying arrangements and forced combination sales, to restrain trade and monopolize or attempt to monopolize commerce in markets for uranium, fabricated fuel and reactors. [1] Each of these products is sold at a different level of the nuclear power industry. Counterclaimants generally operate only on the uranium level, by producing and then selling uranium to electric utility customers and

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1 Counterclaimants have also defined several relevant submarkets, but both sides have not attached any additional significance to those submarkets for the purposes of the present motions.

others. Westinghouse operates on all three levels, selling uranium, fabricated fuel and reactors to the same consumers. Westinghouse's motions essentially seek to confine counterclaimants' antitrust challenges to the uranium market. Because its motions are premised on a perceived economic separation between those markets, we must describe the relationships between uranium, fabricated fuel and reactors in the nuclear power industry. [2]

[6]** Nuclear power plants are used by electric utility companies to generate electricity. The energy source for these plants is uranium. Uranium must be processed in several ways before it is suitable for use as nuclear fuel. It begins as mined uranium ore, which is milled to extract uranium concentrates (U 3O 8), which are known in the industry as "yellowcake." Yellowcake is then converted to uranium hexafluoride (UF 6). Uranium hexafluoride is then enriched through a gaseous diffusion process to increase the concentration of the fissionable U-235 isotope. The enriched UF 6 is then chemically converted into uranium dioxide powder (UO 2). After the powder is compressed and shaped into **[***452]** pellets, it is ready for use in a nuclear reactor.

In this country, different entities perform these steps in the fuel process. All counterclaimants have active mining and milling operations, and sell yellowcake to electric utilities (Atlas P 25, Anaconda P 121, Getty P 130, Homestake P 7, Kerr-McGee P 4, Utah P 2, Western Nuclear P 127). Conversion of yellowcake to uranium hexafluoride is performed by Allied Chemical Company, a non-party, and by Kerr-McGee. (Kerr-McGee P 10(b)). All three domestic **[**7]** enrichment plants are owned by the federal government, which provides enrichment services to private parties on a contractual basis. None of the counterclaimants allege that they presently convert enriched UF 6 into UO 2 powder or pellets. But Kerr-McGee did offer these services between 1965 and 1975. (Kerr-McGee P 4).

After it has reached the pellet form, the uranium is ready to enter the fuel fabrication process. The pellets are placed inside zirconium alloy or stainless steel tubes. Many thousands of these fuel rods are then arranged in clusters to form a fuel assembly. The number and arrangement of fuel **[*398]** rods are individually engineered for each reactor design. From 1966 through 1975, in addition to reactor manufacturers, several non-reactor companies produced fuel assemblies, including Kerr-McGee, Nuclear Fuel Service Corporation, United Nuclear Corporation, Exxon Nuclear Company, Inc., and Nuclear Materials and Equipment Corporation. At the present time, however, Exxon (a non-party) is the only remaining independent fabricator which competes with Westinghouse and the other reactor manufacturers for fuel fabrication business (Kerr-McGee P 13, Utah P 7). Besides **[**8]** Kerr-McGee, none of the other counterclaimants claim any past or present stake in the fuel fabrication market.

After fabrication into fuel assemblies, the uranium is ready to be housed in the power-generating equipment of the nuclear power plant, which is known as the Nuclear Steam Supply System (NSSS). The NSSS consists principally of a reactor enclosed within a steel pressure vessel, as well as other standard electrical generating equipment. The fuel assembly is placed into the reactor and surrounded by water. The heat created by the nuclear fission reaction creates steam, which causes turbines to rotate, which in turn generate electricity. The United States market for nuclear reactors is supplied by five manufacturers. Westinghouse is the largest manufacturer with about 39% Of the market; General Electric is next with about 31%; Combustion Engineering Inc. and Babcock & Wilcox Co. have about 15% And 12%, respectively, and General Atomic, Inc. has an insignificant share based on sporadic sales in two or three years over the last decade. (Kerr-McGee P 9, Western Nuclear P 137). None of the counterclaimants manufacture or sell nuclear reactors.

The first fuel assemblies used **[**9]** in a reactor are usually fabricated and sold to the utility customer by the reactor manufacturer at the time the reactor is purchased. (Kerr-McGee P 11). After a reactor operates for twelve to eighteen months, some of the fissionable uranium becomes depleted. Consequently, some of the original fuel assemblies must be replaced and others rearranged. Thereafter, one third of the fuel core must be replaced annually. The replacement fuel assemblies are called reloads. Reload fabrication is performed by a reactor manufacturer or an independent fuel fabricator. (Kerr-McGee P 12, Western Nuclear P 130).

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[2] This description is drawn from allegations in the counterclaims. See also *United Nuclear Corp. v. Combustion Engineering, Inc., 302 F. Supp. 539 (E.D.Pa.1969)*.

A variety of contractual methods have been used by utilities and fuel fabricators to allocate responsibility for procuring fuel for initial fuel cores and reloads. In some cases, the fuel fabricator is responsible for obtaining the yellowcake and for obtaining services for the conversion and enrichment of the yellowcake. In other cases, obtaining one or both of these services is the responsibility of the utility. In still other instances, the yellowcake is obtained by the utility, but one or both of the services is the responsibility of the fuel fabricator. (Kerr-McGee P 14). Counterclaimants **[**10]** all allege that they sell yellowcake, but some are silent on whether they sell or offer to sell yellowcake to utilities, fuel fabricators, or both. (Atlas P 125, Homestake P 7, Kerr-McGee P 4, Western Nuclear P 127). Others allege that they have sold uranium to reactor manufacturers and to electric utilities (Anaconda P 121), to electric utilities and "others" (Getty P 130), or to electric utilities and "intermediaries" (Utah P 2). All allege that the effect of Westinghouse's alleged antitrust violations has been to deprive them of potential uranium sales to electric utilities.

Counterclaimants allege that Westinghouse participates vigorously in all three markets uranium, fuel fabrication and reactor manufacture. Westinghouse is the largest single reactor manufacturer in the United States. It has sold more than one hundred reactors in the United States, giving it a 38-40% Market share. In 1971 its reactors accounted for about 40% Of the generating capacity of commercial nuclear power plants supplied by U.S. manufacturers **[***453]** . (Anaconda P 123, Homestake P 9, Western Nuclear P 136). Westinghouse is presently one of a very few commercial fabricators of fuel assemblies in this country. **[**11]** Its estimated market share in the **[*399]** United States for fuel assemblies sold to date is between 35% And 40%. (Homestake P 9, Atlas PP 43, 27, Utah P 7, Kerr-McGee P 13). Since the mid-1960's Westinghouse has sold large quantities of yellowcake to electric utility customers for long-term delivery at various times up through the end of this century. By 1975, Westinghouse had agreed to deliver some eighty million pounds of yellowcake to utilities during this period. (Anaconda P 125(f), Kerr-McGee P 23, Utah P 11, Western Nuclear P 139). At the beginning of 1976, Westinghouse's commitments represented about 20% Of commercial uranium commitments by all producers to all buyers for contracts through 1994. (Kerr-McGee P 23, Western Nuclear P 141). Estimates of Westinghouse's present orders for yellowcake range as high as one hundred fifteen million pounds. (Atlas P 127, Homestake P 9). Although Westinghouse has a wholly-owned subsidiary engaged in uranium exploration and mining, and has subscribed to several joint ventures engaged in uranium exploration and mining (Atlas P 28, Homestake P 10, Utah P 4), some counterclaimants seem to allege that Westinghouse has no ability **[**12]** to meet any of its contractual obligations from its own production, and will have to rely entirely on purchases of yellowcake from other sources. (Kerr-McGee P 23, Anaconda P 125(a)). All counterclaimants agree that Westinghouse has no uranium available in its inventory to meet the large majority of its uranium commitments. (See, e.g. Western Nuclear PP 140-41). Thus, Westinghouse's alleged position as a major yellowcake Supplier is not buttressed by a concomitant position as a major yellowcake Producer. Westinghouse's productive capacity and dominance instead lies in its reactor and fabricated fuel operations.

With this industry background in mind, we proceed to outline the challenged actions of defendants' counterclaims. Westinghouse attacks counterclaimants' standing to press two claims: 1) that Westinghouse monopolized or attempted to monopolize the fabricated fuel or reactor markets and 2) that Westinghouse used uranium as a tying product to coerce electric utilities to purchase fabricated fuel or reactors from Westinghouse. Westinghouse does not contend that counterclaimants lack standing to pursue their other claims: 1) that Westinghouse monopolized or attempted to monopolize **[**13]** the uranium market or 2) that Westinghouse used reactors or fabricated fuel as a tying product to coerce utilities to purchase tied uranium from it; or 3) that Westinghouse bundled together its sales of uranium, fabricated fuel and reactors, requiring utilities to purchase these products in a package, with the result that competitors in all three markets were injured. (Westinghouse Response, filed 1/17/79, at 5).

I. Tying Counterclaims

We will first describe the challenged tying claim. Although each counterclaim has individual variations in language and form, the essential content of the allegations is the same. Westinghouse allegedly offered to sell yellowcake to its electric utility customers, at prices below the prevailing market, on the condition that the utilities also buy Westinghouse's reactors, fabricated fuel, or both. (Atlas P 37, Anaconda P 125(b), Getty P 133(b), Homestake P 18, Kerr-McGee PP 18-20, Utah P 12, Western Nuclear P 138). Low-cost yellowcake was thus used as a tying product to coerce utilities to buy tied reactors or fabricated fuel. At least one counterclaimant alleges that

Westinghouse was able to maintain its tie-ins by cross-subsidization, that is, **[**14]** by using its profits from its sale of reactors and fabricated fuel to underwrite its predatorily low-priced uranium. [3] (Kerr-McGee P 18).

As a result of its tie-ins, and of other allegedly illegal conduct, such as exclusive dealing contracts, predatory pricing, short-selling and fraudulent misrepresentations, Westinghouse acquired contracts to sell utilities over eighty million pounds of uranium, which was about 20% Of the market. **[*400]** In making these contracts, Westinghouse agreed to provide uranium it did not have and to provide it at unreasonably low prices. Westinghouse also fraudulently misrepresented that it was able to supply the agreed quantities of yellowcake. It then failed to cover its contractual obligations, leaving it short some sixty-five million pounds of uranium. (Kerr-McGee PP 23-26, Western Nuclear PP 139-140).

Westinghouse's conduct had the effect of creating **[**15]** a serious supply-demand imbalance in the yellowcake market. Westinghouse's sales of large amounts of yellowcake, which were at least partially induced by its use of uranium as a tying product, led many utilities which had contracted **[***454]** with Westinghouse to refrain from purchasing from other uranium suppliers, including counterclaimants. This lowered demand for counterclaimants' yellowcake and caused them to accept depressed prices for contracts they were able to make. This demand-price reduction was an artificial one, however, because Westinghouse did not possess the large quantities of yellowcake due for supply under the contracts. The "phantom" uranium was in reality held by other producers, or was in as-yet undeveloped mines or properties. This fact was fraudulently concealed by Westinghouse. Believing that no strong market for their uranium existed, counterclaimants had no incentive to make capital investments to develop new or existing uranium sources. When the illusory nature of Westinghouse's supplies was exposed, counterclaimants were suddenly confronted with demands for the shortfall. However, the depressed prices and reduced capital investment of the preceding years **[**16]** left them unprepared to capitalize on these new sales opportunities, resulting in the loss of substantial revenue and profits. Counterclaimants conclude that Westinghouse's tying arrangement resulted in a lessening of competition in the markets for uranium, fabricated fuel and reactors, and, more specifically, in injury to their position as producers and sellers of uranium. (See Atlas P 41; Anaconda PP 126-127; Getty P 134; Homestake PP 18, 29; Kerr-McGee PP 20, 26-28; Utah PP 18-19, Western Nuclear PP 140-143).

Westinghouse's motion to dismiss these counterclaims is based on the proffered theory that, to have standing to attack an alleged tie-in, a private antitrust plaintiff must be either a purchaser of the tied product (reactors and fabricated fuel) or a competitor of the defendant in the market for the tied product. None of the counterclaimants alleges that it satisfies this test. The purchasers are the utility companies, and the affected competitors are the reactor and fabricated fuel manufacturers. [4] Instead, counterclaimants all allege that they compete with Westinghouse in the market for uranium, the tying product, and that their businesses are injured in that market. **[**17]** Westinghouse contends that the alleged impact on counterclaimants' business in that market is too remote, speculative and indirect to support a private antitrust claim.

In response, counterclaimants argue that the case law does not support a denial of standing to a fixed category of antitrust plaintiffs, without additional consideration of the directness of their injury. They contend that even competitors in the tying product market may sue if they were directly and foreseeably injured by the tie-in device. By their analysis, counterclaimants suffered such an injury here, because Westinghouse's "tying uranium obtained its tying power from its unreasonably low price," and that price was made possible solely by Westinghouse's cross-subsidization of its uranium losses by its profits in the reactor and fabricated fuel markets. The greater the success of the tie-in, **[**18]** the more uranium sales which were diverted from counterclaimants. Furthermore, the injury was foreseeable because counterclaimants are Westinghouse's direct competitors in the sale of uranium to utilities which use Westinghouse's reactors and fabricated fuel. They are not remote links in the chain of distribution, nor are they only indirectly or **[*401]** derivatively affected by competitive injury to others.

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[3] In their memorandum opposing Westinghouse's motion to dismiss, all counterclaimants adopt the cross-subsidization theory.

[4] In its memo, Kerr-McGee does not place itself in the latter category, even though it competed in the fabricated fuel market from 1965 to 1975.

We find some merit in the arguments by both Westinghouse and counterclaimants, and think that their contrary conclusions are the product of the doctrinal confusion which has characterized the law of antitrust standing. The confusion arises from the failure to distinguish between the scope of antitrust standing and the scope of protection under the antitrust laws. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 835 (1977). ***HN1***[] The scope of antitrust protection extends to those persons who are either directly or indirectly injured by antitrust violations, and whose injury is "of the kind the antitrust laws were written to guard against." *Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1168 (7th Cir. 1978)*. ***HN2***[] The standing doctrine **[**19]** narrows this class of injured persons to a subclass of plaintiffs who are best situated, because of their market position, to serve the twin goals of providing compensation for injuries and preserving a competitive market structure. Applying this analysis, we conclude that counterclaimants are not protected by the doctrine of Per se illegality which normally attaches to the antitrust prohibition against tying arrangements, but nevertheless are within the scope of protection and standing to challenge those practices under a rule of reason analysis. [5]

[*455]** **[**20]** ***HN3***[] A tying arrangement is the sale of one item (the tying product) only on condition that the buyer take a second item (the tied product) from the same source. Such arrangements are Per se unreasonable, and therefore violative of the antitrust laws, if 1) the tie-in involves two distinct products, 2) the defendant has sufficient economic power in the tying market to impose significant restraints in the tied product market and 3) a "not insubstantial" amount of commerce in the tied product market is affected. *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)* (Fortner I), quoting *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. Once those elements are demonstrated, plaintiff need not specifically show that defendants' practices produced an unreasonably anticompetitive effect.

HN4[] The doctrine of Per se illegality is only applied to those agreements or practices which have a pernicious effect on competition and lack any redeeming virtue. *Northern Pacific Ry. Co., supra, 356 U.S. at 5, 78 S. Ct. 514*. In placing tie-ins in this category, the Supreme Court has focussed exclusively **[**21]** on the anticompetitive impact of tie-ins on the market for the tied, not the tying, product. In *Times Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 73 S. Ct. 872, 883, 97 L. Ed. 1277 (1953)*, the Court stated that

> ***HN5***[] The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying' product, resulting in economic harm to competition in the "tied' market.

In *United States v. Loew's Inc., 371 U.S. 38, 44-45, 83 S. Ct. 97, 102, 9 L. Ed. 2d 11 (1962)*, the Court said ***HN6***[] tying arrangements

> . . . are an object of anti-trust concern for two reasons they may force buyers into giving up the purchase of substitutes for the tied product, . . . and they may destroy the free access of **[*402]** competing suppliers of the tied product to the consuming market . . . .

Justice Black reiterated in Northern Pacific Ry. Co. that:

> Where such (tie-in) conditions are successfully exacted competition on the merits With respect to the tied product is inevitably curbed. . . . (Tying arrangements) deny competitors free access to the market For the tied product, not because **[**22]** the party imposing the tying requirements has a better product or a lower price but

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[5] We have struggled to fashion what we believe is an appropriate test because recent Seventh Circuit decisions have created a doctrinal void in this area. In its most recent decision expressly adopting a standing test, the Seventh Circuit seemed to use both the "zone of interests" and "target area" tests. *Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164, 1167 (7th Cir. 1976)*. That decision was reversed by the Supreme Court in an opinion which expressly refrained from addressing the standing issue. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 728 n.7, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. The Seventh Circuit's most recent opinion on standing admits that, because of the Supreme Court reversal, the legal foundation of its standing analysis in Ampress Brick now requires reconsideration, but then finds it unnecessary to select or reject any of the various standing and injury doctrines. *Lupia, supra, 586 F.2d at 1169*.

> because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.

356 U.S. at 6, 78 S. Ct. at 518 (emphasis added). Justice White, in his dissenting opinion in Fortner I, adopts the same perspective:

> There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise To distort freedom of trade and competition in the second (tied) product.

394 U.S. at 512, 89 S. Ct. at 1263 (emphasis added). The Courts of Appeals echo these sentiments with statements that "(t)he evil of a tying agreement is the restraint of competition in the tied product." Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 32 (7th Cir. 1976); Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313, 316-17 (5th Cir. 1976).

These cases clearly indicate that the judicial doctrine of Per se unreasonableness in tying arrangements was only designed to protect **[**23]** competitors and purchasers in the market for the tied product, where the major anticompetitive effects are felt. An extension of that doctrine to protect competitors in the tying market would be justified only if tying arrangements "inevitably curbed" competition in that market as well. We know too little about the actual impact of the challenged tie-in to justify such an extension at this stage. And we are skeptical that evidence could be introduced to support that step here. Professors Areeda and Turner have noted in their recent treatise that, "with some exceptions, tying arrangements do not reinforce the firm's market power in the tying product. . . . Ordinarily, the adverse effects, if any, are on competition in the tied item." P. Areeda and D. Turner, ***Antitrust Law*** P 733 at p. 258 (1978). **[***456]**

The allegations in the counterclaims do not convince us that Westinghouse's practices would have such an inherently pernicious effect on competition in the tying market so as to warrant a conclusive presumption of illegality. First, Westinghouse's alleged market power in uranium was illusory. Westinghouse sold large quantities of uranium, but lacked the productive capacity to supply **[**24]** it. It masked its short-selling scheme by falsely misrepresenting its ability to cover. Second, Westinghouse's alleged degree of control in the tied product markets (reactors and fabricated fuel) is not great enough to conclusively infer that it possessed sufficient leverage to extend its economic power to the tying product market (uranium). In some situations, ***HN7***[] where the major or exclusive use of the tying product is in connection with the tied product, and the defendant possesses overwhelming power in one of those markets, control of one can lead to control of the other. See Areeda & Turner, Supra, P 733 at pp. 259-60; United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 325 (D.Mass.1953), Aff'd per curiam, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954). Some courts have defined tying arrangements in such broad terms, theoretically expanding their Per se prohibition to cover all extensions of economic power from one market to another. See, e.g., Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425 (5th Cir. 1978). Here Westinghouse's alleged 40% Share of the reactor and fabricated fuel markets is insufficient to draw a conclusive presumption of illegal leveraging.

[25]** Although counterclaimants' alleged injury is not of the kind the doctrine **[*403]** of Per se unreasonableness was intended to guard against, it is within the scope of protection afforded by the antitrust laws against arrangements which unreasonably restrain trade (s 1 of the Sherman Act) or which substantially lessen competition or tend to create a monopoly (s 3 of the Clayton Act). The allegations of the counterclaims invoke these more general standards of the antitrust laws. We also hold that counterclaimants' alleged injury is sufficient to give them standing to sue. They allege that Westinghouse's tie-in practice reduced demand and lowered prices for uranium, causing them to lose sales and profits to Westinghouse and to delay capital investment needed to meet the actual demand. The sales diversion and investment inhibition were caused by Westinghouse's predatorily-low pricing of the tying product, which in turn was made possible by Westinghouse's cross-subsidization of those low prices by profits earned through its domination or monopolization of the tied products. Westinghouse's alleged predation and tie-in weakened competition in the uranium market by artificially limiting **[**26]** the opportunities of rivals and new entrants. Because counterclaimants sold uranium in direct competition with Westinghouse, their injury does not have the indirect quality which is characteristic of chain-of-distribution cases. See, e.g., Illinois Brick Co. v. Illinois, *supra.* The injury is immediate and severe. This case also does not raise any risk of duplicative recoveries, since counterclaimants only seek recovery for damages incurred in the uranium market, not for those suffered by Westinghouse's competitors or customers in the reactor and fabricated fuel markets. Counterclaimants fit within the class of ". . . those who have been injured by (alleged) restraints imposed by defendant on competitive forces in the economy." *Lupia, supra, 586 F.2d at 1168*. We conclude that counterclaimants have standing under the general standards of Section 1 of the Sherman Act and Section 3 of the Clayton Act to challenge Westinghouse's alleged use of uranium as a tying product to coerce utilities and others to purchase its reactors and fabricated fuel. They are entitled to an opportunity to prove an antitrust violation "on the basis of a more thorough examination of the purposes and effects **[**27]** of the practices involved . . ." *Fortner I, supra, 394 U.S. at 500, 89 S. Ct. at 1257*. Westinghouse's motion to dismiss these counterclaims is denied.

II. Section 2 Counterclaims

Five defendants Atlas, Anaconda, Getty, Homestake, and Kerr-McGee have accused Westinghouse of Section 2 violations in the markets for reactors, fabricated fuel and uranium. The supporting factual allegations are the same as or very similar to those underlying the tying claims.

Westinghouse offered and made package deals with electric utilities to provide them with nuclear reactors, fabricated fuel, and uranium. The actual mechanics behind those deals are variously described in the counterclaims. Westinghouse required utilities to buy all three products together for a total combination price, without regard to the true value of each of the component products. Or Westinghouse sold uranium to utilities at unreasonably low prices, on condition that they also buy Westinghouse's reactor and fabricated fuel. Or Westinghouse used its low-priced uranium as a "loss leader" to induce **[***457]** utilities to buy reactors and fabricated fuel from Westinghouse. Westinghouse's ability to make these deals stemmed from its **[**28]** dominance in the reactor and fabricated fuel markets, and its ability to subsidize its uranium losses with profits on sales in those markets.

In offering these package deals, Westinghouse falsely misrepresented that it could supply all of its purchasers' uranium requirements and could service their full nuclear needs, when in fact Westinghouse had neither the ability nor the intent to cover its sales. By its conduct, Westinghouse successfully induced utilities to enter into long-term exclusive dealing contracts covering all or almost all their uranium requirements. Westinghouse's short-selling program was intended to artificially manipulate the yellowcake market. Westinghouse first seized a sizeable percentage of long-term **[*404]** uranium demand by offering very low prices, then delayed its arrangements with uranium producers to cover its sales, apparently hoping the depressed market would produce a price low enough to protect its short position. As we noted earlier with the tying allegations, Westinghouse's conduct had the effect of diverting uranium sales from counterclaimants to Westinghouse, of diminishing market demand and prices for uranium, of curtailing the forward **[**29]** supply of uranium and of discouraging capital investment and market expansion by competing uranium producers. (Atlas PP 44-45, Anaconda PP 125-127, Getty PP 133-137, Homestake PP 25-26, Kerr-McGee PP 18-28).

Counterclaimants allege that Westinghouse has used its market power in uranium, reactors and fabricated fuel in an anticompetitive and monopolistic manner in violation of Section 2 of the Sherman Act. However, the various counterclaimants diverge in enumerating the specific Section 2 offenses. Atlas and Homestake claim that Westinghouse has monopolized, attempted to monopolize, and conspired to monopolize the reactor and fabricated fuel markets, but has only attempted and conspired to monopolize the yellowcake market. (Atlas PP 46-47, Homestake PP 27-28). Getty and Anaconda claim that Westinghouse has monopolized and attempted to monopolize all three markets. (Getty P 138, Anaconda P 124). In addition, Western Nuclear states that it intends to amend its counterclaim to come within this category, although its present allegations only charge monopolization and attempted monopolization of the uranium market. (Western Nuclear P 150). Kerr-McGee claims that Westinghouse has **[**30]** monopolized, attempted to monopolize, and conspired to monopolize all three markets, as well as various submarkets. (Kerr-McGee P 38).

Westinghouse has moved to dismiss the five counterclaims "to the extent that counterclaimants seek damages or injunctive relief for injury to their business or property or threatened loss or damage resulting from Westinghouse's alleged monopolization, attempted monopolization, or conspiracy to monopolize the markets for reactors or fabricated nuclear fuel." (Westinghouse Supp. Memo p. 14). Westinghouse theorizes that counterclaimants lack standing to complain of monopolization in reactors and fabricated fuel because they are neither consumers nor competitors in those markets. Instead, they are "mere suppliers" of uranium to those market participants. Westinghouse views this connection as too attenuated to confer standing.

In response, counterclaimants argue that they are more than "mere suppliers" to the two markets, and that certain suppliers can have standing to assert claims for injuries caused by actual or attempted monopolization of a market in which they do not directly compete. They recognize that suppliers may lack standing if their injury **[**31]** is only a ripple effect from an antitrust violation in a distant market. But counterclaimants view their injury as more than the loss of sales of uranium to participants in the reactor and fabricated fuel markets because of Westinghouse's monopolistic restraints on the businesses of those participants. Their injury on the uranium level of the industry is not merely the fallout from Westinghouse's violations on the fabricated fuel and reactor levels, but instead is part of the bomb crater caused by a unified attack on all three markets. They contend that Westinghouse is a vertically integrated company which has monopolized or attempted to monopolize multiple levels of the nuclear power industry by bundling together sales of reactors, fabricated fuel and uranium. Westinghouse excluded, or attempted to exclude, competition from all three markets as part of a single comprehensive scheme. They conclude that "whether its true purpose was to monopolize uranium for its own sake, or to leverage its market power there to exclude competitors in fabrication and reactors, Westinghouse took aim at the counterclaimants and should not be shielded from liability because the end of its scheme was **[**32]** monopolization of a "downstream' market." (Counterclaimants' Memo, p. 4). **[***458]**

[*405] In reply, Westinghouse emphasizes that it does not seek to immunize itself from antitrust liability, since it has not challenged counterclaimants' standing to recover damages for alleged Section 2 violations in the uranium market. Counterclaimants compete with Westinghouse for the sale of that product, and are clearly injured by Westinghouse's alleged attempts to cover that market. Westinghouse's motions instead "seek to prevent counterclaimants from asserting that Westinghouse violated the antitrust laws in markets in which they have never been engaged reactors and fabricated fuel." (Westinghouse Reply Memo, p. 4). Westinghouse views the monopolization claims as separable and distinct, and rejects counterclaimants' arguments that Westinghouse's alleged cross subsidization of profits and leveraging of power from its reactor and fabricated fuel markets can tie all three together. Westinghouse urges that if it used the fruits of its monopoly power to engage in predatory pricing or tying arrangements in the uranium market, counterclaimants' proper remedy is a claim for antitrust violations in that **[**33]** market alone.

We think counterclaimants have the better arguments. They have accused Westinghouse with monopolization or attempted monopolization of multiple levels of the nuclear power industry through the exercise of large amounts of market power. Two lines of antitrust violations are involved. One line is created by counterclaimants' allegations that Westinghouse has Vertically integrated all three nuclear markets, thereby causing an overall constriction of uranium buyers and a resulting monopsonistic injury to uranium suppliers. For example, Atlas claims that Westinghouse used low-priced yellowcake

> . . . to entice utilities to buy their full nuclear power needs, including nuclear reactors, fabricated fuel assemblies, and yellowcake, from Westinghouse, for the purpose and with the effect of entrenching Westinghouse's dominant position in the nuclear reactor and fabricated fuel assembly markets, and enhancing its position in the yellowcake market. (P 37).

As part of its package deal to provide for the utilities' fuel nuclear needs, Westinghouse offered

> . . . to act as agent for electric utility company customers in their purchases of yellowcake, with the intent **[**34]** to control such purchases only from or through Westinghouse, to the exclusion of competing yellowcake purchasers. (P 45(f)).

Another line of antitrust violations, economically perpendicular to the first, is created by counterclaimants' allegations that Westinghouse has Horizontally monopolized or attempted to monopolize the three nuclear markets, thereby simultaneously harming its competitors in the primary markets and also increasing its leverage through package sales in upstream or downstream markets, causing injury to competitors in those secondary markets.

Thus, for example, Atlas alleges that Westinghouse has used package deals As a vehicle for achieving dominance in the three markets, and has also been able to use package deals successfully As a consequence of its dominance in those same markets, with market power thus serving as both a means and an effect. (PP 44(a), 45(a)). The counterclaims therefore describe a situation where the same acts of Westinghouse (i. e., its combination sales) have caused two geometrically related lines of antitrust violations.

Westinghouse tries to dissect those two lines, viewing the counterclaims as a complex of several separable **[**35]** antitrust violations. However, we agree with counterclaimants that their pleadings describe a single massive antitrust violation throughout an industry, causing a synergistic continuum of injury to market participants. At this stage of the pleadings, we see no way to segregate issues of proof and injury by market level. Counterclaimants are entitled to recover for their injuries which flow from Westinghouse's anticompetitive conduct in all three levels of the industry.

We will not make a detailed attempt to harmonize our decision with the myriad factual situations appearing in other antitrust standing decisions. We have found few, if any, which contain a similar configuration **[*406]** of parties with comparable antitrust theories of recovery. And we see little need to decide whether to adopt a "competitor-only" or a "direct and foreseeable" standing test to measure the alleged injury, since such stock phrases add nothing to the analysis of the antitrust policies involved. Courts have recognized "the overriding importance of the facts of each case as opposed to the particular test employed," *Cromar v. Nuclear Materials & Equipment Corp., 543 F.2d 501, 508 n. 13 (3d Cir. 1976)*, **[**36]** so we have concentrated our efforts in that area. We do point to two groups of cases which support our analysis. The first holds that Section 2 prohibits the use of monopoly power by a vertically integrated company on one level of an industry to destroy competition on another level. *Poster Exchange, Inc. v.* ***[***459]*** *National Screen Service Corp., 431 F.2d 334, 339 (5th Cir. 1970)*; *FLM Collision Parts, Inc. v. Ford Motor Company, 406 F. Supp. 224, 245-46 (S.D.N.Y.1975)*, Aff'd in relevant part, *543 F.2d 1019, 1030 (2d Cir. 1976)*, Cert. denied, *429 U.S. 1097, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977)*; *Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 379-80 (N.D.Ga.1975)*, *Aff'd, 535 F.2d 313 (5th Cir. 1976)*; *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 346 (D.Mass.1953)*, Aff'd per curiam, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*. The second grants standing to suppliers who are not in a direct contractual or competitive relationship with persons in the market which defendant attempted to monopolize. *Cromar, supra* ; *South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966)*; See also, Berger & Bernstein, Supra, 86 Yale **[**37]** L.J. at 866-70; L. Sullivan, Handbook of the Law of Antitrust 773 (1977). [6]

Westinghouse's motions to dismiss the Section 2 counterclaims are denied.

III. Lanham Act Counterclaim

Westinghouse's final motion seeks to dismiss Count III of Utah's counterclaim, which is based on Section 43(a) of the Lanham Trademark Act, *15 U.S.C. § 1125(a)*. In that count, Utah first repeats ten paragraphs from Count I, which is based on Section 1 of the Sherman Act. Nine of those allegations describe the parties and the structure of the nuclear power industry. The tenth alleges that Westinghouse has contracted with numerous utilities **[**38]** to provide them with nuclear power plants, fabricated fuel, and eighty million pounds of uranium on a long term basis. Utah then adds the allegations in Count III that Westinghouse made two false representations to its utility customers when it negotiated and formed those contracts. First, Westinghouse said "that it had the capability to carry through its commitments to make future deliveries of uranium to the utilities, when it knew or should have known that it had no such capability." Second, Westinghouse said "that it either owned sufficient uranium (or rights thereto) or would be able to obtain sufficient uranium to enable it to meet its commitments to make future deliveries of 80 million or more pounds to the utilities, when it owned only 15 million pounds of uranium (or rights thereto) and had no such ability." Utah claims that these misrepresentations damaged its business and profit position by diverting uranium sales from Utah to Westinghouse and by artificially depressing uranium prices.

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[6] Sullivan states that "Injured competitor's suppliers, landlord, employees and stockholders . . . (might well be denied standing) unless under the particular circumstances they could show a more immediate relationship to the violation that is typically associated with such status," Quoted in Petroleum for Contractors, Inc. v. Mobil Oil Corp., 1978-2 Trade Cases P 62,352 (S.D.N.Y. Nov. 20, 1978).

In its motion to dismiss, Westinghouse argues that these allegations fall outside the scope of Section 43(a), which only prohibits misuse of a trademark or practices of a similar nature. **[**39]** Westinghouse relies chiefly on *Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969)*. In that case, the Seventh Circuit quoted at length the "correct interpretation" of the Lanham Act contained in *Samson Crane Co. v. Union National Sales, Inc., 87 F. Supp. **[*407]** 218 (D.Mass.1949)*, Aff'd per curiam, *180 F.2d 896 (1st Cir. 1950)*, including a statement that Section 43(a) embraces "only such false descriptions or representations as are of substantially the same economic nature as those which involve infringement or other improper use of trademarks." According to Westinghouse's definition, this limiting phrase covers misrepresentations which create consumer confusion over the source or content of defendant's products, or which somehow enable defendant to capitalize on plaintiff's reputation. Westinghouse concludes that its alleged misrepresentations are not of this character, since they only involve Westinghouse's ability to supply its goods to its utility customers.

Utah concedes that it has not accused Westinghouse of trademark misuse or of making misrepresentations concerning the source, qualities or ingredients of its goods. But it argues that Section **[**40]** 43(a) has a much broader scope than Westinghouse urges, and covers any false representation which a defendant uses in connection with his goods or services. Utah claims that its interpretation is consistent with the plain language of the statute, with the statutory purposes, with Bernard Food, and with the weight of judicial authority. And it contends that its counterclaim falls clearly within this interpretation of the Act.

HN8[] Section 43(a) provides, in pertinent part, that

> Any person who shall . . . use in connection with any goods or services . . . any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall **[***460]** be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

HN9[] Despite its broad language and arguably catholic scope, courts have agreed that this section does not have unlimited application to all deceptive trade practices or to all claims of unfair competition. *Alfred Dunhill Ltd. v. Interstate Cigar Co., Inc., 499 F.2d 232, 237 (2d Cir. 1974)*; *Alberto-Culver Co. v. Gillette Co., 408 F. Supp. 1160, 1162 **[**41]** (N.D.Ill. 1976)*. Instead, it "is directed only against a certain kind of advertising false representation of goods or service in interstate commerce." 1 Callman, Unfair Competition, Trademarks & Monopolies, § 18.2(b) at 620-21 (3d ed. 1967).

In attempting to define what kinds of false advertising are within the Act, courts have established very few firm guidelines. One limitation which has garnered a strong following is the Bernard Food holding that § 43(a) does not apply to a defendant's misrepresentation about a plaintiff's products. The only other clear trend which emerges from the cases is that the Act covers something more than just trademark misuse and something less than all forms of unfair competition. [7]

[42]** We recently described the core concern of the Lanham Act in the following terms:

> In a typical Lanham Act action, a newcomer's product or trademark is confusingly similar to that of a well-established competitor. The confusing similarity supports the conclusion that the newcomer is attempting to divert prospective purchasers and "cash in' on its competitor's well-developed reputation in the market. . . . In these cases there is a direct diversion of trade from plaintiff to defendant. Diversion is also likely **[*408]** where

[7] We agree with Utah that the Seventh Circuit's Bernard Food decision, although quoting the Samson Crane limitations on the Act, was not intended to freeze the statute into so rigid a mold as Westinghouse contends. The quotation is followed by a statement recognizing the Act's applicability to "false or deceitful representations which the manufacturer or merchant makes about his own goods or services" and by a citation to *L'Aiglon Apparel v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954)*, where the court rejected the argument that the Act should be limited to trademark misuse or "palming off" of one's goods as those of another. The quotation is best viewed as support for the more narrow holding of Bernard Food, namely, that the Act does not embrace representations made by a defendant about a Plaintiff's product. See *Skil Corp. v. Rockwell International Corp., 375 F. Supp. 777, 782-86 (N.D.Ill.1973)*.

> defendants use a mark to describe simulated goods in a manner that suggests they are original goods produced by the plaintiff. . . . In both cases the consumer is deceived, either that defendant's product is more reputable than it is, or that simulated goods are the real thing. That deception influences purchasing decisions, and reduces plaintiff's sales volume.

Chromium Industries, Inc. v. Mirror Polishing & Plating Co., 448 F. Supp. 544, 554-55 (N.D.Ill.1978).

However, courts have gradually expanded upon this theme, extending recognition to economic variations in which one or more characteristics of the basic pattern have been diluted or **[**43]** even absent. Thus, the misrepresentations need not be used in an attempt to "palm off" defendant's product as plaintiff's, and need not involve a trademark. *Alberto-Culver Co. v. Gillette Co., 408 F. Supp. 1160, 1163 (N.D.Ill.1976)*. ***HN10***[] The statute is not limited to false advertising which compares a defendant's product to a plaintiff's. Id. It proscribes misrepresentations about the quality of defendant's own goods, "even where the misrepresentations do not tend to confuse (his) goods with those of a competitor or otherwise misstate the origin of the goods." *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp., 397 F. Supp. 1063, 1072 (W.D.Pa.1975)*. ***HN11***[] It reaches a seller who exaggerates the scope of his patents, thereby creating a false impression that it is the exclusive source of a product, even though there is no misbranding or mislabelling of the article and no misrepresentation of its inherent attributes. *Chromium Industries, supra.* Finally, ***HN12***[] § 43(a) covers a publisher of a controlled circulation magazine who falsely inflates the size of his audience and thereby causes reduced advertising revenues to a competing publisher, even though the misrepresentations **[**44]** did not refer in any way to plaintiff's magazine or otherwise expressly take aim at an identifiable competitor. *Ames Publishing Co. v. Walker-Davis Publications, Inc., 372 F. Supp. 1 (E.D.Pa.1974)*.

These decisions implicitly or explicitly recognize that the Act proscribes sales diversions caused by false advertising of **[***461]** defendant's goods, and that those diversions can be equally harmful to competitors regardless of whether the misrepresentations falsely describe defendant's products in isolation or falsely connect its products with plaintiff's products. In either case, there is a "false representation used in connection with goods or services," as required by § 43(a).

We see no principled basis for excluding Utah's counterclaim from the logical thrust of these decisions. The "good" at issue here is uranium, a naturally occurring element. Although uranium can be converted and enriched to increase the concentration and facilitate the use of certain fissionable isotopes, it is hardly possible to misrepresent its inherent ingredients or qualities. After the required transformations are performed, it is the same no matter who produces or sells it. It cannot be misbranded, mislabelled, **[**45]** patented, or trademarked. The primary, if not the sole, difference between competitors' products are 1) price and 2) the certainty and mode of delivery. Consequently, a construction of the Lanham Act which limited its applicability to a) trademark misuse or conduct of a similar nature or b) misrepresentations concerning the inherent qualities of uranium or c) other misrepresentations which trade on the goodwill of competitors, would effectively insulate the uranium market from the protections of the Lanham Act. We believe that ***HN13***[] the Act should be read, at minimum, to protect competitors from misrepresentations which a defendant makes about its own products and which relate to the principal bases of competition among sellers. [8] These types of misrepresentations **[*409]** are likely to have direct and major impact in diverting sales to the defendants, which is the same effect as that which is produced by trademark misuses and by related conduct which trades on the goodwill of a competitor. By alleging that Westinghouse has misrepresented its uranium supply capability to its utility customers, Utah has framed an actionable misrepresentation within the

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[8] On this basis, our decision can be harmonized with such divergent cases as *Ames Publishing, supra*, where the court applied § 43(a) to misrepresentations concerning magazine circulation, which was the primary basis of competition among controlled circulation publishers, and with *Fur Information and Fashion Council, Inc. v. E. F. Timme & Son, Inc., 501 F.2d 1048 (2d Cir. 1974)*, where the court refused to apply § 43(a) to misrepresentations about the environmental virtues of imitation fur garments, since the inherent qualities of the goods provided the major basis for consumer choice. Because of our limited holding, we find it unnecessary to consider Utah's argument that § 43(a) covers Any misrepresentation by a defendant of his merchandise where that merchandise moves in interstate commerce.

scope of § 43(a) of the Lanham **[**46]** Act. Westinghouse's motion to dismiss Count III of Utah's counterclaim is denied.

Westinghouse's motions to dismiss the counterclaims filed by defendants Atlas Corporation, Anaconda Company, Kerr-McGee Corporation, **[**47]** Homestake Mining Company, Western Nuclear, Inc., Getty Oil Company, and Utah International, Inc. are denied.

Mac Adjustment, Inc. v. General Adjustment Bureau, Inc.

United States Court of Appeals for the Tenth Circuit

on Briefs March 12, 1979, Submitted ; April 30, 1979, Decided

No. 77-1986

Reporter

597 F.2d 1318 *; 1979 U.S. App. LEXIS 15092 **; 1979-1 Trade Cas. (CCH) P62,599

MAC ADJUSTMENT, INC., an Oklahoma corporation, and B.J. GOSTING, Plaintiffs-Appellants, v. GENERAL ADJUSTMENT BUREAU, INC., a New York corporation, and PROPERTY LOSS RESEARCH BUREAU, an unincorporated association, Defendants-Appellees.

Subsequent History: [1]** Rehearing Denied May 30, 1979.

Prior History: Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CIV-76-0848-E)

Core Terms

interstate commerce, commerce, Sherman Act, insurance business, insurance company, adjuster, summary judgment, trial court, antitrust, conspiracy, losses

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Insurance Law > Industry Practices > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

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

The McCarran-Ferguson Act, *15 U.S.C.S. § 1011 et seq.*, provides that the Sherman Act applies to the business of insurance only to the extent that such business is not regulated by state law. The Act also provides an exception, whereby the Sherman Act continues to apply to an agreement to boycott, coerce or intimidate in relation to the business of insurance. *15 U.S.C.S. § 1013(b)*.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

If a company is engaged in interstate commerce, it is entitled to the protection of the ***antitrust law***, and particularly so if a conspiracy succeeds in putting it out of business.

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

Civil Procedure > ... > Summary Judgment > Hearings > 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

HN3[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate if and only if there is no genuine issue as to any material fact. Only then is the moving party entitled to a judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

HN4[] **Antitrust & Trade Law, Sherman Act**

The summary judgment rule in an antitrust case is that the summary procedures are to be used sparingly. Thus where the record establishes a per se violation of the anti-trust laws, summary judgment is proper, but, in other situations, where the impact of the alleged violation is too little known, and the bare bones of the paper record are insufficient to pass judgment thereon, a trial should be had. Both factual inferences and the record as a whole must be viewed in the light most favorable to the party opposing summary judgment. And summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, or the proof is in the hands of the movant.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN5[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce. Wholly local business restraints can produce the effects condemned by the Sherman Act. As long as the restraint in question "substantially and adversely affects interstate commerce," the interstate commerce nexus required for Sherman Act coverage is established. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. It is sufficient that the allegations in the complaint, if proved, could show that the conspiracy resulted in unreasonable burdens on the free and uninterrupted flow of commerce.

Counsel: Jack N. Shears of Shears & Shears, Ponca City, Okl., for plaintiffs-appellants.

D. Kent Meyers, Jim K. Goodman and John J. Love of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick of Oklahoma City, Okl., and Clarence W. Olmstead, Jr. of Shearman & Sterling, New York City, for defendant-appellee General Adjustment Bureau, Inc.

Terry W. Tippens and Margaret McMorrow Love of Fellers, Snider, Blankenship & Bailey, Oklahoma City, Okl., for defendant-appellee Property Loss Research Bureau.

Judges: Before McWILLIAMS and DOYLE, Circuit Judges, and MARKEY, Chief Judge. *

Opinion by: DOYLE

Opinion

[*1318] This is an antitrust action which is alleged to have arisen under *Section 1* of the Sherman Act, *15 U.S.C. § 1*. The trial court decided the case after a pretrial conference and after hearing evidence on a limited aspect of the case, namely, whether or not there was sufficient impact on interstate commerce to justify **[**2]** the assumption of jurisdiction on its part. The court held, following the hearing, that there was insufficient evidence to support a finding that the acts of the defendants had a substantial effect on interstate commerce. It sustained the defendants' motions for summary judgment which had been filed.

[*1319] The testimony given was that of the plaintiff Gosting, the president of Mac Adjustment, Inc. (Mac), alone and it pertained to the extent to which his business was in commerce. Apparently the trial court concluded that his activities were not sufficiently extensive to be regarded as being substantially involved in commerce.

The plaintiffs' theory of the case is set forth in a general way in the complaint. It alleged that the defendants conspired to eliminate Mac's business as an independent insurance adjuster. The General Adjustment Bureau, Inc. (GAB), one of the defendants, operates an insurance adjustment business throughout the United States. Property Loss Research Bureau, the other defendant, is an unincorporated association of some 100 insurance companies. One of the association's members was Iowa Mutual Insurance Company.

The allegation in the complaint is that **[**3]** the defendants acted in concert to coerce insurance companies, including Iowa Mutual, not to use Mac as an independent adjuster. It is alleged that this coercion was successful as a result of the issuance of false statements by GAB in which it was claimed that the plaintiff was too generous in adjusting losses, in particular the losses from a storm in Tonwaka, Oklahoma, in November of 1973. It is alleged that these statements were made to Iowa Mutual, Southwest Adjustment Company (a company which provided about 75% of Mac's business), various insurance agents, and some individual insureds. Most of the storm losses were covered by Iowa Mutual. The defendant GAB was engaged to audit and readjust plaintiffs' previous adjustments of these losses. The conspiracy to destroy the plaintiffs' business allegedly resulted from a series of meetings which took place in relationship to this auditing procedure.

* Of the United States Court of Customs and Patent Appeals, sitting by designation.

Mac Adjustment was started in 1972, after GAB terminated Mr. Gosting's employment. It had prospered until late 1973, and thereafter the business declined, until by 1976 there was almost nothing remaining. Another allegation in the complaint was that plaintiffs were deprived of a listing **[**4]** in a trade publication which would have served to notify the trade that Gosting was in business. GAB refused to verify Gosting's having been employed as a GAB adjuster from 1963 to 1972.

Also, GAB and the insurance companies allegedly agreed to uniform practices and procedures to be used in the adjustment and settlement of claims. These standards and the "quality control checks" GAB performed on other adjusters allegedly gave GAB an unfair advantage.

Due to the fact that the complaint was vague as to the extent to which Mac was engaged in interstate commerce, the trial court, following a pretrial conference, decided that since it was a jurisdictional matter, evidence should be offered at a special hearing on this question.

On September 15, 1977, the testimony of Mr. Gosting was given before the trial court in Oklahoma City. The testimony generally addressed the question whether the plaintiffs were actually engaged in interstate commerce. He testified that he represented 180 insurance companies. A large number of these representations were obtained through Southwest Adjustment with which he had a business connection, and from this connection investigations were apparently referred **[**5]** to Mac. Gosting testified that a vast majority of these companies were in states other than Oklahoma where his office was located.

One gets the impression from reading the testimony that most of Mac's investigations were conducted inside Oklahoma, although some of the work was indeed outside of Oklahoma, but Mac did have this contractual agreement for adjustment services with Southwest Adjustment Company. Gosting spoke of representing a number of insurance companies who had offices outside of Oklahoma which required him to go to their home offices from time to time. Mac had written contracts with adjusting companies from other states, but there were few written contracts with insurance companies, if any. These tended to be oral.

Gosting testified that his company agreed with the insurance companies it represented to go anywhere in the world for adjustment purposes, but he quickly admitted that it would not be feasible for him to pursue an **[*1320]** investigation in Australia and that it would be better to have a local agent do it.

In answers to interrogatories it was shown that Mac competed with adjusting firms in Oklahoma, but Mac could not point to any firms outside of **[**6]** Oklahoma with which it had competed. The only state in which Gosting was licensed as an insurance adjuster was Oklahoma, but there were some kinds of arrangements which allowed him to function in other states even though he did not have a license issued from other states. He could do this on the basis of having the license in Oklahoma. He persisted, however, in contending that it was necessary to travel across state lines in some of his investigations of storms, fires, and automobile losses. However, a review of the exhibits shows that only 18 adjustments, at the most out of 1400 or 1500 required Gosting or Mac's employees to travel outside of Oklahoma. The out-of-state assignments, for the most part, were trips to neighboring Kansas. Additional cases involved telephone calls for mail across state lines as commerce. Some of the assignments completed in Oklahoma involved adjustments on shipments which had come from outside Oklahoma and had come to rest there.

The appellants, Mac and Gosting, maintain that the adjustment and settlement of claims is an integral part of the insurance business. Accordingly, since many insurance companies conduct their business in commerce by soliciting **[**7]** policies, collecting premiums, and paying claims outside of Oklahoma and in other states, the adjustments made by Mac must be regarded as an integral part of the interstate insurance business.

It is not too simple or easy to link the insurance business with interstate commerce. For a long time, the position that the Supreme Court took was that the insurance business was not interstate commerce. However, in 1944, it decided *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*, which held that the insurance business, although not necessarily in interstate commerce, could be engaged in this kind of commerce. There the charge was that there existed a conspiracy to fix insurance rates in a number of states, and the simple question was whether the Sherman Act prohibited this. The district court had held that the Sherman Act did not apply since the insurance business did not constitute trade or commerce within the meaning of the *commerce clause*. The Supreme Court had to decide this exact question. The price-fixing activities affected commerce because premiums were collected, policies were transmitted, and claims were paid **[**8]** throughout the United States. Also, a nationwide business was not deprived of its interstate character merely because it was built on local sales contracts with policyholders. So, the thrust of the Supreme Court's decision was that under the evidence before it, South-Eastern Underwriters Ass'n was engaged in commerce and was subject to the Sherman Act. It is not, however, an across-the-board decision and therefore had a tendency to be restrictive.

In any event, Congress enacted the so-called ***HN1***[] McCarran-Ferguson Act, *15 U.S.C. § 1011 Et seq.*, the purpose of which was to guarantee that states could continue to regulate the insurance rates. This measure also provided that the Sherman Act applied to the business of insurance only to the extent that such business was not regulated by state law. The Act also provided an exception, whereby the Sherman Act continued to apply to an agreement to boycott, coerce or intimidate in relation to the business of insurance. See *15 U.S.C. § 1013(b)*. It is this boycott aspect and coercion feature that the plaintiffs rely on and emphasize. Mac contends that the defendants-appellees used fraud and deceit **[**9]** in order to destroy its business.

The main injury complained of was that Mac's business gradually diminished as a result of GAB communicating to an insurance trade association, companies, and agents that Mac's adjustment work was incompetent and dishonest and that Mac oversettled claims or (in other words) paid too much.

The essence of the trial court's decision was that the plaintiffs were not in the business of insurance as that is defined by the Supreme Court, and so the consequence **[*1321]** would be that the restraints were not beyond the reach of the Sherman Act because of any exemption under the McCarran-Ferguson Act. This particular ruling has not been appealed.

The ruling that the plaintiffs are not in the business of insurance for the purpose of the McCarran-Ferguson Act creates somewhat of a difficulty because, as a consequence, they must establish that they are in the business of insurance in order to satisfy the interstate commerce requirement of the Sherman Act. It is, of course, possible to argue that the insurance adjustment business is independent of the Supreme Court's decision in *South-Eastern Underwriters Ass'n, supra*, that the McCarran-Ferguson **[**10]** Act does not apply and that Mac was engaged in interstate commerce, but there is a question as to whether anything is gained by taking this tack because you cannot get away from the fact that this is, if not the insurance business, so closely related to it that it is not distinguishable from it. So, the commerce element is more likely present by the treating of insurance as commerce.

The difficulty which we find with the judgment is that there is not any evidence to review to speak of because the only testimony that was offered was that of Mr. Gosting in a special hearing that grew out of the filing of the motions for summary judgment. The purpose of the hearing in the trial court was to determine whether or not the plaintiffs were engaged in interstate commerce and whether the activity had a substantial impact or effect on the commerce. No doubt the ultimate question is whether this was an atmosphere of commerce so that the alleged restraints or obstructions on Mac's business created a sufficient impact on commerce. It is rendered all the more complex by the fact that the trial court appeared to be requiring a great impact on commerce, one that this small company was incapable of **[**11]** producing. Certainly the effect on commerce cannot be tremendous in a total social sense if the company which is the object of the conspiracy is small. Nevertheless, ***HN2***[] if the company is engaged in interstate commerce, it is entitled to the protection of the ***antitrust law***, and particularly so if the conspiracy succeeded in putting it out of business. See, e. g., *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 745-46, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *DeVoto v. Pacific Fidelity Life Insurance Co., 516 F.2d 1* (9th Cir.), Cert. denied, *423 U.S. 894, 96 S. Ct. 194, 46 L. Ed. 2d 126 (1975)*; Yellow Cab Co. v. Cab Employers, Automotive & Warehousemen, Local # 881, *457 F.2d 1032 (9th Cir. 1972)*.

The testimony of Mr. Gosting is not satisfactory because it is limited to the kinds of activities in which he engaged how frequently he traveled to other states, why he did so, what he did in these other states and so on, but it did not deal at all with the injuries that were allegedly inflicted by the defendants and so that facet of effect upon commerce was not explored at all.

A further problem is that the judgment **[**12]** of the district court contained no findings of fact. It merely concludes in most general terms that there was not a substantial impact on commerce. The wording of that final decree is such that one gets the impression that it had to be an impediment of a very major kind in order for the plaintiffs to prove a case. Actually if the plaintiffs were able to establish an unreasonable restraint on interstate commerce, and were able to establish that they were engaged in interstate commerce, then they would be entitled to go to the jury or to have the court consider the matter of establishing liability. The narrowness of the hearing leaves a reviewing court with a question whether other evidence existed which, if the trial had been full-scale, would have produced a prima facie showing.

There is, of course, no provision in the Rules of Civil Procedure for having a hearing of the kind that was here conducted, that is, an In limine hearing to decide whether or not the plaintiffs could sufficiently satisfy the jurisdictional requirement of being engaged in interstate commerce so as to justify going to trial.

Our disposition is, therefore, to remand the case for further proceedings to enable **[**13]** the trial court to take any further action **[*1322]** that may be necessary in order to prepare the case for trial or to give, at least, the plaintiffs an opportunity to make a further showing if they have additional evidence which would add to this picture of carrying on business in interstate commerce and of the defendants restraining the flow or substantially affecting interstate commerce.

The judgment here was entered pursuant to *Rule 56(c) of the Federal Rules of Civil Procedure*. It was not, however, an orthodox summary judgment proceeding in that an evidentiary hearing was held. It is fundamental that ***HN3***[] summary judgment is appropriate if and only if there is no genuine issue as to any material fact. Only then is the moving party entitled to a judgment as a matter of law. What we are saying above is that the record does not demonstrate that there exists no genuine issue as to any material fact whereby the movants would be entitled to judgment as a matter of law. When such an issue of fact is present, summary judgment is not appropriate.

In the case at bar the issues whether the plaintiffs-appellants were engaged in interstate commerce and whether the impact on commerce was **[**14]** substantial are connected and considered singly or together are factual.

HN4[] The summary judgment rule in an antitrust case is that the summary procedures are to be used sparingly. Thus

> Where it (the record) establishes a Per se violation of the anti-trust laws, summary judgment is proper, but, in other situations, where the impact of the alleged violation is too little known, and the bare bones of the paper record are insufficient to pass judgment thereon, a trial should be had. Both factual inferences and the record as a whole must be viewed in the light most favorable to the party opposing summary judgment. And summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, or the proof is in the hands of the movant.

6 Moore's Federal Practice P 56.17(5), at 56-741 to 56-743 (2d ed. 1976). The record in this case is, to say the least, sketchy and it fails to demonstrate beyond a reasonable doubt that there is no question of fact to be tried.

The Supreme Court in recent opinions has considered what is necessary in order to satisfy the commerce requirement of the Sherman Act. Thus in *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*, **[**15]** the Supreme Court held that:***HN5***[]

> It is settled that the Act (Sherman Act) encompasses far more than restraints on trade that are motivated by a desire to limit interstate commerce or that have their sole impact on interstate commerce. "(W)holly local business restraints can produce the effects condemned by the Sherman Act." *United States v. Employing Plasterers Ass'n., 347 U.S. 186, 189 (74 S. Ct. 452, 454, 98 L. Ed. 618, 623)* (1954). As long as the restraint in question "substantially and adversely affects interstate commerce," *Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (95 S. Ct. 392, 398, 42 L. Ed. 2d 378, 386)* (1974); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. (219) at 234 (*68 S. Ct. 996, 92 L. Ed. 1328*), the interstate commerce nexus required for Sherman Act coverage is established. " "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' " *Gulf Oil Corp. v. Copp Paving Co., supra* (419 U.S.) at 195 (*95 S. Ct., at 398, 42 L. Ed. 2d, at 386*), quoting *United States v. Women's Sportswear Assn., 336*

> *U.S. 460, 464 (69 S. Ct. 714, 93 L. Ed. 805) (1949)*. **[**16]** . . . It was sufficient for us that the allegations in the complaint, if proved, could show that the conspiracy resulted in "Unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois." *347 U.S., at 189 (74 S. Ct. 452*). (emphasis added).

425 U.S. at 743, 746, 96 S. Ct. at 1851-1853.

In *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*, the Supreme Court considered the interstate commerce requirement where the activity restrained (title examination) was an integral part of the transaction (financing home purchases). In that case significant **[*1323]** amounts of the loan money came from outside the state, and the lenders required a title examination before loans could be granted.

These two cases we regard as valuable in determining the applicable commerce standards required by the Sherman Act.

In addition to those cited in the Hospital Building Co. and Goldfarb cases, there is a decision of the *Third Circuit, Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884 (3d Cir. 1977)*, which is useful and should prove to have value on remand, for **[**17]** Mortensen considered the jurisdiction problem arising from treating interstate commerce and the impact on commerce as a jurisdictional matter and as an element in a *Section 1* Sherman Act case. The framework of the opinion is not unlike that at bar because it was disposed of by the district court on a motion for summary judgment. The opinion of the appellate court was written by Judge Hunter. It was painstaking and careful. It considered at length the commerce problem in an antitrust case as it affects jurisdiction and as it affects the merits.

Based upon the foregoing, the judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with the views expressed herein.

Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.

United States Court of Appeals for the Eighth Circuit

March 14, 1979, Submitted ; May 2, 1979, Decided

No. 78-1726

Reporter

597 F.2d 133 *; 1979 U.S. App. LEXIS 15001 **; 101 L.R.R.M. 2171; 86 Lab. Cas. (CCH) P11,291; 1979-1 Trade Cas. (CCH) P62,602

Amalgamated Meat Cutters & Butchers Workmen of North America, Local Union No. 576, Tony Richards, Donald Keith Chirillo, Lawrence Dale, Wanda L. Colmer and Jesse Earl dGlydewell, Appellants, v. Wetterau Foods, Incorporated, Thomas Briggs and Richard Dailey, d/b/a Briggs & Dailey IGA, Appellees.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Missouri

Core Terms

bargaining, replacement, employees, negotiations, anti trust law, labor dispute, labor policy, meat

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Private Actions, Costs & Attorney Fees**

15 U.S.C.S. § 15 provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, states in relevant part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

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

Criminal Law & Procedure > Sentencing > Fines

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

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN3[] Conspiracy to Monopolize, Sherman Act

Section 2 of the Sherman Act, 15 U.S.C.S. § 2, provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $ 50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN4[] Antitrust & Trade Law, Sherman Act

Although generally a motion to dismiss does not satisfactorily dispose of a complex antitrust action, the court approves its use in actions where the pleaded allegations are not sufficient to base a claim upon which relief can be granted. A motion to dismiss for failure to state a cause of action can serve a useful purpose in disposing of legal issues with a minimum of time and expense to the interested parties and is applicable to an anti-trust complaint. In testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN5[] Exemptions & Immunities, Labor

Under the law employees have the right to refuse to work, the right to strike, and the right to picket to bring economic pressure upon management to accede to their demands, but neither the striking employees nor the union have unlimited control over the employer. The employer in a labor dispute regarding negotiations for a collective bargaining agreement has a right to resist the pressures created by a union's economic strike by replacing striking employees in an effort to carry on business. The continued operation of a business by replacement of economic strikers furthers competition and free interchange of goods in commerce.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN6[] **Labor, Nonstatutory Exemptions**

In resolving conflicts in areas where federal antitrust and labor policies seemingly overlap, the Supreme Court recognizes a nonstatutory labor exemption.In defining the boundaries of this exemption a court must balance the degree of interference with federal labor policy with the magnitude of the restraint of trade and whether the restraint directly or indirectly affects market prices and free competition for the consuming public.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

International Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

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

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN7[] **International Aspects, Commerce With Foreign Nations**

While *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, in terms prohibits all combinations and conspiracies in restraint of interstate or foreign trade or commerce, the scope of the Sherman Act has been narrowed by judicial construction to combinations or conspiracies which "unreasonably" affect trade or commerce in the sense that they violate the "rule of reason" which has long been recognized in antitrust cases. The rule of reason requires that the restraint in question affect market prices or otherwise deprive the consuming public of the benefits of free competition.In the evaluation of whether activity related to labor relations constitutes a restraint of trade or commerce which the Sherman Act condemns there is substantial interplay between the theory of the labor exemption and the "rule of reason" doctrine.

Counsel: Jerome F. X. Waterman of Houlehan & Waterman, Kansas City, Mo. (argued), and Robert L. Kimbrough, Topeka, Kan., on brief, for appellants.

S. Richard Heymann, Bryan, Cave, McPheeters & McRoberts, St. Louis, Mo. (argued), and Thomas C. Walsh, St. Louis, Mo., on brief, for appellee Wetterau.

David F. Yates, Suelthaus, Krueger, Cunningham, Yates & Kaplan, St. Louis, Mo., argued and on brief, for appellees Briggs and Dailey.

Judges: Before GIBSON, Chief Judge, and ROSS and McMILLIAN, Circuit Judges.

Opinion by: GIBSON

Opinion

[*134] This is an appeal from the dismissal, for failure to state a claim upon which relief can be granted, of appellants' complaint seeking treble damages [1.] for an alleged violation of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2 (1973)*, [2.] **[**3]** and the Missouri ***antitrust law***, Mo.Rev.Stat. § 416.010 Et seq. (1969). The District Court [3.] found that the complaint portrayed a labor dispute between union and employer and held that since federal labor laws clearly sanctioned the conduct involved, it could not give rise to an antitrust **[**2]** violation. [4.] We affirm.

The five individual appellants are employees in the meat department of Briggs & Dailey IGA, a grocery store in Moberly, Missouri. They constitute a bargaining unit represented by the Amalgamated Meat Cutters & Butchers Workmen **[**4]** of North America, Local Union No. 576, which is also an appellant. The union, as the certified bargaining agent, negotiated for a collective bargaining agreement with Briggs & Dailey for three months without result. When negotiations came to an impasse on March 10, 1978, the union called an economic strike. In order to continue the operation of the meat department, Briggs & Dailey replaced the striking workers with personnel provided by Wetterau, Incorporated, a wholesale food supplier, which supplied food products to Briggs & Dailey. Wetterau continued to pay the salaries of these personnel, and merely loaned them to Briggs & Dailey on a temporary basis to perform retail meat cutting. After only a few weeks Wetterau withdrew the replacement workers when the union allegedly threatened to strike Wetterau. Appellants claim that the agreement between Wetterau and Briggs & Dailey to supply replacement **[*135]** workers constitutes a combination in restraint of trade. [5.]

[5]** ***HN4***[]

[1.] ***HN1***[] *15 U.S.C. § 15 (1973)* provides:

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

[2.] ***HN2***[] *15 U.S.C. § 1* states in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *.

HN3[] *15 U.S.C. § 2* provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[3.] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

[4.] The District Court did not separately address the state law claim. However, since the District Court found that this case presented merely a normal labor dispute, the doctrine of federal preemption requires that this controversy be governed by federal law. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635-37, 654 n.13, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1974)*; *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*; *California State Council of Carpenters v. Associated General Contractors of California, Inc., 404 F. Supp. 1067, 1072 (N.D.Cal.1975)*. The state ***antitrust law*** claim was properly dismissed with prejudice.

[5.] Neither appellants' complaint nor their brief alleges that appellees have monopolized or attempted to monopolize any product or geographical location, and the factual allegations do not suggest the existence of a monopoly or an attempt to monopolize. Therefore, appellants have failed to state a claim for violation of *section 2* of the Sherman Act, *15 U.S.C. § 2 (1973)*.

Although generally a motion to dismiss does not satisfactorily dispose of a complex antitrust action, See *Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964)*, we have approved its use in actions where the pleaded allegations are not sufficient to base a claim upon which relief can be granted. In *Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973 (8th Cir. 1968)*, Cert. denied, *395 U.S. 961, 89 S. Ct. 2096, 23 L. Ed. 2d 748 (1969)*, we stated:

> A motion to dismiss for failure to state a cause of action can serve a useful purpose in disposing of legal issues with a minimum of time and expense to the interested parties and is applicable to an anti-trust complaint. In testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted. See, 2A Moore's Federal Practice § 12.08, p. 2244.

This observation is particularly appropriate in the instant case because appellants' arguments are premised upon an unreasonable characterization of the facts.

Appellants rely upon the proposition that: "Clearly **[**6]** this is conduct which lies wholly outside the context of any collective bargaining relationship and any "normal labor dispute.' " The fallacy of this thesis is blatant. Briggs & Dailey merely used Wetterau employees to temporarily replace the striking meatcutters in order to counter the union's economic pressure on the contract negotiations. The agreement had no purpose or effect beyond the scope of the labor dispute.

The union and striking employees were exercising their right to bring economic pressure upon an employer to meet their demands. ***HN5***[] Under the law they have the right to refuse to work, the right to strike and the right to picket to bring economic pressure upon management to accede to their demands, but neither the striking employees nor the union have unlimited control over the employer. In *NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345, 58 S. Ct. 904, 82 L. Ed. 1381 (1938)*, the United States Supreme Court recognized the right of an employer in a labor dispute regarding negotiations for a collective bargaining agreement to resist the pressures created by a union's economic strike by replacing striking employees in an effort to carry on business. **[**7]** The continued operation of a business by replacement of economic strikers furthers competition and free interchange of goods in commerce. This court has supported an employer's right to carry on his business by replacing striking employees on numerous occasions. See, e. g., *Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163, 166 (8th Cir. 1972)*; *Wilkinson Manufacturing Co. v. NLRB, 456 F.2d 298, 305 (8th Cir. 1972)*; *First National Bank of Omaha v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969)*; *NRLB v. Gopher Aviation, Inc., 402 F.2d 176, 183 (8th Cir. 1968)*; *NRLB v. L. G. Everist, Inc., 334 F.2d 312, 317 (8th Cir. 1964)*.

Since Briggs & Dailey's conduct clearly complies with the acceptable framework of labor negotiations contemplated by federal labor policy, it is necessary to examine congressional intent in the context of accommodating the Sherman Act to the policies of federal labor laws. The antitrust laws were enacted to prevent restraints to free competition in business and commercial transactions that tend to restrict production, control prices or otherwise control the market to the detriment of consumers. *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*. **[**8]** They were not enacted to regulate labor relations.

Congress provided a statutory labor exemption from the antitrust laws. 15 U.S.C.

[*136] §§ 17 and 26; *29 U.S.C. §§ 52*, *104*, *105* and *113*; See *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. Although these statutes do not directly address the activities involved in this case where the agreement is between two employers, these statutes demonstrate a congressional purpose to restrict the application of the antitrust laws when they unduly interfere with the goals of federal labor law. ***HN6***[] In resolving conflicts in areas where federal antitrust and labor policies seemingly overlap, the Supreme Court has recognized a nonstatutory labor exemption. *Federal Maritime Commission v. Pacific Maritime Association, 435 U.S. 40, 58, 98 S. Ct. 927, 55 L. Ed. 2d 96 (1978)*; Connell Construction Co., Inc. v. Plumbers & Steamfitters *Local Union No. 100, supra, 421 U.S. at 622, 95 S. Ct. 1830*; *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 287, 88 S. Ct. 929, 19 L. Ed. 2d 1090* **[**9]** (Harlan, J., concurring), Modified regarding taxation of costs, *392 U.S. 901, 88 S. Ct. 2049, 20 L. Ed. 2d 1361 (1968)*; *Local Union No. 189, Amalgamated Meatcutters & Butcher Workmen v. Jewel Tea Co., Inc., 381 U.S. 676, 691-97, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*; *United Mine Workers of America v. Pennington, 381*

U.S. 657, 666, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); See also California State Council of Carpenters v. Associated General Contractors of California, Inc., 404 F. Supp. 1067 (N.D.Cal.1975). Defining the boundaries of this exemption has not proved an easy task. A court must balance the degree of interference with federal labor policy with the magnitude of the restraint of trade and whether the restraint directly or indirectly affects market prices and free competition for the consuming public. [6.]

[10]** Briggs & Dailey temporarily accepted the use of Wetterau employees to counteract the effect of the strike and continue operation of the meat department. Appellant union argues that this restrained it in its trade in terms of attracting membership and representing employees. The individual appellants argue that they were restrained in their business and enterprise of earning wages. Since any injury to appellants would flow naturally from the replacement of striking workers, which conduct federal labor policy sanctions, See Mackay, supra, the agreement between Briggs & Dailey and Wetterau cannot constitute a violation of the ***antitrust law***. Federal labor policy sanctions both the goal of resisting union demands and the method of replacing striking workers and the magnitude and nature of any restraint of trade or commerce in this case directly follows from the sanctioned conduct. The agreement had no anticompetitive effect unrelated to the collective bargaining negotiations. [7.]

[11]** **[*137]** Appellants rely upon "sham labor union" cases to support their claim. *Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976)*; Carpenters District Council v. United Contractors Association of Ohio, Inc., 484 F.2d 119 (6th Cir. 1973), Modified, 539 F.2d 1092 (6th Cir. 1976); International Association of Heat and Frost Insulators and Asbestos Workers v. United Contractors Association, Inc. of Pittsburg, Pennsylvania, 483 F.2d 384 (3d Cir. 1973), Modified, 494 F.2d 1353 (3d Cir. 1974). Although these cases can be distinguished upon various grounds, the mere absence of any "sham" labor organization in the instant case sufficiently destroys their precedential value here. Briggs & Dailey does not dispute the union's status as the certified bargaining representative of the meatcutters in its Moberly, Missouri, store. It did not seek to establish a company-dominated labor organization or to affect any commercial or trade relationship other than its collective bargaining agreement with the union. Briggs & Dailey's sole purpose in using the temporary replacements supplied by Wetterau was to continue **[**12]** its business in order to reinforce its bargaining power in the negotiations regarding a collective bargaining agreement with the union, while the union sought by its economic strike to make unprofitable Briggs & Dailey's operation, and thus enhance the union's bargaining power in the labor dispute. Neither side had the absolute right to unilaterally control the other and the collective bargaining process was free to be carried to its ultimate conclusion.

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6. In Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1259 (8th Cir. 1978), this court explained a limitation on the antitrust statute appellees allegedly violated.

HN7[] While § 1 of the Sherman Act in terms prohibits all combinations and conspiracies in restraint of interstate or foreign trade or commerce, the scope of the Act has been narrowed by judicial construction to combinations or conspiracies which "unreasonably" affect trade or commerce in the sense that they violate the "rule of reason" which has long been recognized in antitrust cases. See, e. g., Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958), and Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940). The rule of reason requires that the restraint in question affect market prices or otherwise deprive the consuming public of the benefits of free competition. Apex Hosiery Co. v. Leader, supra, 310 U.S. at 500-01, 60 S. Ct. 982, and cases cited.

578 F.2d at 1259. See also Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

In the evaluation of whether activity related to labor relations constitutes a restraint of trade or commerce which the Sherman Act condemns there is substantial interplay between the theory of the labor exemption and the "rule of reason" doctrine, See Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940), and the protection afforded appellees in the instant case could stem from either basis.

7. The agreement profited Wetterau, the wholesale food supplier, only by continuing the operation of Briggs & Dailey as a retail outlet for Wetterau products in the face of an economic strike which threatened to close this outlet. While Wetterau's conduct may have made it a party to the labor dispute, supplying temporary replacement workers did not have any anticompetitive effect beyond the labor relations at the Moberly, Missouri, store.

The judgment of the District Court is affirmed.

Handgards, Inc. v. Ethicon, Inc.

United States Court of Appeals for the Ninth Circuit

May 3, 1979

No. 76-3150

Reporter
601 F.2d 986 *; 1979 U.S. App. LEXIS 14970 **; 202 U.S.P.Q. (BNA) 342 ***; 1979-1 Trade Cas. (CCH) P62,625; 62 A.L.R. Fed. 183

HANDGARDS, INC., a Corporation, Plaintiff-Appellee vs. ETHICON, INC., a Corporation, Defendant-Appellant

Subsequent History: **[**1]** As Modified on Denial of Rehearing and Rehearing En Banc July 27, 1979.

Prior History: On Appeal from the United States District Court for the Northern District of California.

Core Terms

patent, infringement, antitrust, bad faith, monopolize, anti trust law, gloves, suits, antitrust violation, patent infringement, disposable, patentee, plastic, cases, district court, overall scheme, manufacturers, invalid, antitrust liability, damages, flows, relevant market, lost profits, trial court, prosecuted, initiated, monopoly, barrier, prior patent, good faith

LexisNexis® Headnotes

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN1[] **Infringement Actions, Infringing Acts**

Patentees must be permitted to test the validity of their patents in court through actions against alleged infringers. Their status as alleged possessors of a legal monopoly does not cause them to be pariahs before the law.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] **Bad Faith, Fraud & Nonuse, Bad Faith**

An antitrust plaintiff pursuing a bad faith patent prosecution theory must still prove the other requisites of a *15 U.S.C.S. § 2* offense. There is a need to demonstrate the patentee's possession of exclusionary power within the relevant market before antitrust liability would result.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN3[] **Bad Faith, Fraud & Nonuse, Fraud**

Wholly inadvertent errors or honest mistakes which are caused by neither fraudulent intent or design, nor by the patentee's gross negligence, do not constitute fraud.

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

Patent Law > Infringement Actions > Burdens of Proof

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

HN4[] **Jury Trials, Jury Instructions**

Courts require proof of an overall scheme to monopolize independent of the mere commencement of an infringement suit before permitting the imposition of antitrust liability based on patent enforcement conduct. A proper barrier is that the jury should be instructed that a patentee's infringement suit is presumptively in good faith and that this presumption can be rebutted only by clear and convincing evidence.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Patent Law > Remedies > Damages > General Overview

HN5[] **Regulated Industries, Sports**

The only damages recoverable in an antitrust suit are those which occur by reason of that which made the defendant's actions unlawful. For plaintiffs to recover treble damages they must prove more than injury causally linked to the antitrust violation. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should be the type of loss that the claimed violations would be likely to cause.

Counsel: David F. Dobbins (argued), New York City, George S. Frazza, New Brunswick, N.J., Robert M. Dunne, Phelps, Mills, San Francisco, Cal., for defendant-appellant.

Maxwell M. Blecher (argued), Blecher, Collins & Hoecker, Joel R. Bennett, Kendrick, Netter, Orr & Bennett, Los Angeles, Cal., Morrison & Foerster, San Francisco, Cal., for plaintiff-appellee.

Judges: Before SNEED and KENNEDY, Circuit Judges, and VON DER HEYDT, * District Judge.

Opinion by: SNEED

Opinion

[*344]** **[*987]** Ethicon appeals from a judgment rendered after a civil jury trial in which it was found guilty of violating *Section 2* of the Sherman Act by monopolizing or attempting to monopolize the market for heat-sealed plastic gloves sold to manufacturers of home hair care coloring kits. Plaintiff-appellee Handgards bases its private antitrust action upon its contention that Ethicon earlier had initiated and pursued a series **[**2]** of patent infringement suits against it in bad faith, or as an integral part of an overall scheme to monopolize. On appeal, Ethicon argues, Inter alia, that the district court erred in instructing the jury that Ethicon could be found guilty of an antitrust violation upon proof by a mere preponderance of the evidence that it had prosecuted one or more ill-founded patent infringement actions in bad faith and with an intent to monopolize. This court has jurisdiction pursuant to *28 U.S.C. § 1291*. Because we conclude that the district court erred in so instructing the jury and because of certain deficiencies with respect to the court's charge regarding damages, we reverse **[*988]** the judgment entered below and remand the case for a new trial.

I.

Factual Background

It is helpful to set forth a brief description of the patent enforcement conduct which forms the basis for Handgards' antitrust complaint before reviewing the history of the instant action.

A. The Prior Patent Enforcement Conduct.

The plaintiff-appellee Handgards, Inc. is a Nebraska corporation engaged in the business of manufacturing, distributing, and selling disposable plastic gloves adhered **[**3]** to paper. Handgards was formed from the 1966 merger of two constituent disposable plastic glove manufacturers: Plasticsmith, Inc. (Plasticsmith) and Mercury Manufacturing Company (Mercury). The defendant-appellant Ethicon, Inc. is a wholly-owned subsidiary of Johnson & Johnson and is engaged in the business of manufacturing, selling, and distributing surgical supplies. Prior to 1969, Ethicon manufactured, distributed, and sold disposable plastic gloves adhered to paper through its Arbrook division. Ethicon ended its participation in the disposable plastic glove business in 1969, when the assets of its Arbrook division were transferred to another Johnson & Johnson subsidiary named Arbrook, Inc.

In 1961 Ethicon acquired the assets of the Scott Company, which, for several years, had marketed disposable plastic gloves produced in accordance with a process developed by one of its founders, Joe Gerard. In so doing, Ethicon acquired both Gerard's pending application for a patent on his glovemaking process, as well as his glovemaking equipment. [1] In 1961 Ethicon also acquired the pending patent application of one Rene Orsini. [2] On April 3, 1962, the Gerard patent covering a glovemaking **[**4]** process issued to Ethicon. On October 20, 1964, the Orsini product patent covering a heat-sealed glove issued to Ethicon.

Both Plasticsmith and Mercury were engaged in the manufacture of heat-sealed disposable plastic gloves at the time the Gerard patent issued in 1962. After several months of unproductive negotiations concerning a licensing agreement for the Gerard patent between Ethicon and T. Hamil Reidy, the chief executive officer and controlling shareholder of Plasticsmith and Mercury, Ethicon filed patent infringement suits in October 1962 against both

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* Hon. James A. Von der Heydt, Chief United States District Judge for the District of Alaska, sitting by designation.

1 Gerard filed the patent application covering his glovemaking process on January 2, 1958.

2 Orsini filed an application for a French patent on September 17, 1956; he filed for a United States patent on September 17, 1957.

Plasticsmith and Mercury, alleging infringement of the Gerard patent. [3] In December 1964, after the Orsini patent issued, Ethicon supplemented its patent infringement complaints against Plasticsmith and Mercury by adding a claim **[**5]** that the Orsini patent also was being infringed.

In 1966 Plasticsmith and Mercury were merged into a successor corporation, **[***345]** Handgards, Inc., the plaintiff in this case. Reidy continued as the chief executive officer and controlling shareholder in Handgards. In 1967, after learning that some of the allegedly infringing machines operated by Handgards reportedly were owned by Reidy rather than by Handgards or either of its predecessor corporations, Ethicon filed an infringement action against Reidy individually at his Chicago, Illinois residence. Reidy thereafter voluntarily intervened **[**6]** in the consolidated action then pending in California.

The consolidated patent infringement suit was tried to the court in 1968. Ethicon's trial counsel dropped the claims concerning **[*989]** the Orsini patent from the action, reportedly because he thought Orsini to be the weaker of the two patents and because he believed that narrowing the issues before the court would enhance the chance of successfully prosecuting the Gerard patent. On April 25, 1968, the trial judge entered judgment for Handgards, concluding that the Gerard patent was invalid because of the existence of a "prior public use" of the process by Lyle Shabram, one of the founders of Plasticsmith. [4] **[**7]** On appeal, this court affirmed the district court in a brief per curiam decision. [5]

B. History of the Present Action.

Plaintiff-appellee Handgards filed this civil antitrust action in 1968 seeking to **[**8]** recover treble damages and other equitable relief for the injuries it claimed to its business and property by virtue of the alleged antitrust violations committed by defendant-appellant Ethicon and defendant Johnson & Johnson. The gist of the plaintiff's complaint was that the parent-subsidiary defendants had either unilaterally or in concert, monopolized, attempted to monopolize, and conspired to monopolize trade and commerce for the purpose of eliminating plaintiff as a competitor in the sale of disposable plastic gloves to the hair care and medical markets.

Plaintiff altered its primary theory of recovery dramatically during the eight year period between the time it commenced this action and the time of trial in 1976. Handgards' suit began primarily as a Walker Process case, i. e., a suit alleging antitrust liability for the enforcement of a fraudulently obtained patent (Orsini). [6] **[**10]** See

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[3] Ethicon filed suit against Plasticsmith, a Delaware corporation, on October 30, 1962, in Delaware. Ethicon filed suit against Mercury, a Nebraska corporation, on October 31, 1962, in Nebraska. After attorneys for Plasticsmith prevailed on a motion to transfer the Delaware action to the Northern District of California, Ethicon's attorneys consented to the transfer and consolidation of the Mercury action with the Plasticsmith action.

[4] The "prior public use" defense arises under *35 U.S.C. § 102(b)*, which provides that:

A person shall be entitled to a patent unless

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

[5] ***Ethicon, Inc. v. Handgards, Inc., 432 F.2d 438 (9th Cir. 1970)***, Cert. denied, ***402 U.S. 929, 91 S. Ct. 1525, 28 L. Ed. 2d 863***, Rehearing denied, ***403 U.S. 912, 91 S. Ct. 2204, 29 L. Ed. 2d 690 (1971)***. The complete text of the court's decision reads as follows:

Ethicon's Gerard patent No. 3,028,576 was held invalid because the trial court found that under *35 U.S.C. § 102(b)* there was prior public use for more than one year of the concept of the machine, the subject of the patent.

There is little or no direct contradiction in the oral evidence. In our view, we have a case that could have been decided either way. Ethicon contends the testimony of Handgards' principal was too weak and impaired by certain circumstances. But the trial court was entitled to give more weight to other circumstances which point to Handgards' version being correct.

The decree is affirmed because the findings are not clearly erroneous.

[*346]** *Walker* ***[*990]*** *Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. This theory ultimately proved not viable. [7] In 1975 Handgards expressly abandoned the Walker Process theory at a hearing on a motion for summary judgment **[**9]** and instead asserted the two theories on which this case ultimately was tried: the first was referred to at trial as the "overall scheme" theory; the second was referred to as the "bad faith" theory. The district court's published opinion on the motion for summary judgment reflected the new orientation of plaintiff's case. *Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 921 (N.D.Cal.1975)*.

[11]**

> (1) Handgards now largely bases its monopolization charge on the various patent infringement and other lawsuits brought on behalf of Ethicon by J & J house patent counsel. The claim is rooted in *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952)*, Cert. denied, *344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651 (1952)*, and its progeny particularly *Mach-Tronics, Incorporated v. Zirpoli, 316 F.2d 820 (9th Cir. 1963)*, *Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993 (9th Cir. 1975)*, and *Prelin Industries, Inc. v. G & G Crafts, Inc., 357 F. Supp. 52 (W.D.Okl.1972)*. The Ethicon suits were purportedly brought as integral ingredients of a scheme to monopolize the disposable glove market. . . .
> (2) Plaintiff charges that defendants attempted to create a monopoly in the disposable glove industry by accumulating a number of the relevant patents no matter how weak or narrow and then instigating a series of lawsuits in order to slowly litigate the competition out of business.

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[6] Walker Process stands for the proposition that "the enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present." *382 U.S. at 174, 86 S. Ct. at 349*. Mr. Justice Harlan, concurring, stressed that "deliberate fraud" was required and that the Court did not hold

> that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent (for such a result) might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits.

382 U.S. at 180, 86 S. Ct. at 351-352 (Harlan, J., concurring).

Handgards' original complaint charged the defendants with (i) a violation of section 7 of the Clayton Act, allegedly occurring when Ethicon acquired the assets of the Scott Company in 1961 and (ii) violations of the Sherman Act, allegedly occurring as the result of a fraudulent procurement of the Orsini patent. A supplemental complaint was filed in 1974 which also charged that the defendants had continued to violate the antitrust laws since the date of the original complaint by committing certain illegal acts such as the instigation of baseless lawsuits and pricecutting. Neither complaint charged Ethicon with fraudulent procurement of the Gerard patent. Although plaintiff sought to add such a contention in 1974, the district court had denied leave to amend the complaint. The only allegations in either complaint pertaining to the invalidity of the Gerard patent were that the Gerard patent had been found invalid on the basis of a prior public use and that "(during) the pendency of such action, defendants obtained additional information showing and confirming the invalidity of the Gerard patent."

[7] In 1971 Ethicon filed a motion for summary judgment, arguing that the undisputed facts precluded a finding that the Orsini product patent had been fraudulently procured under the criteria set out in *Walker Process, supra.* See note 6 Supra. The district court denied defendant's motion in 1972 pending completion of discovery in the case, but noted that "(a) ruling that no triable issue of fraud in the procurement of the Orsini divisional patent exists would be within . . . (its) sound discretion." Ethicon renewed its motion for summary judgment in 1975, at which time the district court granted the motion in part and denied it in part. *Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 921 (N.D.Cal.1975)*. The district court's opinion on the motion for summary judgment noted the death of any Walker Process allegations, stating that "Handgards represented at oral argument on the motion and in its post-hearing reply memorandum that it was not proceeding as though this case were governed by Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.," that the "abandonment by plaintiff of its primary theory of recovery based on the Orsini patent is no surprise," that the "Orsini patent infringement suit was not prosecuted in violation of Walker Process," and that plaintiff's complaint had never contained a Walker Process allegation regarding the Gerard patent. *413 F. Supp. at 923*.

> The bringing of a series of ill-founded patent infringement actions, in bad faith, can constitute an antitrust violation **[**12]** in and of itself If such suits are initiated or pursued with an intent to monopolize a particular industry (and, of course, the other elements of a *Section 2* violation are present). *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*; *Kellogg Co. v. National Biscuit Co., 71 F.2d 662, 666 (2d Cir. 1934)*; Bolt Associates, Inc. v. Rix Industries, supra, (1973-1 Trade Cases, P 74,474 (N.D.Cal.1973)).

413 F. Supp. at 923-25 (emphasis in original).

The court defined the term "bad faith" in this context as knowing that the particular patent was invalid because (i) Ethicon allegedly knew (through its agent Gerard) of relevant prior art existing more than a year before the filing of the Gerard patent application; (ii) Ethicon allegedly knew (through its agent Gerard) that the invention had been on sale more than a year prior to the filing of the Gerard patent application; or **[*991]** (iii) Ethicon allegedly knew that the Orsini patent was invalid because material **[**13]** information had been withheld from the patent examiner. [8] *Id. at 925*.

At the trial the parties presented dramatically different versions of the facts to **[***347]** the jury. Plaintiff contended that Ethicon had accumulated the Orsini and Gerard patents, two key patents in the field, intending to monopolize the industry; that Ethicon had initiated and **[**14]** pursued its patent infringement suits against Handgards and its predecessors in bad faith, i. e., with knowledge that the patents were invalid, for the purpose of monopolizing the market; [9] that even if brought in good faith, Ethicon's infringement suits constituted individual predatory acts in an overall scheme to monopolize; and that Ethicon had generated adverse publicity regarding its infringement actions, threatening potential customers of the plaintiff, with the result that vital corporate resources were committed to defense of the infringement actions, Handgards' relations with potential customers were impaired, a proposed joint venture was aborted, and the company found itself unable to obtain outside financing necessary for it to remain competitive in the industry. Defendant Ethicon countered by arguing that it lacked any improper monopolistic motive in its acquisition of the Gerard and Orsini patents; that it had initiated the various infringement actions in complete good faith, after careful investigation, and with the reasonable expectation of success; that it did not publicize its infringement actions within the industry; and that Handgards' competitive problems resulted **[**15]** from its having marketed a lower quality product, provided poorer service, and been unwilling to respond to the competitive demands of the industry.

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[8] In its 1972 decision on defendant's motion for summary judgment, See note 7 Supra, the district court noted that the failure to supply the Patent Office with the information pertaining to the Orsini patent, which already allegedly was part of its files, did not constitute fraud on the Patent Office in the Walker Process sense. In its 1975 decision on defendant's motion for summary judgment, the district court formally held that Ethicon's "failure to inform the Patent Office of information in its own files does not amount to the extremely circumscribed "intentional fraud' necessary to prove an action under Walker Process." *413 F. Supp. at 923*.

[9] Plaintiffs argued that the Gerard and Orsini patents were known by Ethicon to be invalid because they claimed: (1) a Mr. Babb had testified that Gerard had told him that he knew the Gerard patent was invalid; (2) evidence had been introduced suggesting that Ethicon knew of Shabram's invalidating prior public use; (3) evidence had been introduced suggesting (a) that Ethicon knew that Gerard's invention had been "on sale" more than one year prior to the date of the filing of the patent application within the meaning of *35 U.S.C. § 102(b)* and *(b)* that Ethicon's patent attorneys knowingly falsified an answer to an interrogatory in the prior patent action regarding the "on sale" issue; (4) evidence had been introduced suggesting that Ethicon's patent attorneys knowingly falsified an answer to an interrogatory in the prior patent action concerning the date on which Gerard's invention had been reduced to practice, in an attempt to mislead Handgards' counsel into defending the suit on a more difficult ground; and (5) evidence had been introduced suggesting that Ethicon knew the Orsini patent to have been invalid because of its having been anticipated or made obvious by a prior patent.

[16]** The jury returned a general verdict in favor of Handgards in the amount of $ 2,073,000 prior to trebling and gave the following responses to the special interrogatories submitted in the case: (1) the Orsini patent was not invalid on the basis of prior disclosures of another patent; (2) the relevant market in the case consisted of the market of heat-sealed plastic gloves sold to manufacturers of home hair care coloring kits; (3) Ethicon was guilty of monopolizing or attempting to monopolize the relevant market by prosecuting the patent lawsuits against Handgards and its predecessors in bad faith, that is, with actual knowledge that either the Gerard or the Orsini patent was invalid; (4) Ethicon was guilty of monopolizing or attempting to monopolize the relevant market by prosecuting the prior patent action as a predatory act in an overall scheme designed to exclude Handgards from the market; and (5) & (6) Ethicon and Johnson & Johnson were not guilty of entering into an agreement, combination, or conspiracy to restrain trade or to monopolize the relevant market.

[*992] Ethicon advances six basic arguments on appeal: (1) the trial court erred in instructing the jury that the **[**17]** bad faith enforcement of a patent can, without more, constitute an exclusionary act for which antitrust liability may result; (2) the finding that Ethicon prosecuted its infringement actions in bad faith is based upon pure speculation; (3) the jury's finding that Ethicon possessed a valid patent (Orsini) which covered the market found to have been monopolized precludes entry of a verdict of illegal monopolization of that market; (4) the trial court erred in permitting the jury to determine the relevant market and instead should have found that the relevant market was broader than the one chosen by the jury; (5) Handgards failed to show any injury resulting from the alleged *section 2* violations by Ethicon; and (6) the trial court erred in directing a verdict against Ethicon on its antitrust counterclaim against Handgards. Because we conclude that resolution of appellant's contentions concerning the bad faith theory and the damages recoverable in a case of this sort necessitate reversal and remand for a new trial, we need not, at this time, reach the other issues urged by appellant. All such issues may be presented to the trial court for such reconsideration as it deems proper in the **[**18]** light of this opinion.

II.

Antitrust Liability for Patent Enforcement Conduct.

A. The Problem.

We are confronted in this case with the complex interaction between two conflicting bodies of law: One, the patent law, is **[***348]** concerned with the creation and commercial exploitation of a statutory grant of monopoly power; the other, the ***antitrust law***, is concerned with proscribing various kinds of monopoly power. [10] Reconciling the interrelationship between the patent and antitrust laws has long been a topic of concern to courts as well as to commentators. See, e. g., *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*; *Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993* (9th Cir.), Cert. denied, *423 U.S. 831, 96 S. Ct. 52, 46 L. Ed. 2d 49 (1975)*; *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416* (10th

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[10] The power to exclude, which is the essence of every patent, is monopoly power. Hence, "(a)ny action to enforce a patent is in a very explicit sense "exclusionary,' both in purpose and, if successful, in effect." L. Sullivan, Handbook of the Law of Antitrust § 181, at 522 (1977). See P. Areeda & D. Turner, III ***Antitrust Law*** P 704a, at 114-15 (1978). The patent laws contemplate "broad criteria of patentability while lodging in the federal courts final authority to (determine patent validity)," *Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 332, 91 S. Ct. 1434, 1444, 28 L. Ed. 2d 788 (1971)*; patentees invoke that authority by initiating infringement suits to enforce their patents. The antitrust laws on the other hand, proscribe certain types of exclusionary conduct that threaten or create monopoly power, including, in at least some situations, the use of vexatious litigation. See, e. g., *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359*, On remand, *360 F. Supp. 451 (D.Minn.1973)*, aff'd mem., ***417 U.S. 901, 94 S. Ct. 2594, 41 L. Ed. 2d 207 (1974)***. It therefore is necessary to reach an accommodation between the patent and the antitrust laws whenever antitrust liability is premised on a finding regarding a patentee's intent to monopolize or its exercise of exclusionary power. To determine the existence of *section 2* liability properly requires careful distinctions between lawful patent-related exclusionary conduct or intent and unlawful patent-related exclusionary conduct or intent; only unlawful patent-related exclusionary conduct or intent is evidence of an intent to monopolize or the exercise of exclusionary conduct within the meaning attributed to *section 2*. See *SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D.Conn.1978)*. The task then, is to "identify the point at which . . . (an attempt to enforce a patent), always exclusionary in . . . (the) literal sense, . . . become(s) so intractable as to warrant its being called exclusionary in the sense relevant to the establishment of a *Section 2* violation. . . ." L. Sullivan, Supra, § 181, at 522.

Cir.), Cert. denied, *344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651 (1952)*; P. Areeda & D. Turner, III ***Antitrust Law*** P 704a, at 114-15 (1978); L. Sullivan, Handbook of the Law of Antitrust § 181 (1977); and Stedman, Patents and Antitrust The Impact of Varying **[**19]** Legal Doctrines, 1973 Utah L.Rev. 588. This case presents yet another instance in which the boundaries of the patent-antitrust interface must be determined.

[20]** **[*993]** ***HN1***[] Patentees must be permitted to test the validity of their patents in court through actions against alleged infringers. Their status as alleged possessors of a legal monopoly does not cause them to be pariahs before the law. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* require no less. [11] **[**21]** On the other hand, infringement actions initiated and conducted in bad faith contribute nothing to the furtherance of the policies of either the patent law or the ***antitrust law***. [12] The district court was correct in holding, in effect, that such actions may constitute an attempt to monopolize violative of *Section 2* of the ***antitrust law***. [13] "Bad faith," however, is a subjective state of **[***349]** mind the existence of which, while not susceptible to certain proof, easily can spring from suggestive and weakly corroborative circumstances.

[22]** The problem, as we see it, is to provide the means whereby the bad faith infringement action can be identified post hoc with a sufficiently high degree of certainty to make it highly improbable that the action in fact was

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[11] It is worth emphasizing that the absence of an immunity does not create an antitrust offense. The fact that defendant's conduct is not immune from antitrust scrutiny does not satisfy the plaintiff's burden of proving the usual elements of an antitrust offense, including significant harm causally related to the conduct.

P. Areeda & D. Turner, Supra, I ***Antitrust Law*** P 204e2.

See *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*; *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359*, On remand, *360 F. Supp. 451 (D.Minn.1973)*, aff'd mem., ***417 U.S. 901, 94 S. Ct. 2594, 41 L. Ed. 2d 207 (1974)***; *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976)*, Cert. denied, ***430 U.S. 940, 97 S. Ct. 1571, 51 L. Ed. 2d 787 (1977)***.

[12] Subjecting a potential rival or actual rival to . . . (the burden of defending an infringement suit) may weaken him or even dissuade him from beginning or continuing the rivalry with the monopolist-patentee and perhaps without regard to the merits of the infringement claim.

P. Areeda & D. Turner, Supra, III ***Antitrust Law*** P 708, at 145. See generally L. Sullivan, Supra, § 181; Stedman, Supra, at 593-94.

[13] ***HN2***[] An antitrust plaintiff pursuing a bad faith patent prosecution theory must still prove the other requisites of a *§ 2* offense. In Walker Process the Supreme Court emphasized the need to demonstrate the patentee's possession of exclusionary power within the relevant market before antitrust liability would result.

To establish monopolization or attempt to monopolize a part of trade or commerce under *§ 2* of the Sherman Act (on a Walker Process theory), it would . . . be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure . . . (defendant's) ability to lessen or destroy competition. It may be that the (patented) device . . . does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof, as is the amount of damages . . . .

382 U.S. at 177-78, 86 S. Ct. at 350-51.

We note the existence of a jury finding in this case that the relevant market consisted of the market of heat-sealed plastic gloves sold to manufacturers of home hair care coloring kits, or the home hair care plastic disposable glove market; a market coterminous with that covered by the Gerard patent. In view of that finding, Ethicon's prosecution of a bad faith infringement action likely would constitute an attempt to monopolize violative of *section 2*. The requisite intent to monopolize in this case could be inferred from the finding of bad faith. Not all bad faith infringement actions will necessarily constitute attempts to monopolize violative of *section 2*. Nor will a patentee found guilty of prosecuting an infringement action in bad faith necessarily be guilty of an offense of monopolization. The imposition of antitrust liability will depend upon plaintiff's proof that the defendant-patentee possessed or threatened to possess an ability to lessen competition in the relevant market.

brought in good faith. The imposition of treble damages, a sanction strongly punitive, See *Walker Process, supra, 382 U.S. at 180, 86 S. Ct. 347* (Harlan, J., concurring) and P. Areeda & D. Turner, Supra, II ***Antitrust Law*** PP 311, 331, dictates that such means exist. For reasons which appear below the solution of this problem points the way to the proper disposition of this case.

[*994] B. The Solution.

Our search for a solution commences by distinguishing the facts of this case from those of the cases on which appellee Handgards primarily relies. First, this is not a Walker Process case. Walker Process stands for the proposition that "the enforcement of a patent procured by fraud on the Patent Office" may give rise to antitrust liability. See notes 6 & 7 Supra. Plaintiff Handgards does not contend that Ethicon sought to enforce a fraudulently-procured patent. Instead, Handgards asserts that Ethicon prosecuted infringement actions in bad faith, **[**23]** that is, with knowledge that the patents, though lawfully-obtained, were invalid.

Second, this is not a Kobe case. *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416* (10th Cir.), Cert. denied, *344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651 (1952)*. In Kobe a patentee had engaged in a plan of monopolization by acquiring all present and future patents relevant to an industry, obtaining covenants not to compete from those from whom it purchased the patents, publicizing its infringement suits throughout the industry, and threatening suit against anyone trading with the alleged infringer. Kobe and its progeny, among which is *Rex Chainbelt, supra*, hold that a patentee may incur antitrust liability for even the good faith prosecution of a valid patent where it is shown that the infringement suit "was brought in furtherance and as an integral part of a plan to violate the antitrust laws." *Rex Chainbelt, supra, 512 F.2d 1005-06*. [14] **[**25]** Our careful examination of the record in this case reveals that no evidence of any overall scheme to monopolize exists Apart from allegations that directly relate to the bad faith prosecution charges. The old wine in this case consists **[**24]** of evidence indicating that Ethicon may have brought the infringement actions in bad faith. It is the same old wine when put in a new bottle labelled "overall scheme." [15]

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[14] The issue in Rex Chainbelt was whether Harco could recover attorneys' fees incurred in its successful defense of a patent infringement suit as damages resulting from an antitrust violation by Rex Chainbelt. After studying the Report of the Attorney General's National Committee to Study the Antitrust Laws 247-48 (1955) and a line of cases highlighted by *Kobe, supra* and ***Ansul Co. v. Uniroyal, Inc., 448 F.2d 872 (2d Cir. 1971)***, Cert. denied, ***404 U.S. 1018, 92 S. Ct. 680, 30 L. Ed. 2d 666 (1972)***, we concluded that "(t)he mere coincidence of an antitrust violation (an illegal tying arrangement) and a patent infringement suit is not sufficient to entitle Harco to attorney's fees expended in defense of the patent infringement claim absent some showing from which the . . . court can find or infer, that The patent infringement suit was brought in furtherance and as an integral part of a plan to violate the antitrust laws." *512 F.2d at 1005-06* (emphasis added).

[15] The district court instructed the jury on both the "bad faith" and "overall scheme" theories, stating that "(the prosecution) of one or more ill-founded patent infringement actions in bad faith . . . constitutes an antitrust violation in and of itself if such suits are initiated or pursued with an intent to monopolize a particular market or industry," Reporter's Transcript at 2134, and that "if . . . the lawsuits instituted by Ethicon against plaintiff were brought or maintained in whole or in part to further a plan or a scheme . . . to monopolize . . . or in furtherance of a conspiracy or combination to monopolize or restrain trade . . . (then) the institution and maintenance of these suits violate the antitrust laws, even though the defendants may actually have believed that the . . . patents were valid, and even though the defendants believed that Handgards had infringed these patents." Id. at 2151. The court defined "bad faith" in this context as "knowing either at the time the lawsuit is filed or during its pendency that the particular patent sued upon is invalid." Id. at 2134. Proof of bad faith, the court charged, must be shown by a preponderance of the evidence, which it described as proof that the proposition is "more likely true than not true." Id. at 2095.

The district court summarized the evidence pertaining to the overall scheme for the jury as follows:

. . . (Under) the overall scheme theory, the plaintiffs contend that the defendants accumulated numerous patents on plastic gloves to prevent competition; that they threatened to sue manufacturers, or purchasers, of allegedly infringing gloves, and misused the Gerard patent.

To support this claim, the plaintiff introduced Gerard's letter to Sam Porter, claiming that anyone manufacturing gloves on paper was in violation of his patent, and was subject to suit for patent infringement.

[*350] [**26] [*995]** Finally, this is not an Otter Tail case. *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359*, On remand, *360 F. Supp. 451 (D.Minn.1973)*, aff'd mem., *417 U.S. 901, 94 S. Ct. 2594, 41 L. Ed. 2d 207 (1974)*. Handgards has neither pleaded nor proved that Ethicon engaged in a pattern of baseless, repetitive litigation designed to prevent meaningful access to an adjudicatory tribunal. See generally *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1081 n.4, 1087 (9th Cir. 1976)*, Cert. denied, *430 U.S. 940, 97 S. Ct. 1571, 51 L. Ed. 2d 787 (1977)*. [16]

The plaintiff also presented the testimony of Mr. Webbe regarding the difficulty that Handgards encountered obtaining financing for its operations.

Mr. Campbell, a past employee of Glore Forgan, also testified that his company would not become involved in underwriting the sale of Handgards' stock, because of the pendency of the infringement suit.

Mr. Webbe also testified as to the reluctance of Sam Porter to enter into a joint venture because of the pending suit. And Porter, similarly, testified regarding his concern over the infringement action.

The defendants presented the following evidence to refute the plaintiff's claim that the patent suits were brought as part of an overall scheme to monopolize.

Messrs. Laff and Neuman both testified that the patent actions were filed against Plasticsmith and Mercury Manufacturing because Ethicon was unsure of the relationship between the two companies.

Mr. Laff explained that Delaware was chosen as the place to sue, because it was more convenient for Ethicon; and that after the court ordered the case transferred to San Francisco, Ethicon did not oppose the consolidation of the lawsuit against Mercury, so the action could be tried as one lawsuit.

Messrs. Laff and Neuman testified that the lawsuit was begun against Mr. Reidy when it was learned that Mr. Reidy paid for some of the accused machines.

The evidence shows Ethicon offered Handgards a license under the Gerard patent prior to the lawsuit.

Mr. Webbe and Mr. Blatz have testified that in their opinion the license offered was not reasonable, and would have put Handgards at a competitive disadvantage.

Messrs. Laff, Neuman, and Schlemmer, testified that the letter from Mr. Gerard to Mr. Porter, dated March 16th, 1965, in which Mr. Gerard enclosed a copy of his patent, did not constitute a misuse of the Gerard patent.

The evidence shows that as of at least the date of that letter, all disposable plastic gloves purchased by hair care kit companies were manufactured under the Gerard process.

Mr. Gerard and Mr. Porter testified that the letter was sent at the specific request of Mr. Porter.

Messrs. Laff, Neuman, and Schlemmer testified that no one except a manufacturer of gloves could have been sued under the Gerard patent, which was the sole object of that letter.

Id. at 2114-16.

As we indicated in the text, our review of the record convinces us that only the bad faith theory of recovery exists in this case. The evidence of an overall scheme to monopolize the relevant market constitutes substantially the same evidence relied upon to show Ethicon's alleged bad faith prosecution conduct. If this evidence, under the instructions our opinion requires, should fail to support the bad faith theory, it should not be sufficient to support the overall scheme theory. To hold otherwise would undercut the protections we here seek to afford the ordinary patentee. For this reason we are unable to affirm the judgment below on the basis of the jury's finding that an overall scheme existed. It is unnecessary for us to address explicitly the issue whether the trial court erred in charging the jury on two theories. It is enough to point out that if on retrial the evidence remains substantially the same, the charge to the jury should reflect only the bad faith theory. We express no opinion on the type of additional evidence that would require an overall scheme charge. *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416* (10th Cir.), Cert. denied, ***344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651 (1952)*** is the archetype, however.

[16] Judge Kennedy's opinion, concurring in the result and qualifiedly concurring in the majority's opinion, suggests that defendant Ethicon may have available on remand the "immunity" afforded by Franchise Realty. Our opinion treats "infringement actions initiated and conducted in bad faith," established in the manner we require, as violative of *Section 2* of the ***antitrust law***. When

[*351]** **[**27]** Rather, this case involves simply the commencement and maintenance of related infringement actions in what the jury found to be bad faith.

A clash between the policies of patent and antitrust laws also was present in Walker Process and Kobe. In the former the compromise consisted of erecting high **[*996]** barriers to success by the antitrust plaintiff. As we noted in *Cataphote Corp. v. DeSoto Chemical Coatings, Inc., 450 F.2d 769 (9th Cir. 1971)*, cert. denied, *408 U.S. 929, 92 S. Ct. 2497, 33 L. Ed. 2d 341 (1972)*:

> The patent fraud proscribed by Walker is extremely circumscribed. In Walker the Supreme Court excluded from its definition of fraud "an honest mistake as to the effect of prior installation upon patentability so-called "technical fraud.' " *Walker, supra*, (382 U.S.) at 177, *86 S. Ct. 347, 350 (15 L. Ed. 2d 247*). ***HN3***[] Wholly inadvertent errors or honest mistakes which are caused by neither fraudulent intent or design, nor by the patentee's gross negligence, do not constitute fraud under Walker. . . . The road to the Patent **[**28]** Office is so tortuous and patent litigation is usually so complex, that "knowing and willful fraud" as the term is used in Walker can mean no less than *Clear, convincing proof of intentional fraud involving affirmative dishonesty,* "a deliberately planned and carefully executed scheme to defraud * * * the Patent Office." . . . Patent fraud cases prior to Walker required a rigorous standard of deceit. Walker requires no less.

450 F.2d at 772 (emphasis added) (footnote and citations omitted). See *SSP Agricultural Equipment, Inc. v. Orchard-Rite Ltd., 592 F.2d 1096 at 1103 (9th Cir. 1979)*.

In overall scheme cases such as Kobe, ***HN4***[] courts require proof of an overall scheme to monopolize independent of the mere commencement of an infringement suit before permitting the imposition of antitrust liability based on patent enforcement conduct. This requirement diminishes the specter of antitrust liability encountered by an ordinary patentee who brings an infringement action. See Hibner, Litigation as an Overt Act Development and Prognosis, 46 Antitrust L.J. 718, 720 (1977). **[**29]**

The common thread is that in both Walker Process and Kobe barriers were erected to prevent frustration of patent law by the long reach of ***antitrust law***. This suggests our proper course. It is to erect such barriers to antitrust suits as are necessary to provide reasonable protection for the honest patentee who brings an infringement action to protect his legal monopoly.

A proper barrier is, in our opinion, suggested by Walker Process. It is that the jury should be instructed that a patentee's infringement suit is presumptively in good faith and that this presumption can be rebutted only by clear and convincing evidence. See *Cataphote Corp., supra, 450 F.2d at 772*; *SSP Agricultural Equipment, supra.* Such an instruction accords the patentee a presumption commensurate with the statutory presumption of patent validity set forth in the patent laws, 35 U.S.C. P 282, which can only be rebutted by a showing of clear and convincing evidence. See, e. g., *Santa Fe-Pomeroy, Inc. v. P & Z Co., 569 F.2d 1084, 1091 (9th Cir. 1978)*; *Saf-Gard Products, Inc. v. Service Parts, Inc., 532 F.2d 1266, 1271* (9th Cir.), Cert. **[**30]** denied, *429 U.S. 896, 97 S. Ct. 258, 50 L. Ed. 2d 179 (1976)*.

The trial court in this case, however, gave no such instruction. See note 15 Supra. Moreover, it charged that the patentee's subjective bad faith need only be proved by a mere preponderance of the evidence. This constitutes reversible error. The district court charge eliminates a barrier we hold necessary, and were it accepted as proper, "might well chill" legitimate patent enforcement efforts "because of fear of the vexations or punitive consequences of treble-damage suits." *Walker Process, supra, 382 U.S. at 180, 86 S. Ct. at 352* (Harlan, J., concurring).

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so established, it would be strange to then hold that nonetheless a Franchise Realty immunity might exist. In any event, this is an issue that the present record does not require us to address.

The barrier we impose is not one intended to be utilized in antitrust litigation generally. It is fashioned in response to the unique characteristics of proceedings in which the alleged violation of the ***antitrust law*** consists solely of one or more infringement actions initiated in bad faith.

III.

Damages Recoverable By Victims of Bad Faith Infringement Actions.

Difficulty also exists with respect to the trial court's charge to the jury concerning **[*997]** the nature of the injuries for which plaintiff properly may recover damages in **[**31]** an antitrust suit based upon a bad faith prosecution theory. "The Supreme Court has recently ruled that ***HN5***[] the only damages recoverable in an antitrust suit are those which occur by reason of that which made the defendant's actions unlawful." *Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir. 1978)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477,* ***[***352]*** *489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Brunswick states the applicable rule and is the governing authority:

> . . . (For) plaintiffs to recover treble damages . . . they must prove more than injury causally linked to . . . (the antitrust violation). Plaintiffs must prove Antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. 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." Zenith Radio Corp. v. Hazeltine Research, 395 U.S. (100) at 125 (*89 S. Ct. 1562 at 1577, 23 L. Ed. 2d 129*). **[**32]**

429 U.S. at 489, 97 S. Ct. at 697-698 (emphasis in original) (footnote omitted).

Plaintiff must show that the injury for which it seeks to recover is "the type the antitrust laws were intended to prevent" and "flows from that which makes defendant's acts unlawful." In a suit alleging antitrust injury based upon a bad faith prosecution theory it is obvious that the costs incurred in defense of the prior patent infringement suit are an injury which "flows" from the antitrust wrong. Damages for the loss of profits, however, will not necessarily so flow. We have some doubt, for example, whether plaintiff's damage claim for lost profits allegedly resulting from the entry of an additional competitor into the market during the pendency of the infringement suit is the type of injury for which antitrust recovery is appropriate. "The antitrust laws . . . were enacted for "the protection of Competition, not Competitors.' " *Brunswick, supra, 429 U.S. at 488, 97 S. Ct. at 697* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Moreover, the jury's finding in this case that Ethicon possessed a valid **[**33]** patent covering the market it was accused of monopolizing also raises doubts concerning whether plaintiff's lost profits "flowed from" the antitrust wrong claimed in this case.

The court's charge concerning the damages available to plaintiff for lost profits is ambiguous. Several times the court stated that plaintiff could only recover for lost profits that it would have earned "but for" the antitrust violation by the defendant. See Reporter's Transcript at 2160, 2162. The court also stated however, that plaintiff could recover as damages profits lost as the "proximate result" of the antitrust violation. Id. at 2163. The court earlier had defined the term "proximate cause" to mean "an act . . . (that) played a substantial part in bringing about" the injury. Id. at 2161. According to Brunswick, plaintiff must show more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have "flowed" from the wrong. To "flow" from the wrong, Brunswick suggests, the loss must be " "the type of loss that the claimed violations . . . would be likely to cause.' " *429 U.S. at 489, 97 S. Ct. at 697*, quoting from *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. **[**34]** To be one of several causes is not enough. The injury must be of the type likely to be caused by the defendant's bad faith infringement action. On the record before us we are left in doubt whether the Brunswick test has been met with respect to plaintiff's claim for lost profits. The failure of the trial court to resolve this doubt specifically constitutes error.

IV.

The Reasonable Balance.

The additional burdens imposed by our holdings on those who seek an antitrust **[*998]** recovery against one who has brought a patent infringement action against them achieve what we believe to be a reasonable accommodation of the policies of patent and ***antitrust law***. Patent holders must be cautious in bringing infringement actions and alleged infringers remain equipped with a strong retaliatory weapon available for use against those who sue them in bad faith. [17] We think this represents a reasonable balance.

[35]** Accordingly, this case is reversed and remanded to the district court for a new trial in accordance with the views expressed herein.

REVERSED and REMANDED.

Each party to this appeal shall bear its own costs and neither party's costs shall be taxed against the other. *Rule 39, F.R.App.P.*

On Petition for Rehearing.

Concur by: KENNEDY

Concur

KENNEDY, Circuit Judge, concurring:

I concur in the result of Judge Sneed's opinion, and think it inappropriate to address the question whether or not Ethicon could rely on an immunity granted to antitrust defendants under the principles set forth in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976)*, Cert. denied, *430 U.S. 940, 97 S. Ct. 1571, 51 L. Ed. 2d 787 (1977)*. The matter was not raised by Ethicon at any stage of these proceedings. Since a new trial is required in this case, **[***353]** because of the erroneous jury instructions noted by the majority, the district court in the first instance should determine whether Ethicon may raise the question on retrial.

In Franchise Realty we held that an antitrust plaintiff must plead that the litigation **[**36]** or petitions which allegedly caused competitive injury were sham proceedings, the showing required by a line of Supreme Court decisions, See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 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)*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*; *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977)*. Franchise Realty might be interpreted to require dismissal of antitrust claims unless the plaintiff can show that the defendant's conduct was designed to cause competitive injury by exacting such extraordinary costs that meaningful use of an agency or tribunal was barred, See *542 F.2d at 1080-81* & n. 4, and perhaps to require further that the defendant must have engaged in conduct other than instigation and maintenance of the proceedings, See id. See also *Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124 (N.D.N.Y.1977)*; **[**37]** *Ernest W. Hahn, Inc. v. Codding, 423 F. Supp. 913 (N.D.Cal.1976)*. Whether this is a correct interpretation of Franchise Realty or the Sherman Act, Cf. P. Areeda & D. Turner, ***Antitrust Law*** §

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[17] We note that substantial disincentives to instigating ill-founded patent infringement suits that are not actionable under the standard of antitrust liability announced today already exist. For example, the patent laws contain a specific remedy for prosecution in bad faith. *35 U.S.C. § 285*; the rule of collateral estoppel announced in *Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1972)* serves to dissuade ill-founded patent infringement suits; and nothing appears to preclude a successful defendant in an infringement action from bringing a common law malicious prosecution claim. Moreover, this opinion does not limit any antitrust liability that a patentee may incur for conduct actionable under an overall scheme or Walker Process theory.

201-204, 203c n.9 at 44-45 (1978), and whether Ethicon's conduct was actionable under such standards are important questions, but the issues are not presented for consideration here.

The majority opinion seems to suggest that a showing of sham proceedings under Franchise Realty is not required where the claimed antitrust injury flows from patent litigation, but it does not indicate the respects in which patent litigation somehow presents a greater threat to interests protected by the Sherman Act than other types **[*999]** of suits governed by California Motor and Franchise Realty. It is irrelevant that a successful plaintiff in a patent action is enforcing a lawful monopoly. Very costly "sham" unfair competition or tort suits, for example, may produce more anticompetitive injury than less costly but successful infringement actions. Moreover, it is difficult to argue that a successful plaintiff has engaged in sham litigation. But to the extent that the patent plaintiff is unsuccessful, **[**38]** I see little reason to distinguish patent litigation from other kinds of litigation. If attempted enforcement of a patent known to be invalid is the special circumstance which justifies a special rule, the court's opinion states no reason to depart from the requirement that a plaintiff prove knowing, intentional fraudulent procurement as stated in Walker Process. To the extent that abuse of the judicial process by bad faith prosecution of a claim known to be without merit is the essence of the antitrust violation, the court's opinion states no reason for departing from the circuit's precedents, See Franchise Realty, governing this type of antitrust violation. Further, a more lenient rule for patent litigation appears at odds with the principal holding that a special burden of proof is required before an antitrust plaintiff may prevail on the claim of injury from a previous patent litigation, our purpose being to avoid undue discouragement to the adjudication of patent infringement claims. In my view, however, whether and why the kind of antitrust litigation permitted in Walker Process is distinguishable in meaningful ways from that discussed in California Motor, the relationship between **[**39]** the different standards applied in those cases, and the applicability of Franchise Realty to this case, are best left for a later decision when the point has been specifically raised by the parties. [1]

[40]** Finally, the majority states that in proving injury "flowing from" an antitrust violation, "To be one of several causes is not enough." To the extent this language suggests a change in the normal standards regarding causation in antitrust cases, the statement is unexplained. There is no need in this case to reexamine the rule that "proximate cause" in antitrust cases is defined in terms of "a substantial cause." See *Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1075 n.3 (9th Cir. 1970)*; *Hecht v. Pro-Football, Inc., D.C.Cir., 187 U.S.App.D.C. 73, 570 F.2d 982, 996 (1977)*; *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970)*; E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§ 90.31, 80.18 (1977) ("proximate cause" in antitrust cases defined in terms of "substantial factor"). To the extent the language applies only to antitrust claims based on prior patent infringement actions, the majority similarly does not explain why a different causation rule is appropriate in this kind of case. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, is squarely **[**41]** in point for our holding that the injury must result from a competitive wrong prohibited by the antitrust laws, but in my view it should not be interpreted to introduce a new standard for proving causation either in antitrust cases generally or antitrust claims based on prior patent litigation. I am not as sure as Judge Sneed that part of Handgards' damages claim was for lost profits resulting from the entry of an additional competitor, but I agree that the effect of the Orsini patent on plaintiff's claim of injury creates an issue which the district court should decide.

[*1000] With the above observations, I concur in the opinion of the majority.

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[1] Defendant's position on this appeal was that antitrust claims based on the prior bringing of infringement actions differ from other kinds of antitrust suits based on alleged abuse of the judicial system. It expressly declined to rely on California Motor, stating in its brief: "The only relevance of California Motor Transport, which had nothing to do with patents, is its explicit reaffirmation by the Supreme Court of Walker Process as the applicable standard of fraud in connection with a *§ 2* case charging enforcement of invalid patents." Appellant's Brief at 27. Instead, defendants argued that this case was governed by Walker Process. They claimed plaintiff should have been required to prove common law intentional fraud, not merely bad faith, and that the standard of proof should have been clear and convincing instead of a preponderance of the evidence. Their second argument is adopted in Judge Sneed's opinion.

Newspaper Printing Corp. v. Galbreath

Supreme Court of Tennessee

May 7, 1979

No Number in Original

Reporter

580 S.W.2d 777 *; 1979 Tenn. LEXIS 429 **; 5 Media L. Rep. 1065; 1979-2 Trade Cas. (CCH) P62,829

NEWSPAPER PRINTING CORPORATION, Tennessean Newspapers, Inc. and the Nashville Banner Publishing Company, Petitioners, v. Charles GALBREATH, Respondent

Core Terms

advertising, newspaper, publish, abbreviations, Printing, monopoly, anti trust law, predatory, costs, refuse to accept, pricing

LexisNexis® Headnotes

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

HN1[] **Freedom of Speech, Free Press**

The publication of a newspaper is strictly the private business of its publisher, and it has been aptly observed that a publisher in publishing a paper assumes no office, trust, or station in a public sense, nor does he enter into any public or contractual relation with the community at large.

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

HN2[] **Freedom of Speech, Free Press**

The rights and liabilities of newspaper publishers arising out of contracts are therefore governed by the rules applicable to contracts generally.

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

HN3[] **Freedom of Speech, Free Press**

A newspaper publisher is under no legal obligation to sell advertising to all who apply for it and is not required to accept for publication any advertisement, although in proper form, even though the charge which the newspaper makes for publishing like advertisements is tendered.

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

HN4[] Freedom of Speech, Free Press

Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication.

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

HN5[] Freedom of Speech, Free Press

The publisher of a newspaper has the right to condition its acceptance of advertising upon its being in a form satisfactory to the newspaper and its being placed in a classification which, in the judgment of the newspaper, will result in a truthful and convenient disclosure to its readers. In short, since it may refuse to publish at all, it may require that advertisements submitted to it for publication comply with such rules and regulations as the publishers deem proper.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > Fair Housing Amendments Act

Constitutional Law > Equal Protection > Nature & Scope of Protection

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

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

HN6[] Communications, Sherman Act

Freedom of the press, like other freedoms, is not absolute. Thus, the constitutional rights of others, such as the right to equal treatment under the equal protection clause of the Fourteenth Amendment, require the recognition of narrow exceptions to the otherwise complete freedom of the publisher to publish or refuse to publish as he pleases. Nor does freedom of the press authorize the newspaper to attempt to monopolize in violation of the Sherman Antitrust Act.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

The rejection by a newspaper, acting singly, of advertising because it does not meet the publisher's requirements does not violate the antitrust laws.

Counsel: [1]** Alfred H. Knight, III, Nashville, for petitioners; Willis & Knight, Nashville, of counsel.

Charles Galbreath, pro se.

Judges: Brock, Justice wrote the opinion. Henry, C.J., and Fones, Cooper and Harbison, JJ., concur.

Opinion by: BROCK

Opinion

[*778] The plaintiff, Charles Galbreath, sought to purchase from the defendant newspapers, Tennessean Newspapers, Inc., and The Nashville Banner Publishing Company, and their jointly controlled publishing company, defendant Newspaper Printing Corporation, advertising space for publication of the following advertisement:

> "West End Area -- Lge. apt. 4 rms. 1 b.r., Cent. heat and a/c Drps. Shag cpts. frost free ref. gar. dis. ds. washer. $145 -- 352-4066."

The defendant, Newspaper Printing Corporation, to whom the proposed advertisement was submitted, refused to accept it in the foregoing form and agreed to publish it only after it was modified to read as follows:

> "West End Area -- Large apartment. 4 rooms. 1 bedroom. Central heat and air conditioning. Drapes. Shag carpet, frost free refrigerator. Garbage disposal. Dishwasher. $145. 352-4066."

The action of the defendants prompted the plaintiff, Galbreath, to file this **[**2]** class action in his own behalf and on behalf of all others similarly situated, seeking relief by way of a mandatory injunction requiring the defendant newspapers and their publishing company to "print all advertising, not violative of any law, as composed by the author of same upon the payment or offer of payment of the usual rate," and requiring "that the defendant cease censoring and modifying advertising copy submitted to it for publication by the plaintiff, Charles Galbreath, and all others similarly situated." The complaint also prayed for damages for "the excessive costs incurred because of the arbitrary, invalid and unconstitutional acts of the defendants," and for an award of reasonable attorneys fees and costs.

> The plaintiff alleges that the defendants ". . . have a monopoly in the metropolitan area of Nashville, Tennessee, in that only through the latter defendant [Newspaper Printing Corporation] may advertisement in newspapers with large daily circulations be published. That because of this monopoly there is no competition and the plaintiff and others similarly situated have no recourse but to submit to the excessive charges resulting from the arbitrary refusal **[**3]** of the Newspaper Printing Corporation to accept advertising copy utilizing the universally recognized economical method of reducing advertising costs by using abbreviations recognized in the trade of the business involved.
>
> "That the only reason the defendants refuse to permit liberal use of abbreviations in copy for advertisement is to unjustly enrich themselves at the expense of the advertiser consumer who, because of the monopoly enjoyed by the defendants, has no other source of advertisement in large daily newspapers in the area of the plaintiff's business activities."

The plaintiff further alleges that the refusal of the defendants to publish his tendered advertisement, as above quoted, was **[*779]** "wrongful and arbitrary" and ". . . forced the plaintiff against his will to allow the advertisement to be censored and changed so as to eliminate the economical use of abbreviations as customarily permitted in other advertising markets of the nation in the newspapers, and, forced him to choose between not advertising his property or incurring the substantial additional expense of having the advertisement published without abbreviations so as to require 33 1/2 percent more **[**4]** space and resulting costs."

In stating his legal theory, plaintiff alleges that the policy of the defendants in refusing to accept advertisements containing abbreviations is unreasonable, capricious and arbitrary ". . . and violative of the *First Amendment to the Constitution of the United States* and *Art. I, § 19, of the Constitution of Tennessee*, in that they restrict freedom of the press and because said policy and standards being direct outgrowths of a monopoly the resulting unfair competition is violative of *Art. I, § 22, of the Constitution of Tennessee.*" [1]

[5]** The defendants filed a motion for summary judgment coupled with a motion to dismiss the complaint upon the ground that it failed to state a claim upon which relief could be granted. The Chancellor sustained the motion to dismiss, holding that the complaint failed to state a cause of action. Upon appeal, the Court of Appeals reversed the Chancellor's order of dismissal and remanded the case for trial on the merits. We granted the petition for certiorari filed by the defendants.

I

HN1[] The publication of a newspaper is strictly the private business of its publisher, and it has been aptly observed that a publisher "in publishing a paper, assumes no 'office, trust, or station' in a public sense, nor does he enter into any public or contractual relation with the community at large. ***HN2***[] The rights and liabilities of newspaper publishers arising out of contracts are therefore governed by the rules applicable to contracts generally." 58 Am.Jur.2d *Newspapers, Periodicals, Etc.* § 20 (1971). Moreover, it is well settled in this country that ***HN3***[] a newspaper publisher is under no legal obligation to sell advertising to all who apply for it, and is not required to accept for publication any advertisement, **[**6]** although in proper form, even though the charge which the newspaper makes for publishing like advertisements is tendered. *Burke v. Kingsport Publishing Corporation, 377 F. Supp. 221*, *aff'd* *497 F.2d 923 (1974)*; *In re Louis Wohl, Inc., 50 F.2d 254 (Mich.App. 1931)*; *J.J. Gordon, Inc. v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961)*; *Bloss v. Federated Publications, Inc., 5 Mich.App. 74, 145 N.W.2d 800 (1966)*, *aff'd* *380 Mich. 485, 157 N.W.2d 241 (1968)*; *Camp-of-the-Pines, Inc. v. New York Times Co., 184 Misc. 389, 53 N.Y.S.2d 475 (1945)*; *Approved Personnel, Inc. v. Tribune Company, 177 So.2d 704, 18 A.L.R.3d 1277 (Fla.App.1965)*; *Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813, 83 A.L.R. 975 (1933)*; *Friedenberg v. Times Pub. Co., 170 La. 3, 127 So. 345 (1930)*; *Mid-West Elec. Coop. v. West Texas Chamber of Comm., 369 S.W.2d 842 (Tex.Civ.App.1963)*; *Modla v. Tribune Publishing Company, 14 Ariz.App. 82, 480 P.2d 999 (1971)*.

HN4[] Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in **[**7]** the area of its publication. *Shuck v. Carroll Daily Herald, **[*780]** supra; J.J. Gordon, Inc. v. Worcester Telegram Publishing Co., supra; Mid-West Elec. Coop. v. West Texas Chamber of Comm., supra;* 66 C.J.S. *Newspapers* § 21c (1950). *Cf.* *Uhlman v. Sherman, 31 Ohio Dec. 54, 22* Ohio N.P.,N.S., 225, *Herald Company v. Seawell, 472 F.2d 1081 (Colo.App.1972)*. ***HN5***[] The publisher of a newspaper has the right to condition its acceptance of advertising upon its being in a form satisfactory to the newspaper and its being placed in a classification which, in the judgment of the newspaper, will result in a truthful and convenient disclosure to its readers. In short, since it may refuse to publish at all, it may require that advertisements submitted to it for publication comply with such rules and regulations as the publishers deem proper.

II

The plaintiff asserts that the freedom of the press provisions of the *First Amendment to the Constitution of the United States* and of *Art. I, § 19, of the Constitution of Tennessee* impose a duty upon the defendants and create a

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[1] As pertinent here, *Art. I, § 19, of the Constitution of Tennessee* provides:

> "That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

Art. I, § 22, of the Constitution of Tennessee provides:

> "That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."

correlative right in the plaintiff to publish his advertisements containing abbreviations, as hereinabove quoted. **[**8]** This assertion of the plaintiff is unsupported by either authority or reason. Indeed, the command of those constitutional provisions requires the opposite conclusion, *i.e.*, freedom of the press means freedom not to publish, as well as freedom to publish, as the publisher sees fit. As noted by the Iowa court in *Shuck v. Carroll Daily Herald, supra*, if a newspaper may be required to accept an advertisement, it may also be compelled to publish a news item or an editorial. [2]

[9]** III

The attempt by the plaintiff to rely upon the anti-monopoly provision of our Constitution is quite obscure; consequently, we are not certain what his theory is. He avers that the policy of the defendants in refusing to accept advertisements containing abbreviations is "unreasonable, capricious and arbitrary" and that

> ". . . said policy and standards, being direct outgrowths of a monopoly, the resulting unfair competition is violative of *Art. I, § 22 of the Constitution of Tennessee.*"
>
> He also alleges that the defendants
>
> ". . . have a monopoly in the metropolitan area of Nashville, Tennessee, in that only through the latter defendant (Newspaper Printing Corporation) may advertisements in newspapers with large daily circulations be published. That because of this monopoly there is no competition and the plaintiff and others similarly situated have no recourse but to submit to the excessive charges resulting from the arbitrary refusal of the Newspaper Printing Corporation to accept advertising copy utilizing the universally recognized economical method of reducing advertising costs by using abbreviations recognized in the trade of the business involved."

[10]** Both the Chancellor and the Court of Appeals have treated the complaint as alleging a violation of the Federal antitrust laws, a construction which we consider to be generous. [3]

[*781] The trial court held that the practice of the defendants in jointly refusing to accept for publication advertisements containing abbreviations such as that tendered by the plaintiff was authorized by the Newspaper Preservation **[**11]** Act, *15 U.S.C., §§ 1801, et seq.*, thus furnishing no basis for an action by the plaintiff. Section 2 of that Act provides:

> "Congressional declaration of policy
>
> "In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter [*15 U.S.C.S., §§ 1801, et seq.*]."

Also pertinent here is § 1802(2) which provides:

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[2] Of course, ***HN6***[] freedom of the press, like other freedoms, is not absolute. Thus, the constitutional rights of others, such as the right to equal treatment under the equal protection clause of the Fourteenth Amendment, require the recognition of narrow exceptions to the otherwise complete freedom of the publisher to publish or refuse to publish as he pleases. *See, Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel., 413 U.S. 376, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)*; *United States v. Hunter, 459 F.2d 205 (4th Cir. 1972)*; Civil Rights Act of 1968, *42 U.S.C. § 3604(c)*. Nor does freedom of the press authorize the newspaper to "attempt to monopolize" in violation of the Sherman Antitrust Act. *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*.

[3] Since both parties and both lower courts have treated the case as one alleging a violation of the Federal antitrust laws, we confine our discussion to that theory and do not determine whether the anti-monopoly provision of *Art. I, § 22, of the Constitution of Tennessee* is self executing and may furnish the basis for a civil action by one who claims that another has violated that provision. *See, The Charles River Bridge v. The Warren River Bridge et al., 36 U.S. 420, 11 Pet. 420, 9 L. Ed. 773 (1837)*; *Leeper v. State, 103 Tenn. 500, 53 S.W. 962 (1899)*; 58 C.J.S. *Monopolies* §§ 1, 27 (1948).

"As used in this chapter [*15 U.S.C.S., §§ 1801, et seq.*] --

* * *

"(2) The term 'joint newspaper operating arrangement' means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is **[**12]** taken or agreed to be taken, with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution; *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined."

The Court of Appeals, while agreeing that the Newspaper Preservation Act applies, was of the opinion that the complaint alleged predatory pricing or practice which was not authorized by that Act. It relied upon § 4(c) of the Act which provides:

"Antitrust [exemptions]

* * *

"Nothing construed in the chapter [*15 U.S.C.S., §§ 1801, et seq.*] shall be construed to exempt from any ***antitrust law*** any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any ***antitrust law*** if engaged in by a single entity. Except as provided in this chapter, no **[**13]** joint newspaper operating arrangement or any party thereto shall be exempt from any ***antitrust law***."

The Court of Appeals further concluded that whether the joint advertising policy of the defendants constituted predatory pricing or practice presented a factual issue which required that the motion for summary judgment be denied. Accordingly, that court reversed the judgment of the trial court and remanded for a trial on the merits.

The refusal of a newspaper to accept tendered advertising because it fails to meet the standards required by the publisher, whether acting singly or jointly, does not amount to "predatory pricing or practice," as those terms are used in the antitrust laws. As used in such laws, "predatory" refers to pricing or other action aimed at competitors rather than the "gouging" of consumers. *See, International Air Ind., Inc. v. American Excelsior Co., 517 F.2d 714, 722 (5th Cir. 1975)*.

It has been held that ***HN7***[] the rejection by a newspaper, acting singly, of advertising because **[*782]** it does not meet the publisher's requirements does not violate the antitrust laws. *Staff Research Associates, Inc. v. Tribune Company, 346 F.2d 372 (7th Cir. 1965)*. **[**14]**

It follows, then, that the joint action of the defendants in refusing to accept such advertising does not come within the exception contained in § 4(c) of the Newspaper Preservation Act, above quoted, it being one which would not be unlawful if engaged in by a single entity.

We, therefore, conclude that the Court of Appeals erred in reversing the judgment of the Chancellor and in remanding this case for trial on the merits. The judgment of the Court of Appeals is reversed and that of the trial court is affirmed. Costs incurred in this Court will be taxed against the respondent.

HENRY, C.J., and FONES, COOPER and HARBISON, JJ., concur.

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People ex rel. Freitas v. City and County of San Francisco

Court of Appeal of California, First Appellate District, Division Two

May 11, 1979

Civ. No. 43082

Reporter

92 Cal. App. 3d 913 *; 155 Cal. Rptr. 319 **; 1979 Cal. App. LEXIS 1732 ***; 1979-2 Trade Cas. (CCH) P62,747

THE PEOPLE ex rel. JOSEPH FREITAS, JR., as District Attorney, etc., et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents; RICHARD B. SPOHN, as Director, etc., Intervener and Appellant

Subsequent History: **[***1]** A petition for a rehearing was denied June 8, 1979, and the petition of the plaintiffs and appellants and the intervener and appellant for a hearing by the Supreme Court was denied July 26, 1979. Bird, C. J., did not participate therein.

Prior History: Superior Court of the City and County of San Francisco, No. 715624, John E. Benson, Judge.

Disposition: The judgment on the pleadings in favor of defendants on the first cause of action of both complaints, and on the eighth cause of action of the complaint in intervention, is affirmed.

Core Terms

taxicab, regulation, fares, Cartwright Act, public utility, powers, anti trust law, sovereign, Sherman Act, rates, cases, municipal, exempt, immunity, political subdivision, intermediate, plaintiffs', antitrust, cause of action, state action, transportation

LexisNexis® Headnotes

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

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

Cal. Bus. & Prof. Code, § 16702, the Cartwright Act, defines "persons" to include "corporations, firms, partnerships and associations." This definition does not include cities.

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

Fundamental rules of statutory interpretation require that a legislative act be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase and clause so that no part or provision will be useless or meaningless.

Governments > Local Governments > General Overview

HN3[] **Governments, Local Governments**

Municipal corporations are political subdivisions of the state. Subject only to its own laws and constitution, the state may create, expand, diminish or abolish such subdivisions, and all this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

Energy & Utilities Law > Utility Companies > General Overview

Governments > Local Governments > Administrative Boards

Constitutional Law > State Constitutional Operation

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

Governments > Public Improvements > General Overview

HN4[] **Energy & Utilities Law, Utility Companies**

See *Cal. Const. art. XII, § 8*.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

A district attorney filed an antitrust complaint for injunction, civil penalties and other equitable relief against a city and county. One cause of action alleged a per se violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) by defendants' fixing of taxicab fares. Another cause of action by the Director of the California Department of Consumer Affairs, who was given permission to intervene, alleged that defendants had no lawful authority to set and fix taxicab fares, and that the section of the municipal code under which they purported to act was ultra vires and void. The trial court entered judgment for defendants on the pleadings on both causes of action. (Superior Court of the City and County of San Francisco, No. 715624, John E. Benson, Judge.)

The Court of Appeal affirmed. The court first held that federal antitrust cases had no relevance in determining whether the city was liable under the Cartwright Act, and that only California law needed to be consulted to determine whether the city could set taxicab fares under the act. The court further held that the city, as a political subdivision of the state, could not be sued under the act. While agreeing with the proposition that taxicab rates may be subject to regulation by the state Legislature through the Public Utilities Commission, the court pointed out that the Legislature has not yet claimed jurisdiction or sought control in this area; accordingly, the court held that absent an assertion by the state of its authority to regulate taxicab rates, the city had the power to do so. The court rejected plaintiffs' argument that even if the city was immune under the Cartwright Act, the individual members of the board of supervisors could be sued. (Opinion by Rouse, J., with Taylor, P. J., and Kane J., concurring.)

Headnotes

CA(1)[] **(1)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Liability of City—Federal Law.

--In an antitrust action against a city alleging a violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), arising out of the fixing of taxicab fares, federal antitrust cases did not have any relevance in determining whether the city has liability under the Cartwright Act. Because the state acts as an originator of the antitrust laws in question, not as an intermediate sovereign between the cities and the originator of the antitrust laws, only California law need be consulted.

CA(2a)[] **(2a)** *CA(2b)*[] **(2b)** *CA(2c)*[] **(2c)** *CA(2d)*[] **(2d)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Liability of Cities.

--In an antitrust action against a city alleging a violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), arising out of the fixing of taxicab fares the trial court properly entered judgment for defendant on the pleadings. Because cities are political subdivisions of the state and are specifically defined as persons entitled to sue under the act (*Bus. & Prof. Code, § 16750*), while the definition of "persons" subject to the act does not include cities or political subdivisions, the Legislature did not intend for cities to be subject to the Cartwright Act. Moreover, since the city could not be sued under the act, and the board of supervisors was operating within the scope of its powers in setting taxicab rates, individual members of the board could not be held individually liable for the same immune conduct.

[See **Cal.Jur.3d**, Monopolies and Restraints of Trade, §§ 19, *29; **Am.Jur.2d**, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 472*.]

CA(3)[] **(3)**

Statutes § 39—Construction—giving Effect to Statute—Conformation of Parts.

--A legislative act is to be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase and clause so that no part or provision will be useless or meaningless.

CA(4)[] **(4)**

Municipalities § 13—Legislative Control—Cities as Political Subdivisions of State.

--Municipal corporations are political subdivisions of the state. Subject only to its own laws and Constitution, the state may create, expand, diminish or abolish such subdivisions, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

CA(5)[] **(5)**

Municipalities § 15—Powers—Police Power—Regulation of Business and Professions—Setting Taxicab Rates.

--While taxicabs are common carriers and their rates may therefore be subject to regulation by the state Legislature through the Public Utilities Commission, the Legislature has not claimed jurisdiction nor sought control in this area. Accordingly, absent an assertion by the state of its authority to regulate taxicab rates, a city has the power to do so, and the fact that taxicabs occasionally or frequently venture beyond the city and county limits is irrelevant.

Counsel: Joseph Freitas, Jr., District Attorney, Judith D. Ford, Raymond T. Bonner, David C. Moon, Gary G. Devine and Maria P. Rivera, Assistant District Attorneys, for Plaintiffs and Appellants.

Harry M. Snyder and Luana Martilla as Amici Curiae on behalf of Plaintiffs and Appellants.

Richard A. Elbrecht, Steven M. Fleisher and A. Paul Griebel for Intervener and Appellant.

George Agnost, City Attorney, and Edmund A. Bacigalupi, Deputy City Attorney, for Defendants and Respondents.

Judges: Opinion by Rouse, J., with Taylor, P. J., and Kane, J., concurring.

Opinion by: ROUSE

Opinion

[*915] [320]** Plaintiffs appeal from a judgment on the pleadings entered in favor of **[***2]** defendants City and County of San Francisco and its board of supervisors (hereafter City and Board). We are asked to decide whether the provisions of the Cartwright Act apply to the City and whether San Francisco has the authority, under the California Constitution, to set taxicab fares.

The instant action was initiated by the District Attorney of the City and County of San Francisco (hereafter District Attorney), who filed an antitrust complaint for injunction, civil penalties and other equitable **[*916]** relief. Permission to intervene was then granted to Richard Spohn, Director of the California Department of Consumer Affairs. Intervener's complaint was identical to that filed by the District Attorney, except that it added an eighth cause of action. The judgment on the pleadings was granted as to the first cause of action of both complaints and as to the eighth cause of action of the complaint in intervention. [1]

[*3]** The first cause of action alleged a per se violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) by defendants' fixing of taxicab fares. The eighth cause of action in intervener's complaint alleged that defendants City and Board had no lawful authority to set and fix taxicab fares, and that the section of the San Francisco Municipal Code under which they purported to act is ultra vires and void.

The following facts were established by plaintiffs' request for admissions and defendants' response thereto: The Board fixes the fares which all taxicab companies operating in San Francisco must charge. Since January 1971, Yellow Cab has submitted five requests for fare increases to the Board. Although an increase was granted in response to all five requests, defendants denied that the fare was set at the level requested by Yellow Cab in every instance.

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[1] All counts of plaintiffs' complaint relating to defendants City and Board were decided by the trial court; therefore, the one final judgment rule permits this appeal. (6 Witkin, Cal. Procedure (2d ed. 1971) Pt. I, § 42, p. 4057.)

Summary judgment for defendants was granted as to the third cause of action; however, this decision is not being appealed. The second, third, fourth, fifth, sixth and seventh causes of action do not run against the City or the Board and are therefore irrelevant to this appeal.

The portion of this action concerning Westgate California Corporation, Yellow Cab Company and Charles O'Connor were stayed by pending bankruptcy proceedings; as a result of these proceedings, the action against Yellow Cab was dismissed without prejudice.

[321]** Plaintiffs' [2] first four arguments on appeal are all based on the presumption that federal case law under the Sherman Anti-Trust Act (hereafter Sherman Act; *15 U.S.C.A. 1*) should be followed in this case. [3] They reason that since cases interpreting the Sherman Act are applicable to the California Cartwright **[***4]** Act (*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 926 [130 Cal.Rptr. 1, 549 P.2d 833]*), recent changes in the federal law compel the conclusion that San Francisco is not exempt under the Cartwright Act.

[*917] Defendants' major argument is that *Widdows v. Koch (1968) 263 Cal.App.2d 228 [69 Cal.Rptr. 464]*, controls in this case. That case held that municipalities were not "persons" under *section 16702 of the Business and Professions Code* and therefore were not subject to the provisions of the Cartwright Act (p. 235). Defendants also contend that even though the Sherman Act cases are applicable, they can be distinguished from this case. Finally, they rely **[***5]** upon *In re Martinez (1943) 22 Cal.2d 259 [138 P.2d 10]*, which held that a municipality has the power to set taxicab rates for taxicabs operating within its boundaries.

CA(1)[] **(1)** The first question to be addressed, then, is whether federal antitrust cases have any relevance in determining whether a city has liability under the California Cartwright Act. Our analysis of the federal cases and California law leads us to conclude that, in this limited instance, federal case holdings provide no guide to the interpretation of California ***antitrust law***. Accordingly, plaintiffs' contention that federal law is pertinent to this case must fail.

In *Parker v. Brown (1943) 317 U.S. 341 [87 L.Ed. 315, 63 S.Ct. 307]*, the United States Supreme Court held that federal antitrust laws were not intended by Congress to apply to state action. The court reasoned that there was "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 **[***6]** 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." (Pp. 350-351 [*87 L.Ed. p. 326]*.) It was pointed out that although previous cases had held that a state could sue under the federal antitrust laws, the legislative history of the act indicated that it prevented only "'business combinations.'" (P. 351 [*87 L.Ed. p. 326]*.) The act "must be taken to be a prohibition of individual and not state action." The state, acting as sovereign, is not prohibited by the Sherman Act from imposing a restraint as an act of government. (P. 352 [*87 L.Ed. p. 326]*.)

Goldfarb v. Virginia State Bar (1975) 421 U.S. 773 [44 L.Ed.2d 572, 95 S.Ct. 2004], held that the state action exemption announced in *Parker* was inapplicable to a minimum fee schedule for lawyers published by a local bar association and enforced by the state bar. In order to come within *Parker*, anticompetitive activities must be compelled by direction of the state acting as a sovereign. (P. 791 [44 L.Ed.2d p. 587].) The Virginia Supreme Court was authorized to regulate the practice of law, and had **[*918]** **[***7]** adopted ethical codes which dealt in part with fees, "and far from exercising state power to authorize binding price fixing, explicitly directed lawyers not 'to be controlled' by fee schedules." (P. 789 [44 L.Ed.2d p. 586].) When the state bar provided for disciplinary action for deviation from fee schedules, it "voluntarily joined in what is essentially a private anticompetitive activity" which is within the reach of the Sherman Act. (Pp. 791-792 [44 L.Ed.2d p. 587].)

In *Cantor v. Detroit Edison Co. (1976) 428 U.S. 579 [49 L.Ed.2d 1141, 96 S.Ct. 3110]*, a **[**322]** private utility distributed, without additional charge, lightbulbs to residential customers, under a longstanding practice antedating state regulation of electric utilities. This practice, challenged as an unlawful "tie-in" of bulbs to electricity, was described in the utilities tariffs, which were binding on the utility until changed. Nevertheless, the challenged tie-in was held not to be immune from antitrust laws. The court pointed out that Chief Justice Stone in *Parker* had carefully selected language which plainly limited the court's holding to official action taken by state officials. (P. 591 **[***8]** [49 L.Ed.2d p. 1150].) "The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State),

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[2] The District Attorney filed a written brief on appeal. Intervener adopts and joins in all arguments in District Attorney's brief.

[3] An amicus curiae brief filed on behalf of Consumers Union of United States, Inc. and the Gray Panthers of San Francisco takes essentially the same position as plaintiffs.

on the other hand." (P. 591, fn. 24 [94 L.Ed.2d p. 1150].) The court emphasized that *Cantor* was distinguishable from *Parker* because the only defendant in *Cantor* was a public utility and there was no claim that any state action violated the antitrust laws. Since *Parker* involved the issue of whether the sovereign state itself was subject to the antitrust laws, it was not controlling in *Cantor*. (Pp. 591-592 [49 L.Ed.2d p. 1150].) Therefore, since the state had merely approved but had not mandated the "tie-in" arrangement, the state action "exemption" did not apply.

By contrast, a Sherman Act immunity was found in *Bates v. State Bar of Arizona (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691]*. The United States Supreme Court found that a ban on price advertising, adopted by the Arizona Supreme Court, did not violate the Sherman Act, because the state court itself had adopted the challenged rule, and the state bar's role was completely defined. **[***9]** The court found the restraint to be compelled by direction of the state acting as sovereign. (P. 360 [53 L.Ed.2d p. 821].) Nevertheless, the ban on advertising was invalidated on the ground that it violated the First Amendment because of overbreadth. (Pp. 383-384 [53 L.Ed.2d pp. 835-836].)

Finally, in *Lafayette v. Louisiana Power & Light Co. (1978) 435 U.S. 389 [55 L.Ed.2d 364, 98 S.Ct. 1123]*, the court held that cities were not **[*919]** exempt from the federal antitrust laws, when they owned and operated electric utility systems both within and beyond their city limits. The court pointed out that cities have long been "persons" under the Sherman Act (citing *Chattanooga Foundry v. Atlanta (1906) 203 U.S. 390 [51 L.Ed. 241, 27 S.Ct. 65]*.) The court concluded that the "*Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." (P. 413 [55 L.Ed.2d p. 383].)

On the basis of their analysis of the above cases, plaintiffs conclude that, before local government can deprive the public **[***10]** of the benefits of competition, the conduct must be thoroughly analyzed, and the government must establish that it has been compelled by the state to engage in the otherwise unlawful activity.

Defendants subscribe to the concept that federal cases interpreting the Sherman Act are applicable to the Cartwright Act. (*Widdows v. Koch, supra, 263 Cal.App.2d at p. 234*.) However, they conclude that the federal cases can be used to support their position that San Francisco can regulate taxicab fares.

As previously stated, we have concluded that, under the limited circumstances of this case, the federal holdings are irrelevant. All parties ignore the problem of equating the system under which federal ***antitrust law*** is developed with the system under which California ***antitrust law*** is developed.

The Sherman Act cases are all based on the concept of state sovereignty. A city's antitrust liabilities and exemptions under the federal act are derived through an intermediate state sovereign located between the city and the federal government which enacted the law. Thus, in the framework of the federal act, San Francisco would have an antitrust exemption only if it was compelled to set **[***11]** taxicab fares by the State of California, the intermediate sovereign. **[**323]** It appears to us that the above described analysis is meaningless when attempting to determine a city's liability under the Cartwright Act. California is no longer an intermediate sovereign; it is the originator of the ***antitrust law***. Cities are no longer acting through an intermediate sovereign as under the Sherman Act. In California, cities are operating under constraints imposed by the Cartwright Act, and their liabilities are determined solely by the California Legislature. In this instance, the state is acting as an originator of the antitrust laws, not as an intermediate sovereign under federal antitrust **[*920]** concepts. To determine if San Francisco can set taxicab fares under the Cartwright Act, we need look only to California law. There is no intermediate sovereign between the cities and the originator of the antitrust laws.

CA(2a)[↑] **(2a)** To determine the nature and extent of San Francisco's responsibilities under the Cartwright Act, we should first determine whether, in enacting the Cartwright Act, the Legislature intended to allow cities to be sued as defendants. All parties argue the merits **[***12]** of *Widdows v. Koch, supra, 263 Cal.App.2d 228*, which held that cities were not "persons" under the act. While the reasoning of *Widdows* may be questionable, the basic holding is correct. [4] HN1[] The Cartwright Act defines "persons" to include "corporations, firms, partnerships and associations." (Bus. & Prof. Code, § 16702.) It is apparent that this definition does not include cities.

[*13]** On the other hand, we note that section 16750 of the Business and Professions Code, which is located in the Enforcement section of the Cartwright Act, does include a city within its definition of a person. Subdivision (a) of this section provides, in pertinent part, that "Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor . . . ." Subdivision (b) states that "The state and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section."

CA(3)[] **(3)** HN2[] Fundamental rules of statutory interpretation require that a legislative act be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase and clause so that no part or provision will be useless or meaningless. (Smith v. Regents of University of California (1976) 58 Cal.App.3d 397, 403 [130 Cal.Rptr. 118].)

CA(2b)[] **(2b)** It seems reasonable to assume that, in order to prevent its provisions from being useless, and to harmonize it with the earlier definition of "person," the Legislature included subdivision (b) of **[***14]** section 16750 because it had not intended to include the state and its political **[*921]** subdivisions under the definition of "person" in section 16702. Subdivision (b) speaks in terms of "this section," i.e., section 16750. Thus it is clear that the state and its political subdivisions can sue *as plaintiffs* under the authority of this section. However, since they are "persons" *only* under that section, it is implicit that they cannot be sued as defendants. Therefore, if San Francisco is a political subdivision of the state, it cannot be sued under the Cartwright Act.

The City is a municipal corporation known by the name of San Francisco. (City & County of S.F. Charter (1978) art. I, § 1.100.)

CA(4)[] **(4)** HN3[] Municipal corporations are political subdivisions of the state. Subject only to its own laws and Constitution, the state may create, expand, diminish or abolish such subdivisions, and all this may be done, **[**324]** conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. (Weber v. City Council (1973) 9 Cal.3d 950, 957 [109 Cal.Rptr. 553, 513 P.2d 601].)

CA(2c)[] **(2c)** It appears that, since San Francisco is a political subdivision **[***15]** of the state, the Legislature did not intend for it to be subject to the Cartwright Act. Accordingly, we conclude that the judgment on the pleadings in favor of defendants on the first cause of action must be affirmed.

Plaintiffs next argue that defendants have no authority to fix taxicab fares. This issue was raised in the eighth cause of action in the complaint in intervention.

Plaintiffs cite in part from article XII, section 23, of the California Constitution of 1879, as it read prior to the 1911 and 1914 amendments: "From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; *provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement* **[***16]** *of local, police, sanitary and other regulations, other than the fixing of rates* . . . ." (Italics added.)

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[4] The internal reasoning of *Widdows* appears to us to be inconsistent. After determining that municipalities do not come within the definition of "persons," the court writes: "The city . . . made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but imposed the restraint as an act of government which the Cartwright Act did not undertake to prohibit." (P. 235.) Implicit in this language is the concept that a city is liable under the Cartwright Act if its actions are not characterized as an act of government. This is not consistent with its earlier holding that cities are not "persons" and are not subject to Cartwright Act restrictions.

[*922] Plaintiffs rely on the emphasized portion to support their position that cities cannot fix rates. They point out that, notwithstanding the repeal of this section in 1974, the portion thereof which relates to the setting of fares is still in effect. [5]

However, when the entire clause is read in context, plaintiffs' argument that the emphasized portion of section 23, article XII, *ante*, stands for the proposition that cities are not permitted to fix fares, must fail.

The relevant portion of article XII, section 23, provided, in pertinent part: "From and after the passage by the Legislature of laws conferring powers upon the Railroad **[***17]** Commission . . . all powers respecting such public utilities vested in boards of supervisors . . . of the several . . . cities and counties . . . shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission . . . ." (The Railroad Commission is the predecessor of the Public Utilities Commission.) This phrase indicates that, if there is a conflict between local laws and the powers granted to the commission by the Legislature, the commission powers override.

The next phrase qualifies the foregoing: "[Provided], however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates . . . ." This provision means that the Legislature cannot give the commission powers over local enforcement of local, police, sanitary or other regulations, with one exception, the setting of rates. Thus, if it so chooses, the Legislature can give the commission power to set rates. However, the clear implication is that if the Legislature fails to do so, the local government can fill the void with its own regulation.

This **[***18]** interpretation is supported by the present constitutional provision concerning regulation of public utilities. In 1974, the electors approved a new article XII which was entitled "Public Utilities" and discussed the powers of the Public Utilities Commission. ***HN4***[] Section 8 of article XII now provides that: "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect **[**325]** power over public utilities relating to the making and enforcement of police, sanitary, and other **[*923]** regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law." This section simply restates an existing rule that local government bodies may not regulate in areas in which the commission acts. Implicit in this provision is that, if the Legislature does not grant powers to the commission, then a city may regulate. Thus, to decide whether San Francisco has the power **[***19]** to regulate taxicab fares, it must first be determined if the Legislature has authorized the Public Utilities Commission to act in that area.

The California Constitution classifies taxicabs and their owners as public utilities. "Private corporations and persons that own, operate, control or manage a . . . system for the transportation of people or property . . . are public utilities subject to control by the Legislature." (*Cal. Const., art. XII, § 3*.) The Legislature has asserted this control in the Public Utilities Code.

Chapter 8 of the Public Utilities Code is entitled the "Passenger Charter-Party Carriers' Act." (*Pub. Util. Code, § 5351 et seq.*) A charter-party carrier of passengers is "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this State." (*Pub. Util. Code, § 5360*.) There are exceptions to this definition, one of which is taxicabs. "The provisions of this chapter do not apply to: . . . Taxicab transportation service licensed and regulated by a city or county, by ordinance or resolution, rendered in vehicles designed for carrying not more than eight persons **[***20]** excluding the driver." (*Pub. Util. Code, § 5353, subd. (g)*.)

Thus, it is clear that the Legislature has not given the Public Utilities Commission authority to regulate taxicab fares if they are already licensed and regulated by a city. The Legislature has thereby implicitly approved of local regulation of taxicabs; therefore, it follows that San Francisco is not precluded from regulating them.

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[5] Plaintiffs rely on article XII, section 9, of the 1974 amendment, which reads: "The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change."

Plaintiffs argue that, even if cities can regulate taxicabs, they are nowhere authorized to set fares. They contend that the words "licensed" and "regulated" in *section 5353, subdivision (g), of the Public Utilities Code*, are not synonymous with "setting fares." They claim that they can find no authority which permits a city to set fares.

[*924] In the case of *In re Martinez, supra, 22 Cal.2d 259*, the California Supreme Court held that the Railroad Commission (forerunner of the Public Utilities Commission) did not have jurisdiction over the regulation of taxicabs and that the City of Sacramento was acting within its power when it chose to fix fares for taxicab companies within the municipality.

Plaintiffs rely on *People v. Western Air Lines, Inc. (1954) 42 Cal.2d 621 [268* ***[***21]*** *P.2d 723]*, which overruled "Anything in the Martinez case which is out of harmony with these conclusions . . . ." (P. 642.)

Western Air Lines, Inc., held that an airline was a public utility within the meaning of the California Constitution. (P. 639.) In reaching this conclusion, the Supreme Court expressed concern about the confusion which is alleged to have resulted from divergent holdings of the court on the question of whether a carrier, which is in fact a common carrier transportation company, should be subject to rate regulation by the commission although not specifically mentioned in the Constitution or the statute. (P. 639.)

The court first examined *Western Assn. etc. R. R. v. Railroad Comm. (1916) 173 Cal. 802 [162 P. 391, 1 A.L.R. 1455]*, where it was held that the commission had jurisdiction over certain motor truck and transportation companies despite the fact that they were not specifically mentioned in the Constitution or statutes. (*People v. Western Air Lines, Inc., supra, 42 Cal.2d at p. 640*.) The court then contrasted that case with *In* **[**326]** *re* *Martinez, supra, 22 Cal.2d 259*, which had reasoned that since taxicabs were not specifically **[***22]** mentioned in the Constitution or statutes, they could *not* be regulated by the commission. (*Western Air Lines, Inc., supra, 42 Cal.2d at p. 641*.) In order to resolve an apparent inconsistency, the *Western Air Lines, Inc*. court overruled this reasoning in *Martinez*.

What remains of *Martinez* is the reasoning that the Legislature intended to exempt taxicabs from state regulation. This portion of the case finds independent support in an amicus curiae brief filed by the commission stating that the commission had consistently taken the position that its jurisdiction did not extend to the regulation of local taxicabs and for that reason it had never attempted to regulate their operation. (*People v. Western Air Lines, Inc., supra, 42 Cal.2d at p. 641*.) Thus, we conclude that the basic holding of *Martinez* that taxicab rates can be set by cities because the Legislature has not given this power to the commission is still good law. For this reason, plaintiffs' argument that there is no authority for the setting of taxicab fares by a city must fail.

[*925] Plaintiffs also argue that *In re Martinez, supra, 22 Cal.2d 259*, is inapposite because it established **[***23]** only the limited rights of local governments to regulate taxicab companies operating wholly within the city or county involved. Since taxis regulated by San Francisco are not wholly operated within the City, it is argued that *Martinez* does not apply. Plaintiffs contend that the growth of the taxicab business compels the conclusion that local jurisdictions no longer have the authority to regulate them; "If there is to be any regulation, it must be by the state."

CA(5)[↑] **(5)** We have no quarrel with the proposition that, as common carriers, taxicab rates may be subject to regulation by the state Legislature through the Public Utilities Commission. We observe, however, that the Legislature has not yet claimed jurisdiction, nor has it sought control in this area. Accordingly, we hold that, absent an assertion by the state of its authority to regulate taxicab rates, the city has the power to do so. Such holding is not "out of harmony" with *People v. Western Air Lines, Inc., supra, 42 Cal.2d at page 642*. Until the state does assume such jurisdiction, the fact that taxicabs occasionally (or even frequently) venture beyond the city and county limits is of no moment.

Plaintiffs' final **[***24]** argument is that even if the City is immune under the Cartwright Act, the individual members of the Board can be sued.

In *Martelli v. Pollock (1958) 162 Cal.App.2d 655 [328 P.2d 795]*, the court found that members of the city council had immunity from liability toward persons affected by decisions made within the scope of their powers. The court reasoned that there was no question but that the council was empowered to pass ordinances and, despite allegations of wrongful motive, are protected by the doctrine of legislative immunity. (Pp. 658-659.) To support this, the court relied on *Hardy v. Vial (1957) 48 Cal.2d 577 [311 P.2d 494]*. In that case, the California Supreme Court stated, "The rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in *criminal* actions. First recognized for the protection of judges [citation], it has been extended by the federal decisions to all executive public officers when performing within the scope of their power acts which require the exercise of discretion or judgment." (*Hardy, supra, p. 582*.) In addition, a city attorney and a clerk-administrator **[***25]** have immunity when acting within the scope of their employment. (*Martelli, supra, at pp. 659-660*.)

CA(2d)[] **(2d)** Here, the Board was operating within the scope of its powers. Its setting of taxicab rates did not violate the Cartwright Act. It strikes us as **[*926]** both illogical and unreasonable to hold that the City cannot be sued under the Cartwright Act, and then permit the Board members to be individually liable for the same immune conduct.

[327]** The judgment on the pleadings in favor of defendants on the first cause of action of both complaints, and on the eighth cause of action of the complaint in intervention, is affirmed.

Hecht Co. v. Southern Union Co.

United States District Court for the District of New Mexico

May 14, 1979

No. 78-958-M Civil

Reporter

474 F. Supp. 1022 *; 1979 U.S. Dist. LEXIS 12416 **; 1979-1 Trade Cas. (CCH) P62,647

The Hecht Company, a New Mexico Corporation, et al., Plaintiffs, v. Southern Union Company, a corporation, et al., Defendants.

Core Terms

natural gas, state action, defendants', regulation, Sherman Act, purchasers, plaintiffs', antitrust, consumers, wellhead, producers, immunity, Brick, interstate commerce, conspiracy, anti trust law, electricity, prices, exempt, farm, primary jurisdiction, Clayton Act, contractor, products, parties, pass-on, laches, rates

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

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

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

To meet the "engaged in commerce" requirement of the Clayton Act and to be within the purview of the Sherman Act defendants' activities need not be interstate. The proposition that intrastate activities which adversely affect interstate commerce come within the scope of the Sherman Act is established beyond question. The defendants' activities constitute conduct within the reach of federal ***antitrust law*** if those activities substantially and adversely affect interstate commerce. Likewise the effect on interstate commerce need not be direct.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN2[] **Regulated Practices, Private Actions**

No special form of pleading is indicated or sanctioned in antitrust cases. Indeed the liberal rules of pleading are as applicable to these cases as any other case.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN3[] **Clayton Act, Claims**

Standing to sue pursuant to *15 U.S.C.S. § 15* is a question of law to be determined by the trial court. Plaintiffs need not be within a "target area" of an alleged illegal conspiracy to sue under the Clayton Act. A direct injury or any injury in fact is sufficient to give the plaintiffs standing.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

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

HN4[] **Jurisdiction, Primary Jurisdiction**

By reason of the increased cost of business and the increased cost of goods bought and sold by the plaintiffs the plaintiffs can be said to have suffered direct antitrust injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Administrative Law > Separation of Powers > Jurisdiction

Administrative Law > Agency Adjudication > Decisions > Res Judicata

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN5[] **Separation of Powers, Jurisdiction**

The doctrine of primary jurisdiction is limited to those instances where an administrative agency by reason of particular expertise in the area or by virtue of statutory authority has adjudicative, investigatory or remedial jurisdiction over the claims.

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

HN6[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Lapse of time alone does not constitute laches.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Governments > Legislation > Statute of Limitations > Time Limitations

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

Governments > Legislation > Statute of Limitations > General Overview

HN7[] **Private Actions, Remedies**

Where the plaintiffs' case is controlled by *15 U.S.C. § 15b*, a four-year statute of limitation, laches, being an equitable consideration, is not to bar an action prior to expiration of the four-year period set by Congress.

Antitrust & Trade Law > Sherman Act > Defenses

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

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

HN8[] **Sherman Act, Defenses**

The Noerr doctrine is applicable only where the alleged Sherman Act violation is an attempt by private parties to induce governmental action: no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Governments > State & Territorial Governments > Claims By & Against

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

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

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

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

Energy & Utilities Law > Pipelines & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Energy & Utilities Law > Utility Companies > General Overview

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

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

Governments > Public Improvements > General Overview

HN9[] **Natural Gas Industry, Distribution & Sale**

N.M. Stat. Ann. § 62-6-5 (1978) states in pertinent part: A. The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations, and in respect to its securities, all in accordance with the provisions; and subject to the reservation of, the Public Utility Act and to do all things necessary and convenient in the exercise of its power and jurisdiction. B. The sale, furnishing or delivery of gas, water or electricity by any person to a utility for resale to or for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of such gas, water or electricity at the place where the major distribution to the public begins shall be reasonable and that the methods of delivery thereof shall be adequate; provided, however, that nothing herein contained shall be construed to permit regulation by the commission of production or sale price at the wellhead of gas or petroleum, except regulation of abandonment.

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

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Utility Companies > General Overview

HN10[] **Utility Companies, Buying & Selling of Power**

The New Mexico Public Service Commission (Commission) cannot regulate the price of gas at the wellhead. *N.M. Stat. Ann. § 62-6-4* makes it abundantly clear that the Commission can disallow, for rate-making purposes, any portion of a price paid by a utility which the Commission finds to be unreasonable Unless well head transactions are involved. Neither does New Mexico law permit any other governing body to regulate the price of natural gas at the wellhead. The Natural Gas Pricing Act, *N.M. Stat. Ann. § 62-7-1 et seq.* (1978), sets a ceiling on the price of natural gas. It does not require that producers reach or sell at the "maximum allowable base price" nor does it tell producers and purchasers how to arrive at a fair, reasonable and proper price. New Mexico leaves the price of gas at the wellhead to competition. A decision to buy or sell at the "maximum allowable base price" or any other price is not state compelled.

Counsel: [1]** Michael T. Garrett, Clovis, N. M., Witherspoon, Aikin & Langley, Hereford, Tex., for plaintiffs.

Wilson W. Herndon, Jerry L. Beane, Strasburger & Price, Dallas, Tex., Charles F. Hawkins, Gen. Counsel, Southern Union Co., Dallas, Tex., Montgomery, Andrews & Hannahs, Walter J. Melendres, Santa Fe, N. M., for Southern Union Co., Southern Union Gathering Co. and Gas Co. of New Mexico.

Vinson & Elkins, Houston, Tex., John C. Snodgrass, Travis Broesche, Alison L. Smith, and Ortega & Snead, Arturo G. Ortega, Albuquerque, N. M., for Aztec Oil and Gas Co. and Southland Royalty.

Campbell & Black, Michael B. Campbell, Santa Fe, N. M., for Consolidated Oil and Gas Co., Inc.

Bingaman & Davenport, Anne K. Bingaman, Santa Fe, N. M., for Southern Union Production.

Jason W. Kellahin, Santa Fe, N. M., for Continental Oil Co., for defendants.

Opinion by: MECHEM

Opinion

[*1024] ORDER

The plaintiff Hecht Company is a New Mexico corporation conducting farming activities in Curry County, New Mexico. The individual plaintiffs also engage in farming in Curry and Roosevelt Counties, New Mexico. The defendants are producers of natural gas sold for consumption in New Mexico. The defendants insist **[**2]** that plaintiffs by their complaint are simply contesting the state-approved rate for natural gas per mcf. The plaintiffs, however, bring their action **[*1025]** pursuant to the Sherman Act, *15 U.S.C. §§ 1* and *2*, and the Clayton Act, *15 U.S.C. §§ 15* and *26*, alleging that the defendants have artificially raised the statewide cost of natural gas in New Mexico by combining and conspiring illegally to increase the wellhead price of all natural gas sold in the State.

Various defendants have moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim. Some of the defendants have moved that affirmative defenses be treated as motions to dismiss. The defendants have filed numerous exhibits, each accompanied by a certification. The plaintiffs have filed extensive affidavits and exhibits. By these actions the parties have invited consideration of the motions to dismiss as motions for summary judgment. I find the latter to be the better way to treat the pending motions and all parties were so notified by Order entered April 16, 1979.

The defendants raised principally the anti-trust defenses of lack of interstate commerce, lack of standing, state action **[**3]** immunity, the Noerr-Pennington doctrine, and the "pass-on" defense recently considered in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. I have considered as well the doctrine of primary jurisdiction, Res judicata, waiver, laches and estoppel. I conclude that jurisdiction is present, that the plaintiffs state a justiciable claim and that therefore the defendants' motions for summary judgment should be denied and the case heard on the merits.

I. INTERSTATE COMMERCE

The defendants contend that the alleged restraint or price fixing does not involve a transaction within the flow of commerce and that the alleged conspiracy does not involve natural gas other than that produced in New Mexico and sold exclusively intrastate. Thus the defendants assert the complaint fails to allege the requisite effect on interstate commerce and the plaintiffs' claims must be dismissed for lack of federal jurisdiction.

HN1[] To meet the "engaged in commerce" requirement of the Clayton Act and to be within the purview of the Sherman Act defendants' activities need not be interstate. "The proposition that intrastate activities which adversely affect interstate commerce come **[**4]** within the scope of the Sherman Act is established beyond question." *Burke v. Ford, 377 F.2d 901 (10th Cir. 1967)*, rev'd on other grounds *389 U.S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1968)*. The defendants' activities constitute conduct within the reach of federal ***antitrust law*** if those activities substantially and adversely affect interstate commerce. *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.*

Ct. 1848, 48 L. Ed. 2d 338 (1976). Likewise the effect on interstate commerce need not be direct. 425 U.S. at 744, 96 S. Ct. 1848, 48 L. Ed. 2d 338.

The defendants state that as to the natural gas supplied to the plaintiffs, "No interstate production, transmission or sale was involved." The defendants, nevertheless, in distribution of their product have the use and benefit of interstate gas lines. The plaintiffs' complaint, in addition, clearly indicates that the acts complained of have a substantial and adverse effect on the plaintiffs' interstate business and on the price of goods the plaintiffs put into interstate commerce. ***HN2***[] No "special form of pleading is indicated or sanctioned in antitrust cases. Indeed the liberal rules of pleading are as applicable to these **[**5]** cases as any other case." *New Home Appliance v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957)*. I conclude, then, that the plaintiffs have adequately set out a nexus between the defendants' concerted activities and interstate commerce sufficient to support federal jurisdiction.

II. STANDING

Defendants argue that the natural gas in the San Juan Basin of New Mexico, the pricing of which is the basis of plaintiffs' complaint, was never physically delivered to the plaintiffs "or anyone else in Curry County or Clovis." Defendants contend **[*1026]** that the plaintiffs attack only a rate making process. Defendants insist that because the plaintiffs are neither producers of natural gas nor direct purchasers of natural gas from the San Juan Basin nor a target of the alleged conspiracy to fix prices, the plaintiffs have no standing to sue under the Clayton Act.

HN3[] Standing to sue pursuant to *15 U.S.C. § 15* is a question of law to be determined by the trial court. *John Lenore and Co. v. Olympia Brewing Co., 550 F.2d 495, 498 (9th Cir. 1977)*. Plaintiffs need not be within a "target area" of an alleged illegal conspiracy to sue under the Clayton Act. A direct injury or any injury in fact is sufficient **[**6]** to give the plaintiffs standing. *Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3rd Cir. 1910)*.

I need not decide which test to apply; I conclude that the plaintiffs have established a sufficient basis for standing under any of the tests utilized in antitrust actions. When the defendants agreed to the price of natural gas in the San Juan Basin they had to know by virtue of other contracts that this price would effect the price of all natural gas in New Mexico. Thus plaintiffs as consumers of natural gas in New Mexico can be said to be a target of defendants' activities and agreements. ***HN4***[] By reason of the increased cost of business and the increased cost of goods bought and sold by the plaintiffs the plaintiffs can be said to have suffered direct "Antitrust injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*.

III. PRIMARY JURISDICTION AND RES JUDICATA

I find the doctrine of primary jurisdiction and Res judicata inappropriately applied to the present case. ***HN5***[] The doctrine of primary jurisdiction is limited to **[**7]** those instances where an administrative agency by reason of particular expertise in the area or by virtue of statutory authority has adjudicative, investigatory or remedial jurisdiction over the claims. Here no administrative agency, state or federal, has statutory power over plaintiffs' claims. Neither is there any agency where the plaintiffs are required by law to exhaust their remedies nor any agency with unique expertise in the field.

The role of the New Mexico Public Service Commission will be discussed in consideration of defendants' state action defense. It suffices to say here that I am not bound by the Commission's decisions nor do I believe that the Commission has previously considered all that plaintiffs set out in this action. Accordingly, I consider the defenses of primary jurisdiction and Res judicata of little merit.

IV. WAIVER, LACHES AND ESTOPPEL

The defendants present some loosely-woven ideas regarding waiver and estoppel. They contend that because the plaintiffs did not raise all of the present issues with the New Mexico Public Service Commission they have waived a right to raise the issues here. Defendant Continental Oil Company states: "Since plaintiffs had **[**8]** full opportunity and notice to intervene and appear in the proceedings before the Public Service Commission in 1976, plaintiffs also must now be deemed to have waived their right to challenge the action of the Public Service Commission." I see no logic to this argument. The Public Service Commission does not hear antitrust cases. Neither the Public Service Commission nor the State of New Mexico are parties to this action. The plaintiffs are not "challenging" the actions of the Commission. Defendants' point has nothing to do with the plaintiffs' right to bring a federal court action alleging restraint of trade, price-fixing and conspiracy to raise the price of natural gas.

Neither is laches properly raised. The defendants have suffered no prejudice. ***HN6***[] "Lapse of time alone does not constitute laches." *Shell v. Strong, 151 F.2d 909, 911 (10th Cir. 1945)*. More importantly, ***HN7***[] the **[*1027]** plaintiffs' case is controlled by *15 U.S.C. § 15b*, a four-year statute of limitation. Laches, being an equitable consideration, is not to bar an action prior to expiration of the four-year period set by Congress. See: *International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp.,* ***[**9]*** *518 F.2d 913, 927, 928 (9th Cir. 1975)*.

V. THE NOERR-PENNINGTON DOCTRINE

Defendants, in a shotgun approach, also raise as a defense the doctrine established in *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. Defendant Southland Royalty Company states: "Plaintiffs May claim that it is not the action of the New Mexico Public Service Commission of which they complain, but rather the Defendants' conduct which influenced the administrative body and ultimately affected the gas rates charged Plaintiffs." (Emphasis added.) I do not find anywhere that the plaintiffs have so claimed.

HN8[] The Noerr doctrine is applicable only where the alleged Sherman Act violation is an attempt by private parties to induce governmental action: ". . . no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *365 U.S. at 135, 81 S. Ct. at 528*. The defendants either misread the plaintiffs' complaint or failed to consider seriously *Rule 11 of the Federal Rules of Civil Procedure*. Had the defendants looked for "good ground to support" their Noerr-Pennington defense, they could have saved a much **[**10]** over burdened file an additional volume.

VI. THE ILLINOIS BRICK DEFENSE

Defendant Supron contends that the ruling of *Illinois Brick Co. v. Illinois, supra*, demands the plaintiffs' case against Supron be dismissed for lack of direct injury to the plaintiffs. Supron argues:

> . . . the gas delivered to plaintiffs is sold to them by Gas Company of New Mexico. In turn, Gas Company of New Mexico buys its gas from a number of producers, including SUPRON. Plaintiffs are not, however, direct purchasers of gas from SUPRON and are, therefore, not injured within the meaning of the Clayton Act according to the recent Supreme Court ruling in Illinois Brick Co. v. Illinois (cite omitted).

In Illinois Brick petitioners were manufacturers of concrete block. Three price pass-ons occurred in the case: manufacturer to masonry contractor, masonry contractor to general contractor, general contractor to customer.

> The only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution. *431 U.S. at 727, 97 S. Ct.* ***[**11]*** *at 2065*.

The question to be resolved in the present case is whether the plaintiffs are direct or indirect purchasers of natural gas. The gas producer Supron sells to Gas Company of New Mexico who, by benefit of a cost-plus contract, passes the full costs of its purchases to the plaintiffs. It could be said that one pass-on occurs at this point. Supron is to Gas Company of New Mexico, however, more like a supplier of powdered concrete would be to a manufacturer of bricks. The defendant Supron does not place a product on the public market; only the defendant Gas Company of New Mexico does. Supron supplies the product to the defendant Gas Company of New Mexico, who then, without transforming or processing the product, acts as a pass-through or a conduit, delivering the product to the plaintiffs.

Illinois Brick speaks to distribution of a product from one businessman to another, each businessman adding to the price of the product. In every transaction the mark-up of the product is clearly discernible. The product begins and ends as bricks.

Plaintiffs here produce farm products. Their claim, on the other hand, goes not to the price of farm products, but to the price **[*1028]** **[**12]** of natural gas. Plaintiffs are at once consumers of natural gas and businessmen; they may operate their homes and farms by use of natural gas, but they do not transform natural gas into wheat. Plaintiffs are direct purchasers of natural gas. Plaintiffs' customers purchase farm products. Notwithstanding that as farmer-businessmen plaintiffs put a product on the market made costlier by the cost paid for natural gas, the farmers nonetheless remain direct purchasers and ultimate consumers of natural gas. Although the products plaintiffs sell go on to others, any increase in the price of these products due to rising gas prices is not separable and distinguishable in the manner of Illinois Brick and does not engender or even encourage the kind of multiple antitrust claimants Illinois Brick was intended to prevent. The plaintiffs allege a combination and conspiracy of the suppliers of natural gas and the Gas Company of New Mexico which results directly in harm to the plaintiffs. I do not find the kind of chain considered in Illinois Brick and the pass-on theory does not prevent the present case.

VII. STATE ACTION

The Sherman Act "must be taken to be a prohibition of individual and not state **[**13]** action." *Parker v. Brown, 317 U.S. 341, 352, 63 S. Ct. 307, 314, 87 L. Ed. 315*. Citing 62-6-4 NMSA 1978, the defendants argue that the price of natural gas to New Mexico consumers is determined by the New Mexico Public Service Commission and therefore the action of which plaintiffs complain is "governmental action wholly immune from the federal antitrust laws." ***HN9***[] The New Mexico statute states in pertinent part:

> A. The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations, and in respect to its securities, all in accordance with the provisions; and subject to the reservation of, the Public Utility Act and to do all things necessary and convenient in the exercise of its power and jurisdiction. . . .
>
> B. The sale, furnishing or delivery of gas, water or electricity by any person to a utility for resale to or for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of such gas, water or electricity at the place where the major distribution to the public begins shall **[**14]** be reasonable and that the methods of delivery thereof shall be adequate; provided, however, that nothing herein contained shall be construed to permit regulation by the commission of production or sale price at the wellhead of gas or petroleum, except regulation of abandonment . . . . 62-6-4 NMSA 1978.

By their complaint the plaintiffs allege that the defendants acted in restraint of trade by combining and conspiring illegally to raise the price of natural gas. Without reciting a long history of transactions, plaintiffs allege basically that by a collusive and contrived court action and settlement, by a triggering of "favored nation" clauses, and by use of "Rule 20" authorized by the New Mexico Public Service Commission to allow pass-through of gas purchasing costs to the consumer, the defendants artificially raised the wellhead price of natural gas and simultaneously increased natural gas rates to New Mexico consumers.

The purchaser-distributor, defendant Gas Company of New Mexico, and the natural gas producers, the other defendants here, hold contracts which include what is commonly referred to as "favored nation" clauses. These clauses provide that if the gas purchaser enters **[**15]** into a contract to purchase gas from another producer at a price higher than that price specified in the contract, the price agreed upon shall be escalated to equal the higher price of a subsequent contract. The Public Service Commission's "Rule 20" is titled "Adjustment of Rates to Compensate for Changes in Cost of Purchased Gas" and permits Gas Company of New Mexico to pass on to consumers charged on "Affected Rate Schedules", as **[*1029]** are the plaintiffs, the full cost of its gas purchases.

Although the Public Service Commission can inquire as to other costs defendant Gas Company of New Mexico can include in computation of its rate to customers, the Commission cannot inquire into wellhead prices. 62-6-4 B NMSA 1978. *Maestas v. New Mexico Public Service Commission, 85 N.M. 571, 514 P.2d 847 (1973)*. When a "favored nation" clause is invoked, then, and defendant Gas Company of New Mexico increases payments to all its supplier-producers, the full cost of the increase is passed on to New Mexico consumers. Defendants rely on the Public Service Commission's sanctions of the "favored nation" clauses, of the pass-on of gas purchase costs to the consumers and of the ultimate rate charged **[**16]** by Gas Company of New Mexico on its "Affected Rate Schedules" as the requisite state action that bars defendants' liability under federal ***antitrust law***.

By its statement in *Parker v. Brown, supra*, that state action was not subject to antitrust liability, the Supreme Court deferred to the concepts of federalism and affirmed Congressional intent that the Sherman Act not reach action by a state. Although the immunity thus established is without doubt, the scope of the immunity remains undefined, See: The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act, 89 Harv.L.Rev. 715 (1976).

> It is safe to assume that the language of the general exemption in Parker means that Some state action is exempt; nevertheless, the language of limitation indicates that Not all state action is exempt. Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Northwestern L.Rev. 71, 73 (1974).

Clearly, Parker "becomes applicable when the state, in pursuit of legitimate police power goals, seeks to replace enforcement competition with a scheme of regulation." 69 Northwestern at 91. New Mexico has a scheme of regulation and actively regulates **[**17]** the gas distribution and rate schedules of the defendant Gas Company of New Mexico and any distributors of natural gas that would operate on the same horizontal lines as Gas Company of New Mexico. The distinction must be made again, however, that plaintiffs are not attacking the rate-making process, but an alleged restraint of trade resulting in increased prices at the wellhead. Plaintiffs complain of actions on a level conceptually beneath that line of operations regulated by the New Mexico Public Service Commission. Plaintiffs are saying that the acts of the defendants, before the rates are subject to review by the Commission, have interjected into the rating scheme an artificial component, that is an illegally increased gas price. Thus plaintiffs maintain, and I agree, that the actions complained of are not state actions, but private actions.

Certain limits of Parker v. Brown can be enumerated by the case itself and by subsequent cases: (1) state action immunity is not conferred merely by a state authorizing Sherman Act violations; (2) a private conspiracy is not saved from Sherman Act liability because a state joins in the conspiracy; (3) only closely supervised anticompetitive **[**18]** practices in an area where a state clearly sets out its intention to substitute regulation for competition provides a clear immunity; (4) only where the individual action is compelled, as opposed to condoned, by the state will the immunity be found. See: *Parker v. Brown, supra* ; Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.L.R. 693 (1974).

HN10[] The New Mexico Public Service Commission cannot regulate the price of gas at the wellhead. Quoting first the New Mexico statute set out above, the New Mexico Supreme Court states in *Maestas, supra, at 573, 514 P.2d at 849-850*:

> The above provision makes it abundantly clear that the Commission can disallow, for rate-making purposes, any portion of a price paid by a utility which the Commission finds to be unreasonable Unless well head transactions are involved. Here the subsidiary Producing Company **[*1030]** is involved in such well head transactions and thus is not covered by Commission regulation. (Emphasis added.)

Neither does New Mexico law permit any other governing body to regulate the price of natural gas at the wellhead. The Natural Gas Pricing Act, 62-7-1 et seq. NMSA 1978, sets **[**19]** a ceiling on the price of natural gas. It does not require that producers reach or sell at the "maximum allowable base price" nor does it tell producers and purchasers how to arrive at a fair, reasonable and proper price. New Mexico leaves the price of gas at the wellhead to competition. A decision to buy or sell at the "maximum allowable base price" or any other price is not state compelled. Thus I conclude this case is not within the Parker rule.

New Mexico's regulatory scheme is designed to displace business freedom only on one level. It does not reach the level now called into question. The State acquiesces in a rate to be charged consumers of natural gas and authorizes a maximum wellhead price if buyers and sellers choose to reach that maximum price. Nothing in the

State's scheme, however, acts to prevent the price-fixing alleged by plaintiffs. In natural gas purchasing, the State does not authorize illegal price-fixing, does not condone or join in price-fixing conspiracies, does not regulate or actively supervise the sale of gas at the wellhead and does not compel the agreements, contracts or prices agreed upon among the defendants in this action. If anticompetitive conduct **[**20]** occurs, as the plaintiffs allege, it is not state action.

In *Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*, Michigan regulated pervasively distribution of electricity, but did not regulate the distribution of electric light bulbs. Detroit Edison Company regularly furnished to five million customers both electricity and electric light bulbs. Cantor, a retail druggist selling light bulbs, charged Detroit Edison with a Sherman Act violation, "using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs . . . ." *428 U.S. at 581, 96 S. Ct. at 3113*.

The Court in Cantor recited an "important distinction between economic action taken by the State itself and private action taken pursuant to a state statute permitting or requiring individuals to engage in conduct prohibited by the Sherman Act." *428 U.S. at 589, 96 S. Ct. at 3117*. I find the Cantor decision much more instructive in the present case than Parker v. Brown.

> In this case, unlike Parker, the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust **[**21]** laws. Conversely, in Parker there was no claim that any private citizen or company had violated the law. The only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of § 7 of the statute, was also subject to its prohibitions. Since the case now before us does not call into question the legality of any act of the State of Michigan or any of its officials or agents, it is not controlled by the Parker decision. *428 U.S. at 591, 96 S. Ct. at 3118*.

Cantor emphasizes, in considering state action immunity, the importance of choice. In Cantor, Detroit Edison, in spite of a comprehensive regulatory scheme, had a choice with regard to the actions found to be proscribed. Similarly in this case I find that defendants have a choice. Cantor involved the same sort of "blend of private and public decision making" I find here. The Cantor court held:

> . . . neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program. *428 U.S. at 598, **[**22]** 96 S. Ct. at 3121*.

Thus I conclude that defendants' actions of which plaintiffs complain are neither exempt nor immune from the Sherman Act by reason of state action.

[*1031] VIII. CERTIFICATION

The defendants have failed to establish their motions and the plaintiffs have presented a justiciable controversy. I conclude the motions for summary judgment must be denied on all grounds.

I recognize, however, that the case is a complex one both in law and in fact. The case of *Illinois Brick v. Illinois, supra*, is a difficult one. The state action question is frequently open to controversy. It would not serve the interests of judicial economy to keep these defendants in a lengthy action and to present the case for a jury's determination only to find out that jurisdiction was from the beginning lacking. The questions of jurisdiction presented by this case are controlling questions of law as to which there is substantial ground for difference of opinion. An immediate appeal from this Order may materially advance the ultimate termination of the litigation.

Now, Therefore,

IT IS ORDERED that the defendants' motions for summary judgment are hereby denied.

In re Ampicillin Antitrust Litig.

United States District Court for the District of Columbia

May 21, 1979

M.D.L. No. 50. Misc. No. 45-70

Reporter
82 F.R.D. 652 *; 1979 U.S. Dist. LEXIS 12254 **; 1979-2 Trade Cas. (CCH) P62,935

IN RE: AMPICILLIN ANTITRUST LITIGATION

Core Terms

settlement, class member, requests, notice, damages

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Settlements > General Overview

HN1[] **Class Actions, Class Members**

The failure of class members to attack the adequacy of a settlement may be considered in determining the value of the settlement to class members.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Civil Procedure > Settlements > General Overview

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

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

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN2[] **Purchasers, Direct Purchasers**

The recovery of actual single damages must be the basis for the court's assessment of monetary recovery in an antitrust settlement.

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

HN3[] Private Actions, Remedies

Under the antitrust laws an alleged co-conspirator, after settlement with one defendant, will remain liable for the full amount of treble damages that could have been collected from the original defendants, less only the actual amount paid under the settlement. Thus, the court need not examine a partial settlement as closely as it would a complete settlement since a class will relinquish no part of its potential recovery.

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

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Torts > Procedural Matters > Multiple Defendants > General Overview

Civil Procedure > Settlements > General Overview

HN4[] Settlements, Consent Judgments

A co-conspirator has no standing to object to a settlement between another conspirator and the plaintiffs.

Counsel: [1]** David I. Shapiro, James van R. Springer, Washington, D.C., for City, County and State plaintiffs.

Thomas H. Liddle, III, Antitrust Division, U.S. Dept. of Justice, Washington, D.C., for plaintiff, the United States.

Arnold Bauman, Robert F. Dobbin, New York City, for defendants, Beecham Group Limited and Beecham Inc.

Jerome G. Shapiro, Alan H. McLean, New York City, Philip A. Lacovara, Washington, D.C., for defendant, Bristol-Myers Co.

Opinion by: RICHEY

Opinion

[*652] MEMORANDUM APPROVING BEECHAM CCS SETTLEMENT

The Court now has before it the Settlement Agreement dated November 1, 1978, between defendants Beecham Group Limited and Beecham Inc. (collectively "Beecham") and the representatives of the city, county and state ("CCS") plaintiff classes. This agreement is conditioned upon the Court's approval of a proposed consent decree between the United States and Beecham. A final judgment in accordance therewith is entered of even date herewith. Beecham's co-defendant, Bristol-Myers Company ("Bristol"), strenuously objects to both settlements. No one else has objected to the Beecham-CCS settlement. The Court has heard arguments of counsel for all parties at preliminary **[**2]** and final hearings concerning both settlement proposals, and has had the benefit of papers filed in support **[*653]** thereof and in opposition thereto, as well as the information and experience the Court has gained in the previous discovery, pretrial and settlement proceedings in these cases.

The agreement provides for the settlement of claims based on the antitrust violations with regard to ampicillin and other semisynthetic penicillin drugs which have been or might be asserted against the Beecham defendants by the CCS plaintiffs and classes in this litigation, and by potential similar plaintiffs in other political entities of the United States. Beecham will give the plaintiffs certain economic relief and other cooperation in return for its dismissal. Beecham will establish a fund of $ 2,070,000, with interest at the average prime rate from November 1, 1978, on behalf of the classes. This amount will not be distributed to class members until the settlement or final adjudication of the CCS case against Bristol. This delayed distribution will preserve the fund against the expense of two separate distributions. The fund will continue to earn interest until the Bristol case is **[**3]** resolved. The settlement also contains a most-favored-nations clause, by which the fund will be reduced proportionally if the CCS plaintiffs agree to a settlement with Bristol of less than $ 6.44 million before October 31, 1980, or more than 30 days before a firm trial date. In addition, Beecham will assist the plaintiffs in their prosecution of this case against Bristol, by helping them to obtain the deposition and trial testimony of certain Beecham employees and former employees.

A preliminary hearing regarding the Beecham-CCS agreement was held in this Court on November 8, 1978. On November 17, 1978, the Court issued an order based upon the information gathered at that hearing. That order preliminarily determined that "the proposed settlement is within the range of possible approval." Implicitly, it rejected the initial objections of Bristol-Myers Company. In addition, the Court conditionally certified for settlement purposes a "Residual CCS-Beecham Settlement Class" composed of certain political entities not already included as plaintiffs in the pending actions, established a date for the final settlement hearing, and ordered that notice be sent to class members and potential **[**4]** members concerning the settlement proposal and hearing date.

Pursuant to the November 17 order, notice of the proposed settlement was sent to some 49,000 potential class members, including cities, counties, states, hospital and school districts which may have purchased the drugs in question. This notice fully informed class members of material aspects of this litigation, of the proposed settlement and their rights to object to, comment upon, or exclude themselves from it. Because no immediate distribution of the fund is contemplated, class members were not asked to respond with proofs of damages at this time. The evidence before the Court indicates that the liaison attorneys for the classes have made every effort to properly notify all potential class members. Individual notice has been afforded to all potential class members who could be identified with reasonable effort. It appears that this has been the best notice practicable under the circumstances, as required by *Fed.R.Civ.P. 23*.

The Court has received 170 timely requests for exclusion from this litigation from recipients of the notice, as well as five late requests. Many of these requests to opt out of the settlement **[**5]** are from non-members of the plaintiff class, who have requested exclusion because they never purchased the drugs in question. Such requests were, of course, unnecessary, and can have no effect on the Court's approval or disapproval of the settlement. So far as the Court knows, no drug purchasers have requested exclusion from the settlement. Section 5 of the settlement agreement gave Beecham the right to withdraw from the agreement if, in its judgment, a substantial proportion of class members requested exclusion from the settlement. Beecham has chosen not to exercise this option. This decision can be understood as Beecham's determination that the requests for exclusion are not substantial enough to create a danger of extensive further litigation by **[*654]** "opt-outs." In the Court's view, the requests for exclusion are of insufficient moment to draw into question the validity of the settlement from the perspective of class members. Furthermore, it is unlikely that Beecham will be prejudiced if the Court accepts those exclusion requests from notice recipients which were filed late but prior to the final settlement hearing. Therefore, all potential class members which filed **[**6]** requests for exclusion prior to April 9, 1979, will be excluded from this litigation, pursuant to *Fed.R.Civ.P. 23(c)(2)*.

No class member has in any way objected to the settlement, nor did any previously unrepresented class member appear at the final settlement hearing to offer advice, evidence, comments or suggestions concerning the settlement agreement. ***HN1***[] This failure of class members to attack the adequacy of the settlement may be considered in determining the value of the settlement to class members.

It is apparent from the Court's own knowledge of this case that this settlement was negotiated at arm's-length, and with the utmost regard for the interests of the classes. Substantial monetary relief is obtained on behalf of the classes. The liaison attorneys estimate that it amounts to at least one-half of the amount of potential damages based on direct purchases which class members could prove at trial before trebling. ***HN2***[] The recovery of actual single damages must be the basis for the Court's assessment of monetary recovery in an antitrust settlement. *Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)*.

Liaison attorneys for the classes express near certainty that an ultimate **[**7]** award if this case is litigated to conclusion will be much greater than the present settlement fund, and that Beecham's share of such an award would amount to a greater sum than it now offers. However, they point out that ***HN3***[] under the antitrust laws, as Beecham's alleged co-conspirator, Bristol-Myers will remain liable for the full amount of treble damages that could have been collected from the original defendants, less only the actual amount paid by Beecham. It is argued that the Court need not examine this partial settlement as closely as it would a complete settlement, since the class will relinquish no part of its potential recovery. This is fair, they argue, since Bristol is probably responsible for the larger share of illegal profits. (See discussion below concerning most-favored-nations clause.) In addition, the class will benefit by Beecham's aid in the litigation against Bristol.

The proposition upon which the attorneys rely is well-established ***antitrust law***. See *Wainwright v. Kraftco Corp., 58 F.R.D. 9 (N.D.Ga.1973)*; *Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529* (3d Cir.), Cert. denied, *429 U.S. 825, 97 S. Ct. 78, 50 L. Ed. 2d 87 (1976)*; *Zenith Radio Corp v. Hazeltine **[**8]** Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. While this is indeed an added argument in favor of the settlement, the Court has not relied heavily on this proposition to determine the adequacy of the settlements. Risks inhere in the most airtight of cases. In this Court's view, its present certainty is an important argument in favor of this settlement. Bristol's continuing liability has been of greater significance in this Court's assessment of the value of Beecham's litigation cooperation which is part of its consideration for the settlement. It is apparent that Beecham's assistance in the case against Bristol will prove invaluable to the plaintiffs, and adds substantially to the economic value of the settlement package to the plaintiff classes. (See Order approving U.S.-Beecham Consent Decree, issued of even date.)

The remaining defendant in this litigation, Bristol-Myers, has raised several objections to this settlement. Bristol's objections concerning the discovery provisions of the settlement and Beecham's dismissal from the litigation are dealt with in orders concerning Bristol's motion to amend its answers and the United States-Beecham consent decree, **[**9]** which are issued of even date herewith. It should be noted that ***HN4***[] Bristol has no standing to object to this settlement between Beecham and the CCS plaintiffs. See *In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1103 n. 17 (5th **[*655]** Cir. 1977)*. Furthermore, it seems unlikely that its general objections are raised from any legitimate concern to protect the classes.

Bristol has raised one argument which relates specifically to the Beecham-CCS agreement, and one aspect of which implicates the settlement's fairness to the classes. Bristol argues that the most-favored-nations clause may harm the classes and Bristol as a litigant, by forcing upon them the continued litigation of the case or a reduction in the total CCS recovery. The design of the clause assures that it will not operate prejudicially. The dollar amount of $ 6.44 million at which the clause comes into operation is intended to preserve the Beecham-Bristol damage ratio which was established in a global settlement offer of 1975. The ratio is the same as was approved by the Court for the settlement of other class claims against Beecham and Bristol in this litigation. See Order of October 20, 1978, approving **[**10]** wholesale and retail druggist and private hospital (WRPH) settlement. At one time or another, all of the attorneys in this litigation have represented that this ratio is based on the estimated proportion of Beecham and Bristol ampicillin sales. Assuming that Beecham's settlement payment bears some relation to actual damages, it is unlikely that the $ 6.44 million figure which would trigger the clause is so low as to bar reasonable settlement discussions. Furthermore, by its own terms, the clause is limited in duration. Its inhibiting effect on negotiations will cease by November 1980. The establishment of a firm trial date by this Court would further abbreviate the clause's operation. Therefore, it seems unlikely that either Bristol or the classes will be harmed by the clause. Rather, the classes may benefit from any additional incentive it may create for favorable settlement terms.

The Court has carefully considered all the terms of the proposed Beecham-CCS settlement, and the objections thereto. It has determined that the proposed settlement is fair, reasonable and adequate, and in the best interests of the CCS classes, and will approve it pursuant to *Fed.R.Civ.P. 23(e)*. **[**11]**

McCourt v. California Sports, Inc.

United States Court of Appeals for the Sixth Circuit

October 19, 1978, Argued ; May 22, 1979, Decided

Nos. 78-1462, 78-1463, 78-1464

Reporter

600 F.2d 1193 *; 1979 U.S. App. LEXIS 14514 **; 87 Lab. Cas. (CCH) P11,570; 1979-1 Trade Cas. (CCH) P62,649

DALE McCOURT, Plaintiff-Appellee, v. CALIFORNIA SPORTS, INC., and the Los ANGELES KINGS, INC., Defendants-Appellants. DALE McCOURT, Plaintiff-Appellee, v. CALIFORNIA SPORTS, INC., et al., Defendants, NATIONAL HOCKEY LEAGUE, Defendant-Appellant. DALE McCOURT, Plaintiff-Appellee, v. CALIFORNIA SPORTS, INC., et al., Defendants, NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, Defendant-Appellant

Subsequent History: **[**1]** Rehearing Denied June 27, 1979.

Rehearing denied by *McCourt v. California Sports, Inc., 600 F.2d 1193, 1979 U.S. App. LEXIS 13640 (6th Cir. Mich., 1979)*

Prior History: APPEAL from the United States District Court for the Eastern District of Michigan.

McCourt v. California Sports, Inc., 460 F. Supp. 904, 1978 U.S. Dist. LEXIS 15253 (E.D. Mich., 1978)

Core Terms

players, bylaw, exemption, free agent, League, Hockey, bargaining, negotiations, collective bargaining agreement, anti trust law, equalization payment, arbitrator, equalization, collective bargaining, sports, antitrust, parties, Sherman Act, Rozelle Rule, acquiring, district court, nonstatutory, injunction, courts, team, arm's-length, settlement, contracts, district judge, labor union

LexisNexis® Headnotes

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

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

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

Antitrust & Trade Law > Regulated Industries > Sports > Football

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN1[] Regulated Practices, Price Fixing & Restraints of Trade

In determining whether the non-statutory labor exemption applies to the reserve system provisions of a collective bargaining agreement in professional sports, the proper accommodation is: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

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

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN2[] Regulated Industries, Sports

The subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination. The bargaining agreement is subject to change from time to time as it expires and is up for renegotiation.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

HN3[] Collective Bargaining & Labor Relations, Bargaining Subjects

See *29 U.S.C.S. § 158(d)*.

Counsel: Avern Cohn, William G. Christopher, Honigman, Miller, Schwartz & Cohn, Detroit, Mich., Richard M. Mosk, Mitchell, Silberberg & Knupp, Los Angeles, Cal., for defendants-appellants in No. 78-1462.

Laurence D. Connor, Roger K. Timm, Dykema, Gossett, Spencer, Goodnow & Trigg, John A. Entenman, Ted T. Amsden, Detroit, Mich., Brian M. Smith, Brian M. Smith & Associates, P.C., Troy, Mich., for plaintiff-appellee.

Fred W. Freeman, Kenneth J. McIntyre, Dickenson, Wright, McKean, Cudlip & Moon, Detroit, Mich., Harry L. Shniderman, Bingham B. Leverich, Covington & Burling, Washington, D.C., for defendant-appellant in No. 78-1463.

Joseph A. Sullivan, Bodman, Longley & Dahling, Detroit, Mich., Lawrence Latto, Benjamin Boley, Shea & Gardner, Wendy S. White, Washington, D.C., for defendant-appellant in No. 78-1464.

Judges: Before EDWARDS, Chief Judge, and ENGEL and MERRITT, Circuit Judges.

Opinion by: ENGEL

Opinion

[*1194] The reserve system, [1] in professional athletics, has been the subject of exhaustive and spirited discussion both in the sports and **[**2]** in the legal world. Its supporters urge that it stimulates athletic competition between the teams of a sports league; its opponents urge that it stifles economic competition among those same teams. We have no doubt that there is a measure of truth in both claims.

[3]** I. NHL RESERVE SYSTEM

Involved in this appeal is the validity, under federal antitrust laws, of the reserve system currently in effect in the National Hockey League. In its present form, the system has been termed a "modified Rozelle Rule" because it closely resembles the rule promulgated for the National Football League by its commissioner, Pete Rozelle, but has been modified to the extent that arbitration is not by the commissioner himself but by a professional and independent arbitrator.

At the heart of the NHL reserve system is By-Law Section 9A, which is attached as Appendix A. This section provides the rules governing the acquisition of free agents of other clubs in the league and is specifically made applicable to the players in the league by paragraphs 17 and 18 of the Standard Players Contract, [2] **[**4]** which

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[1] Mr. Ziegler, the President of the National Hockey League, testified concerning the objectives the National Hockey League's version of the reserve system is designed to serve. According to Ziegler, the reserve system prevents deterioration in competitive balance among the NHL teams, thereby allowing the presentation of an attractive form of competitive entertainment. We note, however, the effectiveness of a reserve system in preserving competitive athletic balance depends in great measure upon its restraint of the free market forces that would otherwise control player movement within the sports league. Historically and continuing to the present day, professional sports leagues have employed various forms of the reserve system. See, e.g., *Flood v. Kuhn, 407 U.S. 258, 259 n. 1, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)* (baseball); *Smith v. Pro-Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173 (1978)* (football); and *Robertson v. National Basketball Ass'n., 389 F. Supp. 867, 874 (S.D.N.Y.1975)* (basketball).

[2] Paragraph 17 describes a player's rights and duties upon the expiration of the term of his contract. In relevant part, Paragraph 17 states:

(a) The Club may no later than August 10th of the final year of this contract, tender the Player a Player's Termination Contract and notify him that he has the choice of executing said Player's Termination Contract and delivering it to the Club on or before September 10th of that year or automatically being unconditionally released from any further obligation to provide services under this contract as of midnight, September 10th of that year. The Player's Termination Contract shall be on the same terms and conditions as this contract except that it shall be for only one additional season at the Player's previous year's salary and shall provide for the Player's unconditional release from any further obligation to provide services under said Player's Termination Contract effective the following June 1st.

(b) If the Club does not take the action permitted under subsection(a), it shall no later than September 1st of the final year of this contract (August 10th if the Player is a "protected" player or played at least fifty NHL games in the preceding season), tender the Player a new Standard Player's Contract upon the same terms and conditions (including this *Section 17*) as this Standard Player's Contract except that salary and the number of years of its fixed term may be different.

(c) Without regard to any action taken by the Club under subsections (a) or (b), the Player may notify the Club no later than September 10th of the final year of this contract that he wishes to sign a Player's Option Contract. If the Player gives such notice, the Club shall no later than September 25th of that year tender the Player a Player's Option Contract, and the Player shall forthwith enter into said contract. The Player's Option Contract shall be on the same terms and conditions as this contract except that it shall be for only one additional season at the Player's previous year's salary and shall provide that effective the following June 1st the Player will be a free agent, without any further obligation to provide services under said Player's Option each player in the NHL is required to sign. Further, **[*1195]** the Standard Players Contract, expressly including Paragraph 17, was approved by both the NHL team owners and the National Hockey League Players Association (NHLPA) in the current collective bargaining agreement, Sections 9.03(a) and (b). [3.]

As can be seen from its terms, By-Law Section 9A mandates that when a player becomes a free agent and signs a contract with a different club in the league, his original club has the right under the By-Law to exact an "equalization payment" from the acquiring club. That payment may be by the assignment of contracts of players, by the assignment of **[**5]** draft choices, or "as a last resort," by the payment of cash. If mutual agreement is not reached, each club submits a proposal to a neutral arbitrator, selected by majority vote of the Board of Governors of the League, who then must select, without change, one of the two proposals submitted.

II. THIS LITIGATION

On October 10, 1977, Dale McCourt, a 21-year-old hockey player from Canada, signed a NHL Standard Players Contract (1974 form) with the Detroit Hockey Club, Inc. to play professional hockey for three years with the Detroit Red Wings. [4.] **[*1196]** McCourt was to be paid $ 325,000 over three years. He subsequently played his rookie year, 1977-78, with the Red Wings and was the leading scorer.

Contract, and as such will have the right, as provided by Section 9A of the League By-Laws, the text of which Section is printed on the reverse side hereof, to negotiate and contract with any club in the League, or with any other club.

(d) If the Club does not take the action permitted under subsection (a) and the Player does not give notice to the Club in accordance with subsection (c), then the parties shall enter into a new Standard Player's Contract by mutual agreement or, failing such agreement, the parties shall enter into a new one-year Standard Player's Contract for the succeeding season upon the same terms and conditions (including this *Section 17*) as this Standard Player's Contract, except as to salary, which shall be determined by neutral arbitration under the applicable collective bargaining agreement providing a mechanism for such arbitration, provided, however, that if no such collective bargaining agreement is then in effect, the Player's salary shall be the same as his salary for the previous year.

Paragraph 18 goes further. By Paragraph 18, the parties "mutually promise and agree to be legally bound by the Constitution and By-Laws of the League and by all the terms and provisions thereof . . . ."

[3.] Section 9.03, in part, provides:

(a) Each hockey player employed by each Club in the National Hockey League shall enter into the form of Standard Players Contract, . . . hereby recognized as valid and binding.

(b) The Association, recognizing that the Clubs have entered into this Agreement in reliance on Section 9.03(a), represents that it has been duly authorized to collectively agree to paragraph 17 of the Standard Players Contract . . . and to the applicability of the provisions of Section 9A of the National Hockey League By-Laws as fair and reasonable terms of employment . . . .

The Association hereby so agrees in its capacity as the exclusive bargaining representative of hockey players in the National Hockey League under this Agreement.

[4.] McCourt has claimed that the Red Wings admitted that his contract included an unwritten understanding with the club that he would not be involuntarily traded. Nevertheless, his contract provided, in Paragraph 11:

It is mutually agreed that the Club shall have the right to sell, assign, exchange and transfer this contract, and to loan the Player's services to any other professional hockey club, and the Player agrees to accept and be bound by such sale, exchange, assignment, transfer or loan, and will faithfully perform and carry out this contract with the same purpose and effect as if it had been entered into by the Player and such other Club . . . .

If the Player fails to report to such other Club he may be suspended by such other club and no salary shall be payable to him during the period of such suspension . . . .

The testimony was that such side agreements were not infrequent, but that any contract which formally incorporates a no-trade provision would automatically be rejected by the Commissioner. This is obviously true, since By-Law Section 9A.8(d), incorporated in McCourt's contract by Paragraphs 17 and 18, specifically provided that the contracts of all players under an acquiring club at the time a free agent is acquired shall be available for equalization purposes. The breach of contract counts have not as yet been decided below or appealed to this court.

[6]** Rogatien Vachon had been a star goaltender for the Los Angeles Kings for six years when he became a free agent in 1978. After rejecting a substantial offer by the Kings, Vachon entered into a contract with the Red Wings at a salary of $ 1,900,000 for five seasons. By signing Vachon, the Red Wings obligated itself to make an equalization payment under By-Law Section 9A to the Kings and, when no agreement was reached, each club submitted to arbitrator Houston a proposal pursuant to By-Law Section 9A.8. The Red Wings offered two of its players as compensation and the Kings proposed that McCourt's contract be assigned to it. The arbitrator selected the Kings' proposal and accordingly, the Red Wings assigned McCourt's contract to Los Angeles. Rather than report to the Kings, however, Dale McCourt brought suit in the United States District Court for the Eastern District of Michigan.

Named as defendants in that suit were the National Hockey League, the Los Angeles Kings, the National Hockey League Players Association, and the Detroit Red Wings. Count I of McCourt's complaint alleged that the reserve system, and consequently the assignment of his contract to the Los Angeles Kings as **[**7]** the compensation for free agent Vachon, violated *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1976)*, and sought injunctive relief under Sections 4 and 10 of the Clayton Act, *15 U.S.C. §§ 15* and *26 (1976)*, to prevent the defendants from enforcing the arbitration award and to require that his contract be reassigned to the Detroit Red Wings. [5.]

On September 19, 1978, following an extensive evidentiary hearing, the district court entered a preliminary injunction restraining the defendants from enforcing the arbitration award and from penalizing McCourt for refusing to play professional hockey with the Los Angeles Kings pursuant to the award. This appeal followed. [6.]

[8]** In an opinion accompanying the preliminary injunction and reported at *460 F. Supp. 904*, the district judge held that By-Law Section 9A unreasonably restrains trade in commerce, in violation of *Section 1* of the Sherman Act:

> Like the "Rozelle Rule," bylaw 9A applies to all players without regard to status or ability; it applies to the average player and to the superstar alike; it is unlimited in duration and acts as a perpetual restriction upon a player's ability to freely contract for his services. Bylaw 9A cannot be justified by any legitimate business purpose to achieve the NHL's announced goal of maintaining competitive balance. It inhibits and deters teams from signing free agents, decreases a player's bargaining power in negotiations, denies players the right to sell their services in a free and open market, and it depresses salaries more than if competitive bidding were allowed. Thus, we conclude that plaintiff has sufficiently established that bylaw 9A, as applied, unreasonably restrains trade and commerce and is violative of *Section 1* of the Sherman **[*1197]** Act. See *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*.

[9]** *460 F. Supp. at 907* (footnote omitted).

Having thus ruled, the trial judge went on to hold that the defendants were not entitled to the benefit of the non-statutory labor exemption from antitrust sanctions because "(t)he preponderance of evidence . . . establishes that bylaw 9A was not the product of bona fide arm's length bargaining over any of its anticompetitive provisions. The evidence establishes that the bylaw was unilaterally imposed upon the NHLPA and was incorporated into the

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5. Three other counts in the complaint asserting state contract and antitrust claims and one count alleging a violation of the U.S. Arbitration Act, *9 U.S.C. § 1 Et seq. (1976)*, are not the subject of this appeal.

6. The defendants brought this appeal from the issuance of the preliminary injunction. Following oral argument, the parties filed a stipulation stating:

It is hereby stipulated by and between all the parties to this action: (1) that all parties waive their rights to a trial on the merits of this action as to Count I of plaintiff's Complaint; (2) that the record and the oral and written findings of fact and conclusions of law now before this Court, which were developed at the hearing on plaintiff's motion for preliminary injunction, shall be deemed to constitute the final record and findings of fact and conclusions of law after a trial on the merits as to such Count I; (3) that the appeals filed by defendants under *28 U.S.C. § 1292(a)(1)* from the order granting a preliminary injunction may be treated by this Court as appeals, under *28 U.S.C. § 1291*, from a final decision of the District Court and (4) that plaintiff may renew his remaining claims following this appeal.

collective bargaining agreement in the identical language it contained when it was first adopted by the League." *460 F. Supp. at 910*.

III. ANTITRUST LIABILITY

While the Supreme Court has ruled that other professional sports do not enjoy the unique exemption from antitrust laws which has historically been reserved for the game of baseball, *Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*, it has never directly ruled upon whether the reserve system common to most professional athletics comes within the ban of the Sherman Act, nor has it expressly determined whether the reserve system is a mandatory subject of collective bargaining and, **[**10]** therefore, exempt under federal labor policy from the operation of the federal antitrust laws. [7.]

[11]** Assuming without deciding that reserve systems such a those here are subject to *Section 1* of the Sherman Act and could otherwise be violative of it, we proceed to determine whether the non-statutory labor exemption applies upon the facts here.

IV. LABOR EXEMPTION

A. Legal Standards

The trial court and the parties before us in this appeal have all relied upon Mackey as properly enunciating the governing principles in determining whether the non-statutory labor exemption applies to the reserve system provisions of a collective bargaining agreement in professional sports. *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, Cert. dismissed, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)*. There Judge Lay set forth three broad principles:

> ***HN1***[] We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily **[*1198]** affects only the parties to the collective bargaining relationship. See Connell Co. v. Plumbers & Steamfitters, supra (421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)); Meat **[**12]** Cutters v. Jewel Tea, supra (381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)); Mine Workers v. Pennington, supra (381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)). Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. See Meat Cutters v. Jewel Tea, supra; *Mine Workers v. Pennington, supra.* Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be

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[7.] Jacobs and Winter, in Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L.J. 1 (1971), strongly suggest that the antitrust issue is altogether irrelevant in considering the validity of the reserve system. This article and its conclusion were specifically noted, without comment, by Mr. Justice Blackmun in *Flood v. Kuhn, supra.* In *Radovich v. National Football League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*, the Supreme Court reversed the dismissal of a complaint charging Sherman Act violations by the National Football League and in so doing held that a complaint by a former guard on the Detroit Lions team charging that the National Football League had boycotted him and prevented him from becoming a player-coach in the Pacific Coast League, adequately stated a cause of action under the antitrust laws. A majority of the Court made it clear that while Radovich was entitled to an opportunity to prove his charges, it expressed no opinion as to whether or not the respondents had in fact violated the antitrust laws. The precise language of the reserve system provisions does not appear to have been considered by the Supreme Court in Radovich, its emphasis rather having been to hold that its prior decisions relating to the game of baseball did not invariably apply to all team sports. Lower court activity has almost uniformly indicated that the restraints of the reserve system in sports other than baseball amount to a type of group boycott against a player who desires to sell his professional athletic services to another team after having earlier been engaged by a competing team. See, e.g., *Smith, supra, 593 F.2d at 1177-1181*; *Mackey, supra, 543 F.2d at 618-22*; *Robertson, supra, 389 F. Supp. at 893*; *Kapp v. National Football League, 390 F. Supp. 73, 80-83 (N.D.Cal.1974)*, Aff'd in part and appeal dismissed in part as moot, *586 F.2d 644 (9th Cir. 1978)*, Cert. denied, ***441 U.S. 907, 99 S. Ct. 1996, 60 L. Ed. 2d 375 (1979)***; ***Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1056-57 (C.D.Cal.1971)***, Injunction reinstated sub nom. *Haywood v. National Basketball Ass'n., 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206* (Douglas, J., in chambers, 1971). See generally 7 J. O. Von Kalinowski, ***Antitrust Law*** and Trade Regulation, § 50.01 Et seq. (1978).

> exempted is the product of bona fide arm's-length bargaining. See Meat Cutters v. Jewel Tea, supra. See also *Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C.1976)*; *Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 496-500 (E.D.Pa.1972)*; *Boston Professional Hockey Ass'n, Inc. v. Cheevers, 348 F. Supp. 261, 267* (D.Mass.), Remanded on other grounds, *472 F.2d 127 (1st Cir. 1972)*.

543 F.2d at 614-15 (footnotes omitted).

We see no reason to disagree with the judgment of the district court and **[**13]** of the attorneys on both sides that the proper standards are set out in Mackey. In short, it was proper to apply Mackey's standards; the issue is whether those standards were properly applied.

B. Application of legal standards

We have little difficulty in determining that the first two policy considerations favor the exemption. Clearly here the restraint on trade primarily affects the parties to the bargaining relationship. It is the hockey players themselves who are primarily affected by any restraint, reasonable or not. [8.] Second, the agreement concerning the reserve system involves in a very real sense the terms and conditions of employment of the hockey players both in form and in practical effect. As Mackey correctly points out, the restriction upon a player's ability to move from one team to another within the league, the financial interest which the hockey players have and their interest in the mechanics of the operation and enforcement of the rule strongly indicate that it is a mandatory bargaining subject within the meaning of the National Labor Relations Act, Section 8(d), *29 U.S.C. § 158(d) (1976)*.

[14]** The issue, therefore, in our judgment is narrowed to whether, upon the facts of this case, the agreement sought to be exempted was the product of bona fide arm's-length bargaining. The court in Mackey held under the circumstances before it that such arm's-length bargaining was missing. So did the district court here. The underlying facts in the two cases, however, are quite different.

In Mackey it was shown that the National Football League Players Association, at least prior to 1974, had stood in a relatively weak position with respect to the clubs. The Rozelle Rule had remained unchanged in form since it was unilaterally promulgated in 1963, even before the Players Association was formed. The Eighth Circuit specifically found that the Rozelle Rule was not bargained over in the negotiations leading to the 1968 or 1970 collective bargaining agreements:

> At the outset of the negotiations preceding the 1968 agreement, the players did not seek elimination of the Rozelle Rule but felt that it should be modified. During the course of the negotiations, however, the players apparently presented no concrete proposals in that regard and there was little discussion concerning the Rozelle **[**15]** Rule. At trial, Daniel Shulman, a bargaining representative of the players, attributed their failure to pursue **[*1199]** any modifications to the fact that the negotiations had bogged down on other issues and the union was not strong enough to persist.
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> The 1968 agreement incorporated by reference the NFL Constitution and Bylaws, of which the Rozelle Rule is a part. Furthermore, it expressly provided that free agent rules shall not be amended during the life of the agreement.
>
> At the start of the negotiations leading up to the 1970 agreement, it appears that the players again decided not to make an issue of the Rozelle Rule. The only reference to the Rule in the union's formal proposals presented at the outset of the negotiations was the following:
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> The NFLPA is disturbed over reports from players who, after playing out their options, are unable to deal with other clubs because of the Rozelle Rule. A method should be found whereby a free agent is assured the opportunity to discuss contract with all NFL teams.

[8.] Indeed, the most logical third party to complain about the reserve system, the World Hockey Association, expressly accepted this system in a settlement to the litigation which produced *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D.Pa.1972)*.

> There was little discussion of the Rozelle Rule during the 1970 negotiations.

543 F.2d at 612-13.

Upon the expiration **[**16]** of the 1970 agreement, however, the NFL players obviously found themselves in a much stronger bargaining position than they previously enjoyed. Although the court in Mackey was not concerned with the 1974 collective bargaining negotiations, it noted that:

> (since) the beginning of the 1974 negotiations, the players have consistently sought the elimination of the Rozelle Rule. The NFLPA and the clubs have engaged in substantial bargaining over that issue but have not reached an accord.

543 F.2d at 613.

Regarding these 1974 negotiations, of particular interest is the Eighth Circuit's subsequent opinion in *Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978)*. Reynolds developed when the National Football League Players Association in a class action sought damages and other relief for the alleged injury caused by the anti-competitive effects of the Rozelle Rule, which had earlier been outlawed in Mackey. A settlement of the class action in the district court had been contested by 15 dissenting football players who challenged the validity of the settlement reached. In upholding the settlement, the Eighth Circuit expressly noted that **[**17]** it had been the subject of collective bargaining. The settlement included not only cash payments but a modification of the Rozelle Rule, particularly with a better and refined formula for determining the compensation to be paid the old club when a free agent player is signed by a new club. Reynolds, therefore, represents a reaffirmation of the Eighth Circuit's holding in Mackey:

> We emphasize today, as we did in *Mackey, supra*, that ***HN2***[] the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination. The bargaining agreement is subject to change from time to time as it expires and is up for renegotiation.

584 F.2d at 289.

Returning to the area of professional hockey, we find its history well chronicled by Judge Higginbotham in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D.Pa.1972)*. The district judge's opinion in the **[**18]** instant case picks up the history of the reserve system and the National Hockey League where Judge Higginbotham left it in Philadelphia World Hockey Club, Inc. The district judge here stated:

> Mr. John Ziegler, President of the National Hockey League, testified that in March 1973, after discussions between the NHL and the NHLPA, the Board of Governors authorized a special committee to negotiate a new reserve clause. NHL Exh. 1 at 2-4. At a meeting on March 19, 1973, the owners and player representatives tentatively agreed upon a new **[*1200]** reserve clause pending ratification by the players. NHL Exh. 2 at 3. The tentative agreement provided, among other things, that a player with five or more years in the NHL could elect to become a free agent. See NHL Exh. 3 for the full text of the proposed reserve clause. In June 1973, the NHLPA rejected the proposed reserve clause. Thereafter, the NHLPA, on advice of counsel, refused to attend a meeting on August 28, 1973 to further discuss the proposed reserve clause. Plaintiff Exh. 2 at 3. The NHLPA elected instead to await the final outcome of the World Hockey Association's suit attacking the old reserve clause. See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., supra.* **[**19]** When the positions of the parties solidified, the NHL unilaterally adopted bylaw 9A on November 27, 1973. Plaintiff Exh. 2 at 3.
>
> Several months later, in February 1974, the district court approved a consent decree in the World Hockey Association suit. The NHLPA then threatened to file its own antitrust action to challenge the validity of bylaw 9A. To forestall that suit, the NHL agreed on July 9, 1975, that it would not assert laches or equitable estoppel

> as a defense. See Plaintiff Exh. 3 at 1; Exh. 4 at 1. At a subsequent meeting, on August 13, 1975, Mr. Ackerman, counsel for the NHL, implied that there would be no collective bargaining agreement until the dispute over bylaw 9A was resolved. The NHLPA, however, persisted in its refusal to negotiate on the clause. Plaintiff Exh. 5 at 1-2. The NHLPA's threat of an antitrust suit did not alter the NHL's firm position on bylaw 9A. On August 15, 1975, the members of the owner-players' council were advised that:
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> Mr. Eagleson stated that the commencement of this type of action was still being considered. I replied that decision was, of course, up to them, but that the owners would not negotiate from fear of that **[**20]** possibility. Pl.Exh. 5 at 2.
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> On May 4, 1976, the NHL and the NHLPA signed their first collective bargaining agreement retroactive from September 15, 1975. Collective Bargaining Agreement (CBA) § 2.01. The collective bargaining agreement provides that paragraph 17 of the Standard Player's Contract and bylaw 9A are "fair and reasonable terms of employment." CBA § 9.03(b).

460 F. Supp. at 910-11.

We believe that in holding that the reserve system had not been the subject of good faith, arm's-length bargaining, the trial court failed to recognize the well established principle that nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue. [9] *NLRB v. American National Insurance Co., 343 U.S. 395, 404, 72 S. Ct. 824, 96 L. Ed. 1027 (1952)*.

[21]** In a case where the collective bargaining negotiations proceeded much like those on By-Law Section 9A, our circuit followed American National Insurance Co. to hold that good faith bargaining did not require the employer to alter its position. *NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th* ***[*1201]*** *Cir. 1955)*. There the NLRB sought enforcement of its order directing the company to bargain collectively with the union. The court refused, holding:

> In the present case, the respondent promptly met with the Union at its request, and interposed no objections or delays to later meetings whenever requested by the Union. Its negotiators were fully authorized to act. It submitted a proposed contract which it was willing to execute. The Union's proposals and its own proposals were discussed in detail in lengthy sessions. From the start respondent made its position clear that it would insist upon certain provisions, which, in its opinion, were basically important to the continued successful operation of the Company, such as the unqualified no-strike clause and settlement of grievances by Company management without compulsory arbitration. The Company's position **[**22]** on these issues was not acceptable to the Union. The Union's counterproposals on these issues were not acceptable to the Company. The negotiations, after a period of months, finally resulted in a tentative agreement with respect to all matters except the settlement of grievances. The failure to execute a contract was not because of a failure or refusal to negotiate, but in the final analysis was because the parties would not agree on one remaining issue, considered by both of them as basically important. To say that the Company should have accepted the Union's proposal on this issue is to ignore the language of the statute that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

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[9] Section 8(d) of the National Labor Relations Act, *29 U.S.C. § 158(d)*, describes good faith collective bargaining and makes it clear that the Act does not compel either party to alter its initial stance on an issue. Section 8(d), in relevant part, states:

HN3[] (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but Such obligation does not compel either party to agree to a proposal or require the making of a concession . . . (emphasis added).

> The board also stresses the fact that the Company refused to submit alternate proposals about the grievance issue at the request of the Union after it had refused to accept the Company's original proposal, and that the inflexible attitude of the Company contributed nothing to the success of the negotiations. But the statutory right to decline to make a concession includes the right to firmly stand on a proposal previously **[**23]** made and not accepted.
>
> In our opinion, the matter resolves itself into purely a question of hard bargaining on the part of the respondent. It is not for the Board or the Court to determine what in their opinion the respondent should have agreed to, and, in effect, make the contract for the parties. To decree enforcement of the order, would, as a practical matter, force the respondent to make a concession or be proceeded against for contempt of court. While the Act compels negotiations, which usually result in reaching an agreement, it contains no authority to force an agreement where the parties have reached an impasse. *N. L. R. B. v. American Nat. Ins. Co., supra*; *N.L.R.B. v. Landis Tool Co., 3 Cir., 193 F.2d 279*; *N.L.R.B. v. Norfolk Shipbuilding & Drydock Corp., 4 Cir., 195 F.2d 632*.

219 F.2d at 125-26. See also *Fetzer Television, Inc. v. NLRB, 317 F.2d 420 (6th Cir. 1963)*. [10.]

[24]** As the Fifth Circuit succinctly observed:

> If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system . . . of free collective bargaining.

[*1202] *NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960)*.

Contrary to the trial judge's conclusion, the very facts relied upon by him in his opinion illustrate a classic case of collective bargaining in which the reserve system was a central issue. It is apparent from those very findings that the NHLPA used every form of negotiating pressure it could muster. It developed an alternate reserve system and secured tentative agreement from the owner and player representatives, only to have the proposal rejected by the players. It refused to attend a proposed meeting with the owners to discuss the reserve system further. It threatened to strike. It threatened to commence an antitrust suit and **[**25]** to recommend that the players not attend training camp. [11.]

For its part, the NHL, while not budging in its insistence upon By-Law Section 9A, at least in the absence of any satisfactory counter proposal by the players, yielded significantly on other issues. [12.] It agreed as a price of By-Law Section 9A to the inclusion in the collective bargaining agreement of a provision that the entire agreement could be voided if the NHL and the World Hockey Association should merge. The undisputed reason for this provision was

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10. Other circuits have reached the same conclusions. *NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964)*; *NLRB v. Landis Tool Co., 193 F.2d 279 (3rd Cir. 1952)*; *NLRB v. Norfolk Shipbuilding & Drydock Corp., 195 F.2d 632 (4th Cir. 1952)*; *Chevron Oil Co. v. NLRB, 442 F.2d 1067 (5th Cir. 1971)*; *Wal-Lite Div. of United States Gypsum Co. v. NLRB, 484 F.2d 108 (8th Cir. 1973)*; *NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26* (9th Cir.), Cert. denied, ***393 U.S. 914, 89 S. Ct. 237, 21 L. Ed. 2d 199 (1968)***; *NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978)*.

11. Since the NHLPA represented 100% Of the players, such action would have a profound effect, and thereby, the threat must have carried substantial weight.

12. Mr. Eagleson, the Executive Director of the NHLPA, testified that the union agreed to the provisions of By-Law Section 9A in return for many player benefits. In addition to the benefits described in the district judge's opinion, our review of the record indicates that the players bargained for substantial benefits: (1) increased pension benefits; (2) increased bonus money to players on teams finishing high in their divisions and participating in the Stanley Cup Playoffs; (3) sharing with the owners receipts from international hockey games; (4) greater salary continuation for players injured as a result of playing hockey; (5) increased training camp expense allowances; (6) modification of NHL waiver procedures; and (7) modification in scheduling of games and travel during the season.

player concern that with a merger of the two leagues, the reserve system would be rendered too onerous because the players would, by the merger, lose the competitive advantage of threatening to move to the WHA. Likewise, the NHL team owners obtained a provision voiding the entire agreement should the reserve system be invalidated by the courts. **[**26]** [13.]

[27]** The trial court, while acknowledging that the new collective bargaining agreement contained significant new benefits to the players, held that they were not "directly **[*1203]** related to collective bargaining on bylaw 9A." This observation and the trial court's conclusion that "the NHLPA never bargained for bylaw 9A in the first instance" typifies its approach. It is true that the NHLPA did not "bargain for" By-Law Section 9A; it bargained "against" it, vigorously. That the trial judge concluded the benefits in the new contract were wrung from management by threat of an antitrust suit to void the By-Law merely demonstrates that the benefits were bargained for in connection with the reserve system, although he opined that the threat of a suit was a more effective bargaining tool than the threat of a strike. And while we agree with the trial judge that inclusion of language in the collective bargaining agreement that the reserve system provisions were "fair and reasonable" would not immunize it from antitrust attack, it is manifest from the entire facts found by the court that there was no collusion between management and the players association. Thus, the trial court found **[**28]** that "(t)he NHLPA agreed to include bylaw 9A in the collective bargaining agreement only after the NHL conceded that the NHLPA could terminate the entire agreement if the NHL merged with the World Hockey Association." *460 F. Supp. at 911*. The trial court also credited the testimony of John Ziegler that "the owners took a strong stand toward equalization, that they believed bylaw 9A was fair, and that they wanted it incorporated into the collective bargaining agreement. . . ." Finally, the trial court found that "(t)he NHLPA's acceptance of bylaw 9A was essential to get the parties off dead center. The players had no other alternative. The Standard Player's Contract required them to accept all the bylaws adopted by the NHL." *460 F. Supp. at 911*.

From the express findings of the trial court, fully supported by the record, it is apparent that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm's-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the **[**29]** contract. This failure was a part of and not apart from the collective bargaining process, a process which achieved its ultimate objective of an agreement accepted by the parties.

V. CONCLUSION

Assuming without deciding that the reserve system incorporated in the collective bargaining agreement was otherwise subject to the antitrust laws, whether the good faith, arm's-length requirement necessary to entitle it to the

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[13.] The collective bargaining agreement, Sections 9.03(c) and (e), provides that:

(c) It is expressly understood that if the National Hockey League enters into an agreement to merge with the World Hockey Association, the National Hockey League Players Association shall forthwith be entitled to terminate either this entire agreement, or its agreement contained in this Section 9.03 with respect to the said paragraph 17, . . . and the said Section 9A upon written notice to the Clubs within 15 days after notice of said agreement to merge. If the Association elects to terminate as provided in the preceding sentence, the subjects covered by the said termination shall then be reopened for collective bargaining at the request of either party.

(e) The parties hereto recognize that recent court decisions affecting professional sports other than hockey, may give rise to uncertainty as to whether the provisions of Paragraph 17 of the Standard Players Contract . . . and Section 9A of the National Hockey League By-Laws are lawful subjects of collective bargaining. The Association further recognizes that the provisions of this agreement beneficial to the Association and the (sic) the players were entered into by both parties in the good faith belief that subparagraphs (a) and (b) above are lawful subjects of collective bargaining and are valid, and that the Clubs agreed to said beneficial provisions in reliance thereon. In the event of a final judicial determination not subject to appeal that Paragraph 17 of the Standard Players Contract . . . or Section 9A of the National Hockey League By-Laws are not lawful subjects of collective bargaining or are otherwise invalid, the Clubs may within 30 days thereafter terminate this Collective Bargaining Agreement upon written notice to the Association. If the Clubs elect to terminate as provided in the preceding sentence the parties shall promptly thereafter commence collective bargaining negotiations in an effort to arrive at a new collective bargaining agreement.

non-statutory labor exemption from the antitrust laws applies is to be governed by the developed standards of law applicable elsewhere in the field of labor law and as set forth in *Mackey, supra.* So viewed, the evidence here, as credited by the trial court, compels the conclusion that the reserve system was incorporated in the agreement as a result of good faith, arm's-length bargaining between the parties. As such it is entitled to the exemption, and the trial court's conclusion to the contrary must be deemed clearly erroneous.

The injunction is vacated, and the cause remanded for entry of judgment in favor of defendants upon Count I of the complaint. The cause is also remanded for further proceedings not inconsistent herewith.

No costs.

APPENDIX **[**30]** A

NATIONAL HOCKEY LEAGUE BY-LAW SECTION 9A

FREE AGENTS AND EQUALIZATION

(Adopted November 27, 1973)

Free Agents

9A. 1. A player who becomes a "free agent" pursuant to subsections 2 or 3 of this By-Law shall have the right to negotiate and contract with any Member Club or with any club in any other league.

9A. 2. A player who enters into a 1974 Form Standard Player's contract shall have **[*1204]** the right to become a free agent in accordance with the terms of *Section 17* of said contract and in accordance with the Player's Option contract to which said *Section 17* refers.

9A. 3. Any other player under contract to any Member Club on the date this By-Law is adopted, the final year of whose contract ends on or after September 30, 1974, shall become a free agent on June 1 of the final year of that contract, except that any such player whose contract is a 1972 Form Standard Player's contract whose final year ends on September 30, 1974, shall become a free agent on June 1, 1975. For purposes of this subsection 3, the "final year" of a contract shall be the last year of its fixed term specified in *Section 1* of said contract, including, however, any period added to that term by any **[**31]** addendum or exercised special option contracted for by the Member Club and player.

9A. 4. The foregoing subsection 3 shall not be construed to derogate in any way from the rights of any player under any contract but constitutes instead a waiver of any and all rights by each Member Club under the contracts to which said subsection is applicable to require the services of players for periods beyond those set out in said subsection.

Free Agent List

9A. 5. On or before May 15 in each year each Member Club shall deliver to the President a report in writing, by TWX, telegram or by mail, (which report shall remain confidential until the issuance of the Free Agent List described below), setting forth the name of each player under contract to it who, unless signed to a new contract with said Club prior to June 1 of that year, will become a free agent as of that date. Each Member Club shall also furnish to the President after May 15 of such year, by immediate TWX or telegram, information as to any change of status of any such player. The President shall, on June 1 of such year, issue to all Member Clubs a Free Agent List setting forth the names of all players he finds to be free agents as **[**32]** of such date, together with the name of the Member Club with which each such player was last under contract, and shall thereafter promptly issue such bulletins correcting, amending, or updating such list as may be necessary to ensure its accuracy and currency. Except during a period that a player's name remains on the Free Agent List, no Member Club other than the Club with which he was last under contract may sign a contract or negotiate with such player, directly or indirectly, without the prior written consent of the Member Club with which he was last under contract, or otherwise take any action which would violate *Section 15* of these By-Laws.

Obligation to make equalization payment

9A. 6. Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract, as prescribed by subsection 8 **[**33]** of this By-Law. Each Member Club may acquire the right to the services of as many free agents as it wishes, subject to the provisions of subsection 9 of this By-Law.

Determination of Equalization Payment

Purpose

9A. 7. The purpose of the equalization payment shall be to compensate a player's previous Member Club fairly for loss of the right to his services when that player becomes a free agent and the right to his services is acquired by another Member Club or a club owned or controlled by another Member club.

Procedure

9A. 8. (a) The Member Club acquiring the services of a free agent, or owning or controlling the club acquiring **[*1205]** such services, shall immediately notify the player's previous Member Club and the President of that fact by TWX or telegram. The equalization payment shall be determined, if possible, by mutual agreement of the two Member Clubs involved. If no such agreement is reached within three business days after the date on which the player's services are acquired, each of the Member Clubs involved shall within two additional business days submit by TWX or telegram its proposal for an equalization payment to a neutral arbitrator selected from time **[**34]** to time by majority vote of the Board of Governors of the League.

9A. 8. (b) Within two business days after the deadline for receipt of the Clubs' proposals, the arbitrator shall, unless notified by both Clubs in writing, by TWX or by telegram that they have reached agreement on the equalization payment, select without change one of the proposals submitted to him, and his determination shall be final and not subject to review.

9A. 8. (c) The Clubs' proposals and the arbitrator's determination of equalization must be limited to:

(i) the assignment of a contract or contracts for the services of a player or players binding upon such player or players for at least the next season; and/or

(ii) choices in any intra-league, inter-league and/or amateur drafts to be held at any time subsequent to such proposal and/or unsigned draft choices or negotiation nominees; and/or

(iii) cash.

In making his selection the arbitrator shall be governed by the policy that cash shall be used for equalization purpose only as a last resort.

9A. 8. (d) The contracts of all players under contract to the acquiring Club at the time a free agent is acquired shall be available for equalization purposes.

9A. **[**35]** 8. (e) The cost of the arbitrator shall be borne by the League.

9A. 8. (f) To facilitate a good faith effort to reach agreement on the equalization payment, the acquiring Club shall furnish to the Club entitled to that payment such information as may reasonably be required with respect to any player the assignment of whose contract is proposed by either party as an equalization payment, in whole or in part, including, but not limited to, the salary, bonus, and other compensation of such player, a copy of the player's contract, and any adverse information with respect to the physical, mental, or emotional condition of such player.

9A. 8. (g) The details of the procedure to be followed in the event arbitration is required shall be set forth in the agreement entered into by the League and the arbitrator.

Satisfaction of Equalization Obligation

9A. 9. No Member Club, or any club owned or controlled by such Member Club, shall be entitled to sign or acquire the right to the services of any free agent until it has satisfied in full its equalization obligation under these By-Laws as to each other free agent, the right to whose services it has acquired, by assigning the player contracts **[**36]** and/or draft rights and otherwise consummating the equalization payment required by mutual agreement or by arbitration. It shall be the responsibility of the acquiring Club to notify the President that it has satisfied its equalization obligation.

9A. 10. The President shall disallow the right of any acquiring Member Club to use the services of any signed free agent if he has not received the notice specified in subsection **[*1206]** 9 or otherwise finds that the equalization payment for that player or for any other free agent previously signed has not been fully satisfied by said Member Club in accordance with this By-Law.

Dissent by: EDWARDS

Dissent

EDWARDS, Chief Judge, dissenting.

I respectfully dissent. My basic disagreement with the majority opinion is planted on the proposition that if sports clubs organized for profit are to be exempted from the antitrust laws, this should be accomplished by statutory amendment, in accordance with the Constitution of the United States. Any such amendment would necessarily follow extensive hearings on the possible implications of the exemption, not only on organized sports, but also on the whole of the American economy a process not available **[**37]** to the Judicial Branch.

The essence of the restriction on competition involved in this case is an agreement between all National Hockey League clubs not to hire any hockey player who has become a free agent (by refusing reemployment contract terms offered by his previous club) without undertaking to "equalize" the loss to his former club by agreed on or arbitrated transfer of players or cash. [1.]

[38]** The restriction by its terms is upon the NHL constituent clubs. Its impact, however, is clearly upon star hockey players. Clause 9A.6 obviously diminishes the hockey star's bargaining power, both with his previous employer and any prospective employer. It also may require any player who is transferred under the equalization clause to live in a city and play for a club against his professional (or private) best interests.

The legal question posed by this case is whether an association of employers may in the organized sports industry (here it is hockey) gain exemption from the antitrust laws for an agreement among themselves to restrict otherwise

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[1.] Obligation to make equalization payment

9A. 6. Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract, as prescribed by subsection 8 of this By-Law. Each Member Club may acquire the right to the services of as many free agents as it wishes, subject to the provisions of subsection 9 of this By-Law.

free competition in employment of hockey players by imposing their employer-devised agreement upon a union representing that class of employees through use of economic inducement or compulsion. Before we give judicial sanction to such a practice as consistent with the antitrust and labor-management laws of this country, we should take a long, hard look at the implications for sections of the national economy other than organized sports.

Superstars whose services are at a high premium can be found in many areas of industry and commerce **[**39]** other than the world of sports. Is there any distinction to be drawn between Clause 9A and similar restrictions in, for example, the field of dress manufacturing for the services of highly talented designers, or in the metalworking industries for the services of highly talented engineers, designers, or die shop leaders, or the entertainment field for highly talented personnel, or in the publishing field for highly talented writers?

Such a restriction on freedom of competition (and human freedom in choice of employment) in the interest of promotion or maintenance of business profits, has a distinctly predatory ring. While the majority opinion declines to answer the question as to whether, without benefit of an exemption, Clause 9A would be violative of the Sherman Act, I believe that 9A does violate the antitrust laws and that no "labor union exemption" or nonstatutory exemption is applicable.

The most distinguishing feature of the economy of the United States is the statutory prohibition upon monopoly and upon contracts and devices designed to restrict free competition. Sherman Antitrust Act, *15 U.S.C. §§ 1-7 (1976)*; Clayton Antitrust **[*1207]** Act, *15 U.S.C. §§ 12* ***[**40]*** *-27 (1976)*. Through many decades Congress has adhered to a legal ban upon such practices.

The first and crucial sentence of the Sherman Act is sweeping. It provides:

> S 1. Trusts, etc., in restraint of trade illegal; penalty
> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> *15 U.S.C. § 1 (1976)*.

The Sherman Act and Clayton Act also provide:

> S 2. Monopolizing trade a felony; penalty
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
> S 4. Jurisdiction of courts; duty of United States attorneys; procedure

[41]**

> 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. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.
> S 26. Injunctive relief for private parties; exception
>
> 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, including sections 13, 14, 18, **[**42]** and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by

courts of equity, under the rule governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .
Id. at §§ 2, 4, 26.

This appeal requires us to measure Clause 9A of the National Hockey League By-Laws against the antitrust laws just quoted.

Clause 9A provides:

FREE AGENTS AND EQUALIZATION

(Adopted November 27, 1973)
Free Agents
9A. 1. A player who becomes a "free agent" pursuant to subsections 2 or 3 of this By-Law shall have the right to negotiate and contract with any Member Club or with any club in any other league.
(Clauses 9A2 thru 9A5 omitted. See Appendix to Majority Opinion.)
Obligation to make equalization payment

9A. 6. Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under **[**43]** contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring **[*1208]** the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract, as prescribed by subsection 8 of this By-Law. Each Member Club may acquire the right to the services of as many free agents as it wishes, subject to the provisions of subsection 9 of this By-Law.
Determination of Equalization Payment
Purpose
9A. 7. The purpose of the equalization payment shall be to compensate a player's previous Member Club fairly for loss of the right to his services when that player becomes a free agent and the right to his services is acquired by another Member Club or a club owned or controlled by another Member club.
Procedure

9A. 8. (a) The Member Club acquiring the services of a free agent, or owning or controlling the club acquiring such services, shall immediately notify the player's previous Member Club and the President of that fact by TWX or telegram. The equalization payment shall be determined, if possible, **[**44]** by mutual agreement of the two Member Clubs involved. If no such agreement is reached within three business days after the date on which the player's services are acquired, each of the Member Clubs involved shall within two additional business days submit by TWX or telegram its proposal for an equalization payment to a neutral arbitrator selected from time to time by majority vote of the Board of Governors of the League.
(Clauses 9A8 (b) and (c) omitted. See Appendix to Majority Opinion.)
9A. 8. (d) The contracts of all players under contract to the acquiring Club at the time a free agent is acquired shall be available for equalization purposes.
9A. 8. (e) The cost of the arbitrator shall be borne by the League.

9A. 8. (f) To facilitate a good faith effort to reach agreement on the equalization payment, the acquiring Club shall furnish to the Club entitled to that payment such information as may reasonably be required with respect to any player the assignment of whose contract is proposed by either party as an equalization payment, in whole or in part, including, but not limited to, the salary, bonus, and other compensation of such player, a copy **[**45]** of the player's contract, and any adverse information with respect to the physical, mental, or emotional condition of such player.
9A. 8. (g) The details of the procedure to be followed in the event arbitration is required shall be set forth in the agreement entered into by the League and the arbitrator.
Satisfaction of Equalization Obligation

> 9A. 9. No Member Club, or any club owned or controlled by such Member Club, shall be entitled to sign or acquire the right to the services of any free agent until it has satisfied in full its equalization obligation under these By-Laws as to each other free agent, the right to whose services it has acquired, by assigning the player contracts and/or draft rights and otherwise consummating the equalization payment required by mutual agreement or by arbitration. It shall be the responsibility of the acquiring Club to notify the President that it has satisfied its equalization obligation.
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> 9A. 10. The President shall disallow the right of any acquiring Member Club to use the services of any signed free agent if he has not received the notice specified in subsection 9 or otherwise finds that the equalization payment **[**46]** for that player or for any other free agent **[*1209]** previously signed has not been fully satisfied by said Member Club in accordance with this By-Law.

The nature of the national (and international) sports business is such that the acquisition of talented players is the essence of the business of organized sports clubs. Measures like 9A are anticompetitive agreements banning or restricting competition between clubs for players. Such clauses adopted by an already dominating league will also have the effect of restricting competition from other leagues and thus promoting monopoly.

Clauses like 9A would seem to be per se violations of *Section 1* of the Sherman Act. If measured by the preferred "rule of reason," they fail the United States Supreme Court's case law tests. See *Chicago Bd. of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

Appellants' defense of 9A is cast principally in public policy **[**47]** argument. It runs: Star players like McCourt produce the victories and championships for the club. They also attract the paying customers and generate profits. When star players are monopolized by one club, that club gains profits at the expense of all other clubs in the league. When the star players are distributed somewhat evenly throughout the league, team competition is enhanced and the well-being of the league as a whole is protected. The result is beneficial to the league and to the league's sports-minded public.

The point of this dissent is not to disagree with this public policy argument. Congress, which adopted the antitrust laws in the first instance, may choose to exempt nationally organized sports leagues from the antitrust laws by allowing carefully devised controls over player contracts designed to prevent league imbalance. My problem is that I cannot find any rationale for this court's devising such a policy which is 1) consistent with the antitrust statutes, or 2) which could be limited to the field of sports, or 3) which is supported by decisions on antitrust issues in the United States Supreme Court.

THE EXEMPTION CLAIM

The majority opinion relies solely upon **[**48]** judicial extrapolation from one of the rare exceptions to the strictures of the Sherman Act. It was adopted in 1914 and provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
>
> *15 U.S.C. § 17 (1976)*.

It should be noted that the amendment applies only to organizations "not having capital stock or conducted for profit." Obviously, by its terms, the clubs of the National Hockey League are specifically excluded because they are not "labor, agricultural, or horticultural organizations," and because they do have capital stock and are organized for profit. But in fact, neither the appellants **[**49]** nor my colleagues in the majority rely upon the terms of the statute.

What is relied upon is case law in which the federal courts have sought to reconcile the conflict between the antitrust laws (with their prohibitions against restraint of trade and antimonopoly practices) and the labor union exemption. From the beginning of this conflict it has been recognized that the very purpose of labor organization was to remove wages from the pressures which would otherwise be placed on them by cost competition between competing employers.

[*1210] In *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*, Justice Frankfurter reviewed the history which led to the adoption of the labor union exemption:

> *Section 1* of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton **[**50]** Act of 1914 was the result. Act of October 15, 1914, 38 Stat. 730. "This statute was the fruit of unceasing agitation, which extended over more than 20 years and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Co. v. Deering, 254 U.S. 443, 484 (41 S. Ct. 172, 182, 65 L. Ed. 349*). Section 20 of that Act, which is set out in the margin in full, withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them since the use of the injunction had been the major source of dissatisfaction and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The Clayton Act gave rise to new litigation and to renewed controversy in and out of Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which **[**51]** that Act was designed to remove. Specifically the courts restricted the scope of § 20 to trade union activities directed against an employer by his own employees. *Duplex Co. v. Deering, supra.* Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. Ibid., p. 485-486 (*41 S. Ct. p. 183*). Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act. Act of March 23, 1932, 47 Stat. 70, *29 U.S.C. §§ 101-115*.
>
> The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it **[**52]** had been in the Duplex case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Id. at 229-31, 61 S. Ct. at 465-466 (footnotes omitted).

Subsequently, in *Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, the Supreme Court pointed out that the exemption made available to labor would be lost if it was used in connection with corporations organized for profit to aid them in controlling prices of their products and creating monopoly. In the Pennington case Justice White, speaking for the Court, reviewed the history of the exemptions created by the Clayton and Norris-LaGuardia Acts when they were sought to be employed by unions acting in concert with employers:

> The antitrust laws do not bar the existence and operation of labor unions as **[*1211]** such. Moreover, **[**53]** § 20 of the Clayton Act, 38 Stat. 738, and § 4 of the Norris-LaGuardia Act, 47 Stat. 70, permit a union, acting

alone, to engage in the conduct therein specified without violating the *Sherman Act. United States v. Hutcheson, 312 U.S. 219 (61 S. Ct. 463, 85 L. Ed. 788)*; *United States v. International Hod Carriers Council, 313 U.S. 539 (61 S. Ct. 839, 85 L. Ed. 1508*), affirming Per curiam, *37 F. Supp. 191 (D.C.N.D.Ill.1941)*; *United States v. American Federation of Musicians, 318 U.S. 741 (63 S. Ct. 665, 87 L. Ed. 1120*), affirming Per curiam, *47 F. Supp. 304 (D.C.N.D.Ill.1942)*.

But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws. Thus Hutcheson itself stated:

"So long as a union acts in its self-interest And does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of **[**54]** the end of which the particular union activities are the means." *312 U.S., at 232 (61 S. Ct., at 466*). (Emphasis added.)

And in Allen Bradley Co. v. (Local) Union (No. 3, *IBEW), 325 U.S. 797 (65 S. Ct. 1533, 89 L. Ed. 1939*), this Court made explicit what had been merely a qualifying expression in Hutcheson and held that "when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." *Id., at 809 (65 S. Ct., at 1540*). See also *Brotherhood of Carpenters v. United States, 330 U.S. 395, 398-400 (67 S. Ct. 775, 778, 91 L. Ed. 973*); *United States v. Employing Plasterers Assn., 347 U.S. 186, 190 (74 S. Ct. 452, 98 L. Ed. 618*). Subsequent cases have applied the Allen Bradley doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement, *Brotherhood of Carpenters v. United States, supra* ; see *Teamsters Union v. Oliver, 358 U.S. 283, 296 (79 S. Ct. 297, 304, 3 L. Ed. 2d 312*), **[**55]** and even though the mechanism for effectuating the purpose of the combination was an agreement on wages, see *Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (C.A. 8th Cir. 1958)*, or on hours of work, *Philadelphia Record Co. v. Manufacturing Photo-Engravers Assn., 155 F.2d 799 (C.A. 3d Cir. 1946)*.

United Mine Workers v. Pennington, supra at 661-63, 85 S. Ct. at 1589.

Justice Douglas, speaking for himself and two other Justices, concurred, but added some additional thoughts:

I repeat what we said in Allen Bradley Co. v. Union (No. 3, *IBEW), supra* (325 U.S.), at 811 (*65 S. Ct., at 1535*):

"The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power **[**56]** of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the (Sherman) Act."

Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system.

[*1212] *United Mine Workers v. Pennington, supra at 674, 85 S. Ct. at 1595-1596*.

Until this case, I do not know of any instance where profitmaking businesses have succeeded in justifying a cartel arrangement which suits their purposes by dint of securing that arrangement's introduction into a collective bargaining agreement and thus acquiring the right to the "labor union exemption." The majority's approval of this arrangement in this case in fact stands the labor union exemption squarely on its head.

The District Judge heard evidence on plaintiff's complaint for a preliminary injunction so fully that the parties have now stipulated **[**57]** to submit the issues as if the case had been fully tried.

As to the origin of Clause 9A (the restrictive clause complained about) the District Judge found:

> Finally, the defendants argue that plaintiff may not obtain preliminary injunctive relief upon his antitrust claim because they should be afforded the non-statutory labor exemption from antitrust sanctions. The preponderance of evidence, however, establishes that bylaw 9A was not the product of bona fide arm's length bargaining over any of its anticompetitive provisions. The evidence establishes that the bylaw was unilaterally imposed upon the NHLPA and was incorporated into the collective bargaining agreement in the identical language it contained when it was first adopted by the League.
>
> Mr. John Ziegler, President of the National Hockey League, testified that in March 1973, after discussions between the NHL and the NHLPA, the Board of Governors authorized a special committee to negotiate a new reserve clause. At a meeting on March 19, 1973, the owners and player representatives tentatively agreed upon a new reserve clause pending ratification by the players. The tentative agreement provided, among other things, **[**58]** that a player with five or more years in the NHL could elect to become a free agent. In June 1973, the NHLPA rejected the proposed reserve clause. Thereafter, the NHLPA, on advice of counsel, refused to attend a meeting on August 28, 1973 to further discuss the proposed reserve clause. The NHLPA elected instead to await the final outcome of the World Hockey Association's suit attacking the old reserve clause. See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., supra (351 F. Supp. 462 (E.D.Pa.1972)). When the positions of the parties solidified, the NHL unilaterally adopted bylaw 9A on November 27, 1973.
>
> Several months later, in February 1974, the district court approved a consent decree in the World Hockey Association suit. The NHLPA then threatened to file its own antitrust action to challenge the validity of bylaw 9A. To forestall that suit, the NHL agreed on July 9, 1975, that it would not assert laches or equitable estoppel as a defense. At a subsequent meeting, on August 13, 1975, Mr. Ackerman, counsel for the NHL, implied that there would be no collective bargaining agreement until the dispute over bylaw 9A was resolved. The **[**59]** NHLPA, however, persisted in its refusal to negotiate on the clause. The NHLPA's threat of an antitrust suit did not alter the NHL's firm position on bylaw 9A. On August 15, 1975, the members of the owner-players' council were advised that:
> Mr. Eagleson stated that the commencement of this type of action was still being considered. I replied that decision was, of course, up to them, but that the owners would not negotiate from fear of that possibility.
>
> On May 4, 1976, the NHL and the NHLPA signed their first collective bargaining agreement retroactive from September 15, 1975. Collective Bargaining Agreement (CBA) § 2.01. The collective bargaining agreement provides that paragraph 17 of the Standard Player's Contract and bylaw 9A are "fair and reasonable terms of employment." CBA § 9.03(b). Like the Eighth Circuit Court **[*1213]** of Appeals in Mackey (*Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, Cert. dismissed, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977))*, however, we find that the mere inclusion of bylaw 9A in the collective bargaining agreement cannot serve to immunize it from antitrust sanctions. **[**60]** The evidence offered at the hearing persuades us that the parties did not collectively bargain for bylaw 9A. Mr. Eagleson testified that:
> (T)he owners made it clear that their bottom line position was non-debatable on the By-Law that they had passed and the contract that they had approved unilaterally.

> He further testified that as late as August 1975, the player representatives agreed that unless further "concessions" were made by the owners, they would recommend that their teammates not attend training camp. The NHLPA agreed to include bylaw 9A in the collective bargaining agreement only after the NHL conceded that the NHLPA could terminate the entire agreement if the NHL merged with the World Hockey Association. The agreement also provided that the owners could terminate the agreement if there was a judicial determination that bylaw 9A was invalid. CBA §§ 9.03(c) and (e). Even after the collective bargaining agreement was signed, the NHLPA suggested modifications of the equalization provision. Mr. Eagleson testified that the suggested modifications would be of "great benefit" to the players, suggesting to us that the NHLPA never bargained for bylaw 9A in **[**61]** the first instance.
> Mr. Ziegler further stated on cross-examination that although the NHL was willing to negotiate on equalization at any time, the players had to adhere to the bylaw because the Standard Player's Contract required them to adhere to all bylaws adopted by the NHL. In effect, although the owners indicated that they were willing to negotiate, the players really had no choice. Mr. Ziegler stated that the owners took a strong stand toward equalization, that they believed that bylaw 9A was fair, and that they wanted it incorporated into the collective bargaining agreement. Moreover, it is apparent that both parties to the collective bargaining agreement realized fully that bylaw 9A could not withstand judicial scrutiny.
>
> To support its contention that bylaw 9A was collectively bargained, the NHL argues that the NHLPA received a substantial quid pro quo for agreeing to include the bylaw in the agreement. In our view, the evidence more logically supports the inference that the benefits were received as a settlement of NHLPA's threatened suit to challenge the bylaw. The NHLPA's acceptance of bylaw 9A was essential to get the parties off dead center. The **[**62]** players had no other alternative. The Standard Player's Contract required them to accept all the bylaws adopted by the NHL. We cannot find from this evidence that the increased pension benefits, the right for players to negotiate salaries and the right to share in the proceeds from international hockey competition are directly related to collective bargaining on bylaw 9A. The evidence suggests, for example, that the players "would not agree to (international hockey competition) . . . unless agreement was reached on their request for increased pension benefits." The bylaw was included in the collective bargaining agreement to give the impression that it was a bargained-for provision. When labor and non-labor groups combine to insert into a collective bargaining agreement a non-negotiated provision, courts will not afford either party the non-statutory labor exemption.

Thus the District Judge found these two important facts: Clause 9A originated exclusively with the National Hockey League and its member clubs, and Clause 9A was not the product of arm's length bargaining.

In my judgment this record does not afford any basis whatever for holding that any of these findings **[**63]** of fact and conclusions of law are without substantial evidentiary support or are clearly erroneous. This **[*1214]** leads inevitably to the conclusion reached by the District Judge that Clause 9A is not protected by any labor exemption, either statutory or nonstatutory.

THE ROZELLE RULE CASES

We, of course, in this case are by no means writing upon a clean tablet. The effort on the part of owners of organized sports leagues and clubs to gain control of their players began long ago and achieved its greatest legal success in *Federal Baseball Club v. National League, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922)*. There "Homer nodded" as Mr. Justice Holmes, for a unanimous Court, held "The business is giving exhibitions of baseball, which are purely state affairs." Thus the great American pastime gained exemption from the antitrust laws on the theory that baseball was outside of interstate commerce. That decision has been much criticized both in the courts and in legal literature. See *Flood v. Kuhn, 407 U.S. 258, 280 n. 16, 286, 291-93, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*; *Radovich v. National Football League, 352 U.S. 445, 450, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*; **[**64]** *Salerno v. American League, 429 F.2d 1003, 1005 (2d Cir. 1970)*, Cert. denied sub nom., *Salerno v. Kuhn, 400 U.S. 1001, 91 S. Ct. 462, 27 L. Ed. 2d 452 (1971)*; *Gardella v. Chandler, 172 F.2d 402, 408-09 (2d Cir. 1949)*. It has, however, never been overruled.

In 1972 the Supreme Court majority in an opinion authored by Mr. Justice Blackmun held that baseball's reserve clause was protected by "positive inaction" of Congress in allowing the Federal Baseball decision to stand without statutory correction. But that opinion also included a clear-cut warning to all other sports not so blessed: "other professional sports operating interstate football, boxing, basketball, and, presumably, hockey and golf are not so exempt." *Flood v. Kuhn, supra, 407 U.S. at 282-83, 92 S. Ct. at 2112*.

Turning from the thus historically protected great American pastime to other less fortunate sports, I simply find no authoritative support for legalizing the sort of reserve clause sought to be imposed by the National Hockey League on its players.

The majority opinion cites and quotes from *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, **[**65]** Cert. dismissed, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)*. But there the Eighth Circuit held:

> The district court found, however, that the Rule operates to restrict a player's ability to move from one team to another and depresses player salaries. There is substantial evidence in the record to support these findings. Accordingly, we hold that the Rozelle Rule constitutes a mandatory bargaining subject within the meaning of the National Labor Relations Act.
>
> On the basis of our independent review of the record, including the parties' bargaining history as set forth above, we find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements.

Id. at 615-16.

The District Judge in this case has made a similar finding which, as noted above, I cannot on this record characterize as clearly erroneous.

The attempt to distinguish these findings and conclusions in Mackey from those of the District Court in our instant case seems completely unpersuasive to me.

The majority opinion seems to argue that Mackey's holding that **[**66]** the Rozelle rule violated the Sherman Act was reversed in effect by a settlement between the National Football League and the Players' Association. A voluntary settlement of a lawsuit after remand for trial does not diminish the legal value of the remanding opinion. The Mackey case, in my judgment, stands squarely in favor of the result reached by the District Court in this case and is by no means weakened as precedent by a settlement arrived at during subsequent litigation. See *Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978)*. Perhaps **[*1215]** in this present case also, if it were remanded, the parties might reach a settlement on less restrictive conditions than those shown herein. No judgment can be made in advance as to whether such conditions would satisfy the antitrust laws.

The majority opinion also quotes from now Circuit Judge Leon Higginbotham's excellent District Court opinion in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D.Pa.1972)*. As set forth below, however, Judge Higginbotham specifically held that "the National Hockey League cannot invoke the labor exemptions and **[**67]** is thus subject to a prosecution under the Sherman Act." *Id. at 500*.

He also concluded:

> In providing a special exemption from Sherman Act regulations for labor unions and employers who in good faith negotiated with those unions, Congress attempted to accommodate what frequently were conflicting public policies: the fostering and preservation of competitive business conditions in a free enterprise system on one hand, counterbalanced by a legitimate concern in improving and bettering the working conditions of laborers and the reduction of industrial strife through vigorous union organization and collective bargaining. The labor exemption which could be defensively utilized by the union and employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining, could not be seized upon by either party and destructively wielded as a sword by engaging in monopolistic or other anti-competitive conduct. The shield

> cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the anti-trust laws. To allow and condone such conduct would frustrate Congress' carefully orchestrated efforts **[**68]** to harmoniously blend together two opposing public policies.

Id. at 499-500.

THE RULE OF REASON

In the Mackey case the District Court had held that the Rozelle rule represented a per se violation of the Sherman Act. The Eighth Circuit was not so sure. As a consequence, its opinion weighed the Rozelle rule under the "Rule of Reason" standard and concluded, "We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act." *Mackey, supra at 618*. Assuming that "it (is) more appropriate to test the validity of the Rozelle Rule under the Rule of Reason," *Mackey, supra at 620*, I agree with the analysis of the Eighth Circuit opinion which did not find any legitimate business purpose for the restraints imposed by the Rozelle rule but also held that there were other less onerous (and legally less dubious) methods of achieving reasonable competitive balance in the National Football League. (See pp. 1217-1218 of this opinion)

The kind of restrictions sought to be applied there and here are anti-competitive in purpose and anti-competitive in effect. They are not novel and have frequently **[**69]** been found violative of the antitrust laws in the courts. *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, Cert. dismissed, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)*; *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D.Pa.1972)*; *Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y.1975)*; *Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C.1976)*, *Aff'd, 193 U.S. App. D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978)*.

MANDATORY BARGAINING

I do reject one feature of the Mackey and Reynolds decisions upon which the majority relies. The fact that a particular provision restricting competition is a mandatory subject of collective bargaining and has been agreed upon by management and labor in a collective bargaining contract does not necessarily exempt the restriction from the Sherman Act. The antitrust laws were adopted to protect the free enterprise system and the general public. It is easy to postulate situations where the profit interests **[*1216]** of capital and the wage-hour interests of labor could be mutually served by introducing **[**70]** into collective bargaining agreements restrictions upon competition which are greatly contrary to the public interest and have nothing to do with the labor interests protected by the Clayton and Norris-LaGuardia Acts. In two instances where there was labor-management agreement (albeit not in the written contracts), the Supreme Court struck down the restrictive practices. *Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

In the Pennington case, as we have previously noted, Justice White, in the opinion of the Court, noted that in *Brotherhood of Carpenters v. United States, 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973 (1947)*, the Supreme Court had applied the Allen Bradley doctrine (barring any exemption) without regard to whether the restrictive practice found expression in a collective bargaining agreement.

It should also be noted that what is proposed here is light years removed from the controversy which divided the Court in United Mine Workers v. Pennington as far as origin and purpose of the restrictive practices **[**71]** here involved are concerned. Nonetheless, it is relevant to the legal posture of this case to note that three Justices dissented in the Pennington case, arguing at least in part that because the wage-hour issues in Pennington were mandatory subjects for bargaining, these issues should be exempt from the antitrust laws. The majority of the Court rejected this specific contention. I am unable to find any Supreme Court authority which may properly be cited for any employment of the labor exemption or the nonstatutory exemption as to the anticompetitive practices disclosed in this case. In more recent consideration, the majority of the Court had this to say about the nonstatutory exemption:

> 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 organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance **[**72]** for the lessening of business competition based on differences in wages and working conditions. See *Mine Workers v. Pennington, supra, 381 U.S. at 666, 85 S. Ct. 1585*; Jewel Tea, supra, 381 U.S. at 692-693, 85 S. Ct. (1596) at 1603-1604, (14 L. Ed. 2d 640) (opinion of WHITE, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, E.g., *Federation of Musicians v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market. See *Allen Bradley Co. v. Electrical Workers, 325 U.S. 797, 806-811, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*; Cox, Labor and the Antitrust Laws A Preliminary Analysis, 104 U.Pa.L.Rev. 252 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U.Chi.L.Rev. 659 (1965).
>
> *Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 622-23, 95 S. Ct. 1830, 1835, 44 L. Ed. 2d 418 (1975)*. **[**73]**

Justice Powell's language just quoted would hardly tend to allow the imposition of the restrictions on employment here sought by the hockey clubs in their own interests, as consistent with a "nonstatutory exemption" extrapolated from the Clayton and Norris-LaGuardia Acts. Even more recently the Supreme Court has dealt with the "Rule of Reason" upon which the appellants seek to rely. In *National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*, Justice **[*1217]** Stevens, writing for the Court, stated the following as to the true meaning of that rule:

> From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade (V. U. S., 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683*) to the Court opinion written by MR. JUSTICE POWELL in *Continental T. V., Inc. (V. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568*), the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. "The true test of legality is whether the restraint imposed **[**74]** is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *246 U.S. at 238, 38 S. Ct. at 243*; quoted in *433 U.S. 36, at 49 n. 15, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568*.
>
> *National Society of Professional Engineers v. United States, supra at 691, 98 S. Ct. at 1365*. (Footnote omitted.)

I simply see no way that the restrictive practices we deal with in Clause 9A can be held to "promote competition" (unless, of course, we turn from economic competition to competition on ice). Clause 9A is clearly an unreasonable restraint of trade.

STANDING

Finally, appellants have claimed, and do now, that McCourt had no standing to bring this suit. The District Judge in this case found that he had standing. Other courts have similarly found standing for players similarly situated because of threat to a player's earnings and the restriction upon his freedom to contract with a club in a different location or with different opportunities where opportunities appeared to him to be more desirable. See, e.g., *Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*; **[**75]** *Haywood v. National Basketball Assoc., 401 U.S. 1204, 91 S. Ct. 672, 28 L. Ed. 2d 206 (1971)* (Douglas, J., in chambers opinion); *Radovich v. National Football*

League, 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957); *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, Cert. dismissed, *434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977)*.

The Supreme Court of the United States in *Flood v. Kuhn, supra*, did not specifically deal with standing. Since the United States Supreme Court granted certiorari and decided the Flood case on the interstate commerce issue, we must assume that it accepted the proposition that Flood had standing to prosecute his case.

INJUNCTIVE RELIEF

No doubt Clause 9A operates directly on free agents to their obvious economic disadvantage by decreasing markedly their opportunities to get desirable economic terms with clubs other than their last employer. It also operates directly upon the player like McCourt who is chosen to "equalize" the loss occasioned by his former club's signing a "free agent" previously under contract to another club. Here McCourt seeks to enjoin orders **[**76]** from the club (Detroit) he contracted with, to report to and play for another club (Los Angeles) which he claims will provide him with much less satisfactory career opportunity than Detroit. He will also have to move self and family to Los Angeles, which he asserts is not his free choice and which he sees as an interference with his freedom. The District Judge found on his summary of the evidence that McCourt would suffer irreparable injury and granted injunctive relief as follows:

> There is no real dispute in this record that the plaintiff will suffer irreparable injury if the injunction is not granted. All witnesses have agreed that if the plaintiff does not attend training camp with the team he is ultimately going to play with, he will achieve only mediocre success. Moreover, the evidence establishes that Los Angeles now has three exceptional players who play the same position as plaintiff. One of them, Mr. Dionne, is also a first draft choice and is far more established in hockey competition than this plaintiff. To deny plaintiff an injunction would require him to compete for a regular position with those **[*1218]** three players. Mr. Abel's testimony supports plaintiff's **[**77]** contention that plaintiff would achieve greater success if he continued to play in Detroit. In our view, this plaintiff has, like all sports figures, an inalienable right to pursue stardom. To deny him that right is to injure him irreparably. Plaintiff need not prove his contentions to an absolute certainty. He has produced sufficient evidence to satisfy us that he will in fact suffer irreparable injury.
>
> Moreover, on balance, we find that no defendant is threatened with an injury comparable to the plaintiff's irreparable harm. The Los Angeles Kings and the California Sports, Inc., have argued valiantly, but unpersuasively, that to deny them plaintiff's services will damage their franchise, that the team will be less proficient, that their record as a team and their reputation in the community will be seriously damaged and that they have already lost the sale of a large number of season tickets, which the testimony indicates equals upwards of $ 300,000. These alleged consequences, however, flow from defendants' loss of the services of Rogatien Vachon and not the injunction we will enter. Defendants may not recover for their inability or their refusal to renew Mr. Vachon's **[**78]** contract through the operation of a provision that violates the ***antitrust law***. Any injury the Los Angeles Kings may suffer could have been avoided by exercising a greater effort to retain the services of Mr. Vachon. The testimony from his agent, Mr. Rauch, is that Los Angeles was afforded the first opportunity to contract for Vachon. In any event, there is no relationship shown in the record between the loss it claims it suffered and the services that it claimed plaintiff can recoup for it. Moreover, the balance of public interest favors this plaintiff. Professional sports generally and the public specifically are better served when there is open, unfettered competition for playing positions. See *Bowman v. National Football League, 402 F. Supp. 754 (D.Minn.1975)*.

The District Judge's findings of fact are not clearly erroneous (*Fed.R.Civ.P. 52(a)*) and the relief he ordered did not constitute abuse of his discretion.

I would affirm the District Judge in granting injunctive relief against Clause 9A.

Shapiro v. General Motors Corp.

United States District Court for the District of Maryland

May 29, 1979

Civ. No. Y-71-1329

Reporter

472 F. Supp. 636 *; 1979 U.S. Dist. LEXIS 12114 **; 204 U.S.P.Q. (BNA) 461 ***; 1979-2 Trade Cas. (CCH) P62,725

Nelson H. SHAPIRO et al. v. GENERAL MOTORS CORPORATION et al.

Core Terms

plaintiffs', patent, licensing, inventions, royalties, antitrust, suppliers, inventors, defendants', Memorandum, target area, innovation, anti trust law, conspiracy, monopoly, manufacturers, negotiations, royalty-free, antitrust violation, prices, policies, seatbelt, Sherman Act, cases, parties, input, direct injury, Clayton Act, automotive, in-house

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Per Se Rule & Rule of Reason, Per Se Violations**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

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

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

In the absence of any purpose to create or maintain a monopoly, the Sherman Act, 15 U.S.C.S. § 1 et seq., 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.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

Private companies have the right, in the absence of any purpose to create or maintain a monopoly, to freely choose the parties with whom they will deal.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A monopoly is said to exist if there is one, and only one, seller in a well-defined market. Oligopoly exists when more than one seller is in the market, but when the number is not so large as to render negligible the contribution of each. Where there is a single buyer of an input a monopsony is said to exist; if there are several buyers oligopsony is the proper designation. It is generally true that since all firms in a given market producing the same product will need similar inputs, one typically finds oligopsony in the input market when there is a corresponding oligopoly in the seller's output market.

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

Patent Law > Double Patenting > General Overview

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

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The antitrust laws do not guarantee inventors returns on their inventions. The patent laws do protect them against free riders for a period of 17 years, allowing, in effect, a statutory monopoly; however, there is no guarantee of financial success.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN6[] Private Actions, Costs & Attorney Fees

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, reads as follows: 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 amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

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

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

HN7[] Private Actions, Remedies

The availability of relief under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, is confined only to those individuals whose protection is the fundamental purpose of the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN8[] Clayton Act, Claims

The key language in § 4 of the Clayton Act, *15 U.S.C.S. § 15*, are the phrases "business or property" and "by reason of," which provide the twin requirements for standing. First, a plaintiff must allege an injury to his "business or property" in a strictly commercial sense. Second, a plaintiff must allege that his injury resulted "by reason of" an antitrust violation. In approaching these requirements analytically, courts have tended to adopt one of two methods of analysis: the "direct injury" and the "target area" approaches.

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

HN9[] Private Actions, Standing

The direct injury test looks primarily at the relationship between plaintiff and the alleged antitrust violator. Under the target area test, a court will look at the effect of the alleged violator's activities within a particular area of the economy in which plaintiff claims to have been harmed: To state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the anti-trust laws.

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

HN10[] Private Actions, Standing

The direct injury test raises the issue as to whether consumers have standing to use the passing-on argument offensively, while the target area test presents complications in both identifying real targets and particular areas of the economy which are affected.

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

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

HN11[] Private Actions, Standing

Any final determination as to standing will necessarily turn on the question of the remoteness of the alleged injury, i.e., the relationship between the alleged antitrust violation and the injury inflicted on plaintiffs. Such a determination must consider not only the policies behind allowing recovery under the antitrust laws but also the complicated interrelationships which arise when antitrust and patent law are presented in the same claim. Plaintiffs have the burden of showing (1) that an antitrust violation occurred, and (2) that they were within the "target area" of the anticompetitive activity.The alleged antitrust violation must yield an injury which is "direct" and not "incidental."

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

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN12[] Standing, Clayton Act

While a rule of reason approach to standing under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, should be used, it a plaintiff not a target of any antitrust violation does not become a target by virtue of the culpability of its lessee, patentee, franchisee, supplier, customer, or debtor.

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

Patent Law > Ownership > General Overview

HN13[] Intellectual Property, Ownership & Transfer of Rights

The patentee receives nothing from the law which he did not have before, and the only effect of his patent is to restrain others from manufacturing, using, or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent.

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

Business & Corporate Compliance > ... > Remedies > Buyer's Damages & Remedies > General Overview

Patent Law > Ownership > General Overview

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

HN14[] **Ownership & Transfer of Rights, Assignments**

The holder of a patent has no greater power to restrict the terms upon which a buyer of the patented product resells at the next vertical level than does the owner of any other product. The patentee can obtain the full reward of the patent in the first sale; a right to restrict the goods in more remote channels of trade is not a traditional part of the patent grant nor is it needed in order for the patentee fully to enjoy the monopoly of the patent.

Patent Law > Ownership > General Overview

HN15[] **Patent Law, Ownership**

The purpose of the patent law is fulfilled with respect to any particular article when the patentee has received his reward for the use of his invention by the sale of the article, and that once that purpose is realized the patent law affords no basis for restraining the use and enjoyment of the thing sold.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

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

Patent Law > Ownership > General Overview

HN16[] **Ownership & Transfer of Rights, Assignments**

In construing and applying the patent law so as to give effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant, the particular form or method by which the monopoly is sought to be extended is immaterial. The first vending of any article manufactured under a patent puts the article beyond the reach of the monopoly which that patent confers. Whether the licensee sells the patented article in its completed form or sells it before completion for the purpose of enabling the buyer to finish and sell it, he has equally parted with the article, and made it the vehicle for transferring to the buyer ownership of the invention with respect to that article. To that extent he has parted with his patent monopoly in either case, and has received in the purchase price every benefit of that monopoly which the patent law secures to him. If he were permitted to control the price at which it could be sold by others he would extend his monopoly quite as much in the one case as in the other, and he would extend it beyond the fair meaning of the patent statutes and the construction which has hitherto been given to them.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Patents as Property

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

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN17[] **Conveyances, Licenses**

A patentee may negotiate for a minimum royalty payment but a court cannot go beyond the agreement of the parties to establish a minimum royalty where the parties themselves fail to provide one. A bargained-for royalty in licensing agreements does not have to meet a test of reasonableness. It would seem that in a setting in which marketplace economics determine the ultimate value of a new invention, and where that value is determined by negotiations freely entered into between the patentee-owner and the licensee-manufacturer, that a given outcome should not be challenged by the courts, absent, of course, any clearly prohibited anticompetitive behavior. The law has already recognized that a licensor is free to exact from his licensee a price as high as he can get, and a corollary of this ruling in a free market setting would be that a licensee should be accorded the right to bargain for as low a price as he can get, up to and including a zero royalty.

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

Estate, Gift & Trust Law > Wills > Will Contests > No Contest Clauses

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

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

Patent Law > ... > Damages > Collateral Assessments > General Overview

HN18[] **Justiciability, Standing**

The scope of antitrust standing should be determined by reference to the special problems created by treble damage actions, such as ruinous or duplicative recoveries. The scope of substantive protection should be determined in each case by analysis of pertinent substantive antitrust policies. The "distinction between direct and indirect injury is arbitrary, even metaphysical, since all antitrust injuries are "direct" to a greater or lesser degree. The real difficulty with these traditional approaches to standing is their failure to take account of all aspects of antitrust policy, including the in terrorem effect of treble damages and "overkill" liability, as well as relevant economic and social policies. Such a policy approach to standing analysis must, of necessity, consider the nature and severity of the alleged injury, the parties involved, and the relationship of all of these to substantive ***antitrust law***.

Counsel: [1]** Melvin J. Sykes, Baltimore, Md., and Robert H. Rines, Boston, Mass., for plaintiffs.

Paul V. Niemeyer and David F. Albright, Baltimore, Md., for defendants.

Opinion by: YOUNG

Opinion

[*639] I. THE FACTS

[*464]** Plaintiffs Board and Shapiro spend their spare time as inventors of automotive seat belt equipment. Plaintiff Board is a practicing psychiatrist, and Shapiro an engineer and a patent attorney. In the mid-1960s, the federal government required the installation of seat belts in all new cars sold in the U.S. market. Plaintiffs Board and Shapiro held patents relating to an automatic seat belt retractor, a device which locks seat belts into place and prevents their slippage while being worn by a passenger. In order to realize a return on their investment in the patented articles, plaintiffs sought to license the articles directly with the nation's major car manufacturers. When they approached General Motors ("GM") in 1963, George Cook, the general director of purchasing, told plaintiffs that they had to talk with Hamill Manufacturing Company ("Hamill"), one of GM's suppliers of various automotive parts. According to Cook, GM did not deal directly with outside inventors, preferring **[**2]** instead to route them through suppliers. Plaintiffs also met with representatives from Chrysler and American Motors and with other suppliers of seat belt equipment, including Borg-Warner, American Safety Equipment Company ("American Safety"), and Irvin Industries.

The major car manufacturers told plaintiffs that to license their seat belt retractor device, they had to negotiate directly with the suppliers rather than with the manufacturers themselves. Consequently, plaintiffs commenced licensing negotiations in 1963 with American Safety and completed these negotiations in 1965. It was in conducting these negotiations beginning in 1963 that plaintiffs first became aware of defendants' policy of requiring royalty-free second source licenses. The practice of insisting upon royalty-free second source licenses is an attempt by the car manufacturers to guarantee a steady supply of particular parts used in their automotive production lines from multiple sources. In exchange for a supplier's receiving a certain share of a car manufacturer's business for a given input, the supplier must sign an agreement releasing the car manufacturer from having to pay any item-by-item royalties on the **[**3]** patented products made by the supplier. The obvious effect of such a policy, regardless of whether it is devised to guarantee a steady supply or for other reasons, is to reduce to zero the royalties which the inventors eventually receive. In other words, from a purely competitive standpoint, a licensee-supplier could not expect to remain in business very long if he agreed to pay royalties to inventors where his competitors did not agree, in effect, to cut their own profits by likewise paying royalties. In concluding a licensing agreement with Hamill in 1965, plaintiffs did agree to relinquish their right to 60% Of the potential royalties.

American Safety constructed and tested manufacturing prototypes of plaintiffs' inventions **[*640]** beginning in 1965, and plaintiffs received some $ 95,000, including a $ 25,000 down payment and minimum royalties under the licensing agreement. In 1966, however, American Safety cancelled the licensing agreement before plaintiffs' inventions were actually marketed.

Plaintiffs then renewed negotiations with Hamill in 1967 but were again confronted with a requirement for a royalty-free license provision for 50% Of the procurement needs **[***465]** of the **[**4]** automobile manufacturers. No license agreement was ever concluded with Hamill.

In 1969 and 1970, plaintiffs again negotiated with Hamill to obtain licensing and to develop commercially plaintiffs' inventions. After several meetings, Hamill finally told plaintiffs that it would be economically unfeasible for them to pay plaintiffs' royalties, because Hamill would be operating at a competitive disadvantage vis-a-vis non-royalty-paying second source licensees designated by Ford and GM.

According to plaintiffs, similar negotiations with American Safety, Hamill, and Irvin Industries resulted in no licenses ever being consummated. In the case of negotiations with Irvin Industries, Irvin requested that plaintiffs agree to granting royalty-free licenses to car manufacturers for 90% Of the manufacturers' procurement requirements for plaintiffs' inventions. This meant that plaintiffs would receive royalties on only 10% Of their inventions. These license negotiations were also unsuccessful.

As plaintiffs conclude in their Memorandum arguing for summary judgment,

> In every instance in which plaintiffs either licensed or attempted to license their inventions to a seat belt supplier of **[**5]** the defendants, plaintiffs were faced with a situation in which, because of the royalty-free, second-source licensing policies of the defendants, the prospect of paying reasonable royalties to plaintiffs was economically unattractive to the supplier.

Plaintiffs' Memorandum at 23. [1] On the basis of this alleged injury, plaintiffs filed a suit in this Court in 1971 against defendants GM and Ford. Contesting the legality of the royalty-free second source licensing policies, plaintiffs charged defendants with engaging in trade practices which restructured the entire industry relationship between inventors, licensee-suppliers, and the automakers. According to plaintiffs, the impact of defendants' policies not only tends to foster backward integration in the auto industry since suppliers must increasingly follow the dictates of the car manufacturers but also encourages a trend away from past practices whereby the auto industry relied heavily on various suppliers to discover inventions having new technology. Whereas at one time outside inventors were the principal sources of innovation in the automotive industry, plaintiffs contend that today any innovations come from in-house **[**6]** staff inventors, and the net result, aggravated by defendants' royalty policies, is to make it economically impossible for suppliers to deal with outside inventors.

Since the case was initially filed in 1971, discovery delays and numerous motions have produced seemingly unnecessary complications. While plaintiffs' theories as to patent-antitrust liability may, to some extent, be novel, the issues presented are not insurmountable. In its current posture, the case is before this Court on cross motions for partial summary judgment. Plaintiffs' complaint includes three counts: Count One alleges antitrust violations; Count Two, by reasserting the allegations of Count One, claims unfair competition; and Count Three states a claim for patent infringement. Only Counts One and Two are the subject matter of the partial summary judgment motions **[**7]** presented at this juncture. Claiming defendants' alleged infractions of the antitrust laws to be Per se violations, plaintiffs seek both treble damages and an injunction against further violations.

[*641] Plaintiffs have moved for summary judgment pursuant to *Rule 56(e) of the Federal Rules of Civil Procedure*, stating that the material facts as pleaded are not in dispute. Defendants have responded but suggest that plaintiffs lack standing to pursue their claims and that plaintiffs' suit is barred by the applicable statute of limitations and the doctrine of laches.

II. EVIDENCE OF CONSPIRACY

This case presents several fascinating issues of antitrust-patent litigation. [2] The essence of plaintiffs' complaint is that defendants' alleged policy of requiring royalty-free second source licensing, in effect, made "the prospect of paying reasonable royalties to plaintiffs . . . economically unattractive to the supplier." Plaintiffs' Memorandum at 23. While this result hurts the plaintiffs financially, they also seek to broaden this Court's conception of the real nature of the Social harm involved by stating that the overall impact of defendants' licensing **[***466]** policy is to damage the **[**8]** "market for innovation" in the entire automobile industry:

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[1] References to "Plaintiffs' Memorandum" hereinafter refer to the Memorandum submitted in support of their motion for summary judgment, filed with this Court on June 15, 1978.

[2] *Article I, § 8, cl. 8 of the Constitution* provides Congress with the authority to grant inventors exclusive rights to their discoveries for limited periods to promote new ideas and innovation. Pursuant to this constitutional grant, Congress passed the Patent Act, *35 U.S.C. §§ 1-293 (1976)*. See Note, Patent Law License Agreements, 18 Vill.L.Rev. 968, 969-70 n.12 (1973).

> Simply stated, defendants have blocked the flow of technological improvements between plaintiffs and automobile buyers, thereby effectively restraining plaintiffs in their efforts to compete in the Market for innovation in original automotive equipment.

Plaintiffs' Memorandum at 26 (emphasis added).

The complaint is artfully phrased, and reading through the various documents filed during the past seven years it becomes apparent that what is actually going on here is an attempt by plaintiffs to make some money on their invention. Both the discovery and their own admissions **[**9]** (see Plaintiffs' Memorandum at 20-23) indicate that they have a relatively weak record in terms of "paying" relationships with suppliers. Consequently, one might suppose that the language about the "market for innovation" is an effort by plaintiffs to temper their profitmaking motives with a general appeal to overall consumer welfare. It would seem, then, that given their theory of harm, plaintiffs have an obligation to explain how their failure to make a significant return on their investment as inventors resulted in an injury to the "market for innovation." What they appear to mean is that without a return for their efforts, they and others like them must give up inventing. As will be discussed in greater detail below, however, the antitrust laws do not automatically guarantee inventors returns for their activities. [3] Insofar as the consumer welfare issue is concerned, it would seem possible for the auto manufacturers to argue that not having to pay royalties might mean lower costs to consumers. If this is so, then plaintiffs should be able to explain how losing them as innovators is more valuable to consumers than paying lower car prices because of defendants' royalty-free **[**10]** licensing policy.

A. Alleged Violations of *Section 1* of the Sherman Act

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, or with foreign nations, is hereby declared to be illegal.

[*642] *15 U.S.C. § 1 (1976)*. Plaintiffs claim that by combining with their suppliers to enforce their royalty-free license policies, **[**11]** defendants have created a Per se violation of the antitrust laws. In paragraph 15 of their complaint, plaintiffs charge that defendants

> have attempted to and have conspired to monopolize and deliberately and by conscious parallelism have monopolized trade and commerce in the automotive industry in said equipment and apparatus by the policies and acts, among others, enumerated above, in violation of the anti-trust laws, including Section 2 of the Sherman Act.

Complaint at 7. In support of their claims, as advanced in their summary judgment motion, plaintiffs refer to a number of the most important antitrust conspiracy cases; however, in most of these instances, their reliance is misplaced since the conduct prohibited in those cases Clearly involved conspiracy. As will be explained below, to this date there has been no colorable showing of a conspiracy in this case, and at this latest stage in the development of this case, plaintiffs' counsel admit as much.

Plaintiffs argue that "(w)here someone else acts in tandem with the malevolent actor, the parties to the combination may have different, and even conflicting goals, but there is still a combination." Plaintiffs' Memorandum **[**12]** at 26. Their reliance on *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, however, is misguided. Parke, Davis was a resale price maintenance case in which the Government had introduced evidence showing that Parke, Davis had actually announced a policy of refusing to deal with retailers who failed to charge the minimum prices required by Parke, Davis. Parke, Davis was active in setting up and maintaining this series of arrangements. As the Court noted, "Each wholesaler was interviewed individually but each was informed that his competitors were also being apprised of this. The wholesalers without exception

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[3] While the primary objective of patent law is the public benefit, Rep. Att'y Gen. Nat'l Comm. to Study Antitrust Laws 224 (1955), it remains generally true that ". . . whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these. * * * " (Footnote omitted). Id. citing *Kendall v. Winsor, 62 U.S. (21 How.) 322, 327-29, 16 L. Ed. 165 (1859)*.

indicated a willingness to go along." *362 U.S. at 33, 80 S. Ct. at 506*. The Court noted a difference between "mere customer selection" and behavior which "created combinations or conspiracies to enforce resale price maintenance." *362 U.S. at 38, 80 S. Ct. at 508*.

[*467]** Given the previous reasoning in *United States v. Colgate, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*, it became evident that what was condemned in Parke, Davis was the particular method used to secure enforcement of the resale price maintenance scheme. The Colgate opinion **[**13]** has become celebrated on the basis of the following key passage:***HN2***[]

> In the absence of any purpose to create or maintain a monopoly, the (Sherman) 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.

250 U.S. at 307, 39 S. Ct. at 468. Thus, under Colgate there was room for an agreement between the manufacturer and retailers to fix retail prices so long as their behavior fell short of becoming a conspiracy. Parke, Davis narrowed the Colgate privilege to the "mere announcement of . . . (the manufacturer's) policy (of not dealing with price cutters) and the simple refusal to deal." *362 U.S. at 44, 80 S. Ct. at 512*. See R. Posner, ***Antitrust Law***: An Economic Perspective 153-56 (1976). [4]

[14]** What happened in Parke, Davis, therefore, was the occurrence of activity which went beyond the limits set in Colgate :

> **[*643]** When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act.

362 U.S. at 44, 80 S. Ct. at 512. The Court held that in "involving the wholesalers to stop the flow of Parke, Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices," Parke, Davis stepped beyond the limitations permitted in *Colgate. 362 U.S. at 45, 80 S. Ct. at 512*. In seeking assurances of compliance as well as the compliance itself, *362 U.S. at 46, 80 S. Ct. 503*, Parke, Davis was found to have organized a price-maintenance combination or conspiracy in violation of the *Sherman Act. 362 U.S. at 47, 80 S. Ct. 503*.

Plaintiffs' reliance on *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, is likewise misplaced. They characterize Klor's **[**15]** as holding that "concerted action to deprive even a single merchant of the goods he needed to compete effectively was a Per se violation." Plaintiffs' Memorandum at 31. Although technically accurate, this assessment ignores the fact that Klor's involved a group boycott of proportions not alleged in the instant case:

> Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products.

359 U.S. at 212-13, 79 S. Ct. at 710. While it remains true that the Sherman Act "has consistently been read to forbid all contracts and combinations "which "tend to create a monopoly," " whether "the tendency is a creeping one' or "one that proceeds at full gallop,' *International Salt Co. v. United States, 332 U.S. 392, 396 (, 68 S. Ct. 12, 92 L.*

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[4] Posner notes that some commentators believe that the implicit theory in Parke, Davis is that the combination between Parke, Davis and its wholesalers resembled a boycott, which is a Per se violation of the Sherman Act. Posner questions this since resale price maintenance is also a Per se violation. R. Posner, Supra, at 155-56. Colgate has been traditionally criticized on the grounds that it weakens the Per se prohibition against resale price maintenance first enunciated in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*.

Ed. 20)." 359 U.S. at 213-14, 79 S. Ct. at 710, as in Parke, Davis, the anticompetitive behavior condemned in Klor's had the characteristics of the type of public wrong proscribed by the Sherman Act.

The list of cases cited by plaintiffs includes **[**16]** some of the most noteworthy precedents in antitrust jurisprudence, yet in the case of virtually every alleged violation market exclusion, blocking entry, and creating "bottlenecks" plaintiffs' allegations describe defendants' behavior in purely conclusory terms so as to make defendants' behavior appear to fit within a given anticompetitive practice.

1 Market exclusion. On this point, plaintiffs cite *American Federation of Tobacco Growers, Inc. v. Neal, 183 F.2d 869 (4th Cir. 1950)*, where the violation consisted of defendants allotting selling time on a tobacco auction market so as to exclude plaintiff, a tobacco farmers' cooperative, from the local market and effectively from competing against defendants, the Danville Tobacco Association. What the court condemned was the concerted behavior of "tobacco warehousemen who use their organization **[***468]** into a board of trade to monopolize the time of the tobacco buyers allotted to the market and thus to exclude another warehouseman from competing on the market with them." *183 F.2d at 873*. See also *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)* (contract requirements and agreements of exclusive dealing condemned). [5] While **[**17]** market exclusion may describe the impact of defendants' policies upon plaintiffs, there has been no evidence of the sort of "concerted behavior" prohibited in American Federation.

[*644] 2 Blocking entry. Plaintiffs adopt a "but for" argument (Plaintiffs' Memorandum at 23, 49 & 50) to the effect that they would have received royalties and, implicitly, licenses with suppliers, had defendants not engaged in illegal pricing activities. In *Parmelee Transportation **[**18]** Co. v. Keeshin, 144 F. Supp. 480 (N.D.Ill.1956)*, *Aff'd, 292 F.2d 794 (7th Cir. 1961)*, plaintiffs argued that defendants Deliberately closed to them competition in "an important field of interstate commerce," *144 F. Supp. at 484*, and defendants claimed that by conspiracy or otherwise, the railroads might have awarded the terminal contract to a party other than plaintiffs. In refusing to dismiss the complaint, the court stated:

> It is beyond the power of the plaintiff, or anyone else, to say now with certainty what might or might not have happened had the conspiracy not intervened. Facts have been alleged from which it would be possible and reasonable to draw the inference that the contract would have been awarded to plaintiff but for the wrongful conduct of the defendants. This is sufficient.

144 F. Supp. at 485-86. Again, however, Parmelee involved significantly more "deliberate" behavior than the instant case. See also *United States v. General Dyestuff Corp., 57 F. Supp. 642 (S.D.N.Y.1940)*. While it is true that "(n)either the letter of the law nor its purpose "distinguishes between strangling of commerce which has been born and preventing the birth of a commerce which **[**19]** does not exist,' " *United States v. United Shoe Machinery Co., 247 U.S. 32, 53, 38 S. Ct. 473, 480, 62 L. Ed. 968 (1918)*, it can be questioned whether plaintiffs accurately characterize themselves as being engaged in "commerce" in the traditional sense as that word is used in the antitrust laws. For example, does it even make sense to talk of excluding inventors from a market? Unless the inventor manufactures and sells his invention himself, it is not immediately clear how an inventor is being "excluded" from a market or even from entering into commerce. While an inventor would undoubtedly have a financial interest in whatever royalties were generated once his invention were licensed and marketed, unless he manufactured the invention himself (which plaintiffs Board and Shapiro do not), it is doubtful that the inventor could allege that the "birth of a commerce" had been aborted. [6] As the court in Raitport v. General Motors, No. 73-2054 at

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[5] The Karseal court also reaffirmed the "target area" doctrine as to proximate cause in an antitrust injury:

the rule is that 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. *Loeb v. Eastman Kodak Co., 3 Cir. 1910, 183 F. 704*; *Gerli v. Silk Ass'n of America, D.C.S.D.N.Y.1929, 36 F.2d 959*; *Corey v. Boston Ice Co., D.C.Mass.1913, 207 F. 465*; *Conference of Studio Unions v. Loew's, Inc., supra (9 Cir., 1951, 193 F.2d 51*).

221 F.2d at 363.

[6] This issue will be treated in considerable detail in the discussion of antitrust standing, Infra.

5 (E.D.Pa.1975), *Aff'd, 547 F.2d 1163 (3rd. Cir. 1976)*, Cert. denied, *431 U.S. 932, 97 S. Ct. 2639, 53 L. Ed. 2d 248 (1977)*, said with respect to a similar claim to the effect that defendant car manufacturers were restraining new companies from **[**20]** entering the automotive components market, neither plaintiff nor any other automotive component "inventor-entrepreneur" has a federally guaranteed right to have his business proposals accepted and financed by private automotive companies. Moreover, the Supreme Court has long recognized ***HN3***[] the right of private companies, in the absence of any purpose to create or maintain a monopoly, to freely choose the parties with whom they will deal. *United States v. Colgate & Company, 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*.

In *Gamco, Inc. v. Providence Fruit and Produce Building, 194 F.2d 484 (1st Cir. 1952)*, the court noted that "(t)he (Sherman) Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones." *194 F.2d at 487*. Articulating the appropriate standard for assessing market exclusion, Judge Clark observed that "(t)he conjunction of power and motive to exclude **[**21]** with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *194 F.2d at 488*. Yet in Gamco, the exclusion affected defendant's com **[***469]** petitors directly, whereas to speak of the automakers and plaintiffs as direct competitors is to engage in an exaggeration.

[*645] On the other hand, plaintiffs and defendants may "compete" to the extent that defendants maintain in-house inventors. In the area of creative innovation, however, the traditional concepts of competition and market behavior seem misplaced. Although Ford and General Motors maintain their own in-house inventors, it seems unlikely that the automakers would rely on their own staffs entirely. New ideas in the automotive field can emerge from noncompany private "Edisons" as well as from company employees, and to the extent that the automakers utilize inventions from men like Board and Shapiro, they may in fact be able to pick and choose among new ideas until they discover what they want. Moreover, they can select from among private inventors' inventions without having to put these inventors on the company payroll. While the patent **[**22]** licensing system prevents companies from thereby getting a "free ride" from others' inventions, it is not at all clear as to whether the use of private inventions is cheaper, even with the royalties, than having in-house inventors. [7] Whether or not the use of private inventors is cheaper than in-house inventors, the use of the latter can be justified not on grounds of excluding people like Board and Shapiro, but rather because the automakers' in-house staff can concentrate on providing inventions which satisfy the automakers' technological requirements at a given time, whereas 100% Reliance on private sources may prove detrimental to the industry (and the public) as a whole. Once a given product proves useful, like retractable seat belts, "backward integration" whereby the defendants would manufacture the input themselves may prove cheaper than dealing with a supplier. However, it is clear that backward integration does not follow automatically in all cases, otherwise Ford and GM would manufacture all of their own inputs, and "suppliers" as such would cease to exist. The thrust of this argument is towards one simple, pragmatic point: innovation, like creativity generally, is a **[**23]** fanciful, unpredictable gift, and plaintiffs' argument that defendants are trying to drive them out of or exclude them from the so-called market for innovation makes little sense. There would be no rational reason for defendants to exclude anyone from such a market because at any given time and for any patented input there is never any guarantee that in-house research and development will be better or cheaper or more successful than research and development supplied by private noncompany inventors. It cannot be seriously stated that defendants want to eliminate a source of potential benefit to themselves.

[24]** Plaintiffs cite *Gamco, supra*, for the view that

> a firm that controls a market must treat those within it evenhandedly. Where a firm gains value from innovation which it adopts for its own use, it must pay for that innovation. Certainly defendants pay their own in-house researchers. To refuse to pay outsiders for their innovation is to destroy those outsiders as competitors, in favor of the defendants' own in-house inventors.

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[7] At issue here obviously is the difficulty in assessing both the costs of arriving at an invention and the means of providing an appropriate return on the investment undertaken. This problem is complicated whenever a vital product is discovered by accident or as a spin-off from research designed to produce something completely different. For an example involving "teflon" see W. S. Bowman, Jr., Patent and ***Antitrust Law***: A Legal and Economic Appraisal 39 (1973).

Plaintiffs' Memorandum at 46. Plaintiffs are not being destroyed by defendants' refusal to pay them royalties. If anything, plaintiffs are either bad businessmen, poor negotiators, excessively profit-motivated, or all three. The patent laws protect their inventions, and they remain free to charge what they can get for their ideas. If they do not like the price, they simply do not have to sell. An aggrieved prospective purchaser will either do without the input or find available substitutes, possibly through "inventing around" the patent.

3. Bottlenecks. Related to plaintiffs' claim of market exclusion is their assertion that defendants control the market for innovation, **[*646]** thereby constituting a "bottleneck." Plaintiffs' Memorandum **[**25]** at 47. They elaborate upon this claim, explaining that the "theory provides that where a firm controls an essential stage of the production or distribution of a good and it competes at another level of production, it will be guilty of a Section 2 violation if it forecloses in any way access by its competitors to the essential stage." *Id. at 47*. [8] As authority, plaintiffs **[***470]** cite, inter alia, Gamco which is inapposite for the reasons discussed above, and *Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958)*, which is likewise poor authority to cite in connection with the evidence in this case. In Packaged Programs, the defendant Already possessed a lawful telecasting monopoly and was using that monopoly power to create illegal monopolies elsewhere.

[26]** Lastly, reference should be made to plaintiffs' citation of *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*: "In applying the rule of reason, the touchstone is that the Sherman Act covers all conceivable conduct which could possibly come within its spirit or purpose." Plaintiffs' Memorandum at 42. Standard Oil is one of the most monumental of antitrust cases. According to this Court's reading of the case, plaintiffs' statement inverts what Justice White was really saying for what he actually said was that because the Sherman Act was worded so broadly, it could cause "any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade." *221 U.S. at 60, 31 S. Ct. at 516*. Because of this potential breadth of coverage, Justice White advocated a rule of reason approach for non-Per se cases and called for the "exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated." *221 U.S. at 60, 31 S. Ct. at 516*. Through Standard Oil and **[**27]** his opinion in *United States v. American Tobacco Co., 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911)*, Justice White gave content to the rule of reason approach to antitrust liability in a three-part form: (1) the "inherent nature" or Per se concept of illegality; (2) the "inherent effect" or market power concept; and (3) the evident purpose or specific intent concept. See R. H. Bork, The Antitrust Paradox: A Policy At War With Itself 37 (1978). Among the major attributes of Justice White's opinion is that it showed concern "that the statute not interfere with means of creating efficiency or with market structures that resulted from efficiency." R. H. Bork, Supra, at 34. Consequently, Standard Oil does not support an expansive application of the Sherman Act but rather suggests an application which, in non-Per se cases, is sensitive to the preservation of economically efficient market structures wherever possible. Although plaintiffs have claimed a Per se violation by defendants, they have failed to provide evidence of a conspiracy to violate the antitrust laws. The evidence presented thus far demonstrates that Ford and GM did insist upon the royalty-free second source licensing **[**28]** policy; however, the mere existence of the requirement does not automatically compel the conclusion that a conspiracy was presented or that the requirement otherwise violates the antitrust laws.

At the hearing on the cross motions for partial summary judgment, plaintiffs' counsel presented considerable evidence establishing that Ford and GM insisted that their suppliers agree to the royalty-free paid up license provisions. [9] Summarizing numerous **[*647]** deposition statements, contract provisions and other documents

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[8] Section 2 of the Sherman Act reads as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[9] The evidence consisted of portions of the depositions of various officials from Ford and GM, including Messrs. Desmarais, Cook, and Fisher who were intimately involved in or knowledgeable about the automakers' patent licensing policies, as well as licensing agreements, correspondence, and an internal Ford Supply Manual outlining the procedures for negotiation of license

discovered during the seven years since this case began, plaintiffs' counsel succeeded in showing that the royalty-free policies existed but not that there was any form of conspiracy between the automakers. At one point during the hearing, plaintiffs' counsel indicated that the record showed that Ford and GM purchase more than three-quarters of all seat belt equipment installed in American cars and between the two of them make three-quarters of all American cars. These observations were made to show that parallel policies exist resulting in independent inventors being prevented from dealing with the relevant market. Yet, when the Court further inquired as to whether **[**29]** there was any indication that this result was a mere happenstance or the consequence of an actual conspiracy, plaintiffs' counsel responded:

> We have no proof of conspiracy. We just say it is a very strange thing that the **[***471]** two giants having some common suppliers of the same product and substantially the same equipment, and even as Mr. Cook says, sometimes possibly interchanging the use of tools, vice versa that they should come up with all the same kind of requirements, those requirements being **[**30]** free licenses, ownership of tools. . . .

Transcript of Hearing on cross motions for summary judgment at 20 (Oct. 20, 1978).

Judging from this candid response as well as from the evidence presented thus far, the true nature of plaintiffs' substantive antitrust argument is not the existence of a conspiracy but the presence of consciously parallel behavior as manifested in the royalty-free second source licensing policy. Both parties have raised the issue of "conscious parallelism" in their memoranda. Conscious parallelism, also known as the "interdependence theory" of oligopoly pricing, refers to the situation alleged to result in markets where there are a few sellers and where, though lacking an express agreement, the sellers appear to establish their prices in a "consciously parallel" fashion. See generally, R. Posner, Antitrust 115-27 (1974). Allegations of conscious parallelism have generally been considered in the light of Justice Clark's famous remarks in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 259-260, 98 L. Ed. 273 (1954)*:

> The crucial question is whether respondents' conduct toward petitioner stemmed **[**31]** from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.
>
> But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but, "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely. * * *

Justice Clark's approach to the conscious parallelism problem is still valid, although there have been recent signs that antitrust officials will begin prosecuting in the near future the first of a series of "shared monopoly" cases involving large companies in concentrated industries. See, e.g., Ignatius, Taking Aim at "Shared Monopolies,' Wall St.J., Aug. 22, 1978, at 18, col. 4. In light of the uncertain success which the Justice Department is likely to have as well as the absence of any departure from the traditional approach to conscious parallelism, for **[**32]** the purpose of this case, Justice Clark's reasoning is still valid.

[*648] III. THE ECONOMICS OF PLAINTIFFS' POSITION

In light of the discussion as to the nature of the alleged harm complained of in this case and because the antitrust laws have as one of their primary goals the promotion of economic efficiency, See R. H. Bork, Supra, at 91-92, it is instructive to examine several of the economic issues presented.

A. Monopsony and Oligopsony

What is unusual about this case is that it appears to present an example of monopsony rather than monopoly, and this feature serves to complicate not only the legal analysis but the economic and policy aspects of the case as

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agreements. The highlighted portions of these documents demonstrate the existence of the policy but do not indicate the presence of a conspiracy.

well. *HN4*[] A monopoly is said to exist "if there is one, and only one, seller in a well-defined market." C. E. Ferguson, Microeconomic Theory 284 (1972). Given that neither Ford nor GM alone manages to account for more than half of the total U.S. automobile market, what we would ordinarily have, from a seller's perspective, is an oligopoly. Oligopoly exists "when more than one seller is in the market, but when the number is not so large as to render negligible the contribution of each." C. E. Ferguson, Supra, at 334. **[**33]** In this case, however, plaintiffs are alleging that defendants' behavior as Purchasers of inputs for their final products rather than their behavior as sellers to the public constitutes the gravamen in violation of the antitrust laws. "Where there is a single buyer of an input a Monopsony is said to exist; if there are several buyers Oligopsony is the proper designation." C. E. Ferguson, Supra, at 436. It is generally true that since all firms in a given market producing the same product will need similar inputs, one typically finds oligopsony in the input market when there is a corresponding oligopoly in the seller's output market. K. Lancaster, Introduction to Modern Microeconomics 232 (1969). Ford and General Motors would fit this characterization given their large market shares in the U.S. car market. That it is this alleged monopoly in the input market (monopsony) which is the heart of plaintiffs' complaint is apparent from the following passage in their memorandum: **[***472]**

> In the usual price-fixing case, the producer is accused of fixing the prices charged to its customers higher than would be charged under unrestrained conditions. In this case, Ford and GM fix the prices **[**34]** they Pay the suppliers for innovation at a rate Lower than would be set under unrestrained conditions. But since it is the buyers (the defendant automobile companies), rather than the sellers, who are exercising monopoly power in this case, it is not surprising that the price-fixing results in lower prices to the buyers, rather than higher prices to the sellers.

Plaintiffs' Memorandum at 40. In this passage, plaintiffs come very close to admitting that the royalty-free licensing policy means lower consumer prices. This result would follow in the event that the automakers passed on these savings directly to consumers. In light of this situation, plaintiffs bear a substantial burden in answering two crucial questions: (1) Can they show unambiguously that Ford and General Motors actually conspired to fix the prices at which they purchased their inputs? In other words, if there is no conspiracy or agreement to fix prices, were not the major car manufacturers behaving as rational economic decisionmakers in bargaining with their suppliers (plaintiffs' licensees) to secure the seat belt retractors at lower prices? and (2) Without evidence of a conspiracy, are not the plaintiffs **[**35]** simply presenting a case to the effect that they have been outbargained? Does not the royalty-free policy benefit consumers? Abandoning the royalty-free licensing policy would undoubtedly raise prices for defendants, and, just incidently, line plaintiffs' pockets.

Plaintiffs clearly want to extend the reasoning of *Parke, Davis, supra*, to the facts of this case. They argue, for example, that "GM forced its suppliers to negotiate With each other to shield GM from making payments for innovation. Each supplier knew that the policy applied to all suppliers, and acquiesced in the plan." Plaintiffs' Memorandum at 30. (Emphasis added). **[*649]** Although plaintiffs are absolutely correct as to the impact of defendants' pricing policy, it does not follow necessarily that a negative impact upon plaintiffs is necessarily the type of behavior automatically proscribed by the antitrust laws. Similarly, plaintiffs argue that "(e)ven though the wholesalers were duped, the Court found that the use by one company of other companies to carry out its plan is a conspiracy within the meaning of *Section 1* of the Sherman Act." Plaintiffs' Memorandum at 29. While this passage accurately characterizes **[**36]** the outcome in Parke, Davis, it is only relevant here to the extent that the Court finds facts evidencing a clear plan. In Parke, Davis there was considerable correspondence establishing the alleged conspiracy. There have been no such incriminating materials in this case.

Another difference from Parke, Davis, to be discussed in more detail below in connection with standing, is the element of indirectness which permeates this entire case. Many of plaintiffs' arguments sound as if they really should be made on behalf of the licensees who actually supply the seat belt apparatus to Ford and GM. Plaintiffs argue, for example, that

> By making it impossible for their seat belt suppliers to pay reasonable royalties to independent inventors for innovative contributions to the original automotive equipment art, defendants have deprived plaintiffs of their livelihood from their trade and business of inventing and marketing inventions and have deprived the car-buying public of the benefits of plaintiffs' inventions.

Plaintiffs' Memorandum at 27. In a typical passing-on situation, one party is attempting to recover damages based on the fact that the antitrust violation occurred **[**37]** further upstream in the chain of dealing. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*, Reh. denied, *393 U.S. 901, 89 S. Ct. 64, 21 L. Ed. 2d 188 (1968)*. At issue then is the question of the remoteness of the alleged injury from the occurrence of the alleged violation. Usually in a passing-on situation, the injury results from higher prices being passed along the chain of distribution to consumers. In an oligopsony setting, however, plaintiffs would be arguing in effect that Lower prices for inputs were being passed on and had an effect which was detrimental to their business. This situation might be termed a "pass-back" since the presence of oligopsonistic conditions means that lower prices (as plaintiffs argue) for the input prevent the plaintiffs from even getting a foot in the door of the relevant market. [10]

[38]** **[*650]** B. Plaintiffs' Economic Analysis

At several points in their memorandum in support of their motion for summary judgment, plaintiffs advance a number of economic arguments of questionable validity. As these arguments touch substantially on the nature of the injury which plaintiffs alleged, as well as on their claim that they have standing, the Court will consider them briefly in light of the economic, legal, and policy issues which they raise.

1. "It is a simple fact that the royalty-free license policies of the defendants have shifted from the inventor to the defendants the profit associated with inventing." Plaintiffs' Memorandum at 37. While it is evident that plaintiffs are losing out here, it does not necessarily follow that defendants pocket the royalty. Although Ford and GM do not have to pay the royalty, it seems to be a meaningless distinction as to whether that money fills the coffers of the car manufacturers or rather permits them to charge less for their cars.

2. "Faced with the unreasonable restraints of having to grant free licenses to competitors, a policy dictated by the defendants, the seat belt suppliers were hardly in a position to deal fairly and **[**39]** at arm's length with plaintiffs." Plaintiffs' Memorandum at 36. The suppliers are not being hurt, apparently, so the reference to fairness and arm's length dealing is not entirely clear. As defendant GM points out in its Memorandum in support of its motion for

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[10] In their briefs, both sides have addressed the various issues raised in this case which are similar to those presented in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Illinois Brick held that the pass-on theory, rejected as a proper defense in *Hanover Shoe, supra*, could not be asserted offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant). *431 U.S. at 726, 97 S. Ct. 2061*. In rejecting the offensive use of passing-on, the court noted that to do otherwise would be to run the risk of duplicative recoveries as well as to complicate the "evidentiary complexities and uncertainties" involved in proving an offense. *431 U.S. at 732, 97 S. Ct. 2061*. With regard to the enforcement policies of the antitrust laws implicated by restricting recovery to direct purchasers only, the court said:

(w)e understand Hanover Shoe as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

431 U.S. at 734, 97 S. Ct. at 2069.

[*473]** On its face, although the court specifically stated that the outcome did not turn on the matter of standing, *431 U.S. at 728 n.7, 97 S. Ct. 2061*, Illinois Brick appears relevant to the instant case, especially as a precedent for defendants. Plaintiffs would minimize its impact by referring to the possibility of Congressional modifications, while defendants cite it but without fully or precisely explaining its relevance. Here, what is being passed-on is lower prices rather than higher ones, and unlike the Illinois Brick situation, recovery would not be concentrated on the intermediate party (I. e., the licensees) since that party has accepted the royalty-free policy. This Court notes the relevance of Illinois Brick in light of what may be called the "pass-back" present in this case. Since the presence of a patent context is vital to understanding the relevant antitrust policies to be applied in this oligopsony context, the value of Illinois Brick as a precedent must await further clarification by the Supreme Court. The standing tests considered Infra are sufficient to dispose of the issues presented in this case, and the Court is mindful of the Supreme Court's distinction that "the question of which persons have been injured by an illegal overcharge (read "undercharge" here) for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." *431 U.S. at 728, n.7, 97 S. Ct. at 2066, n.7*.

summary judgment, at 22, it would appear that what plaintiffs are really complaining about is the price term I. e., that they are not receiving enough money in order to compensate them adequately for their investment.

3. "By requiring royalty-free licenses, the defendants effectively set the price of innovation under such licenses at zero." Plaintiffs' Memorandum at 39. Is it not the case that every inventor who fails to license or market his innovation or invention achieves a zero return insofar as his "price of innovation" is concerned? ***HN5***[] The antitrust laws do not guarantee inventors returns on their inventions. The patent laws do protect them against free riders for a period of seventeen years, allowing, in effect, a statutory monopoly, *United States v. E. I. DuPont de Nemours & Co., 118 F. Supp. 41 (D.Del.1953)*, *Aff'd, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1955)*; [11] however, there is no guarantee of financial **[**40]** success. See generally, W. S. Bowman, Supra at 1-9.

4 "Defendants' policies also have an indirect effect upon the price to be paid for inventions, and that effect has been declared unreasonable per se by the Supreme Court. The case of the *United States v. General Motors Corp., 384 U.S. 127 (86 S. Ct. 1321, 16 L. Ed. 2d 415) (1966)*, furnishes an example." Plaintiffs' Memorandum at 39. The directness of the effect will be considered below as part of the standing analysis. One can read General Motors, however, to support a distinction similar to that offered above in connection with Klor's and Parke, Davis based upon substantially different facts being proved. In General Motors, the anticompetitive behavior involved was a classic conspiracy in restraint of trade involving joint, collaborative behavior by dealers, associations and GM to eliminate **[**41]** a group of competitors and to deprive franchised dealers of the freedom to deal with discounters. *384 U.S. at 138-48, 86 S. Ct. 1321*. **[***474]** At issue was the restrictiveness of a particular "location clause" which GM attempted to enforce. Again, since the pattern of behavior here is admittedly different, **[*651]** plaintiffs' reliance on General Motors is necessarily undermined.

5. "In this case, each defendant has total control over the decision as to what technology is embodied in its cars and each maintains research staffs in competition with outside inventors providing that technology. It is encumbent upon defendants not to use their strategic dominance to favor their in-house staffs." Plaintiffs' Memorandum at 47. This assertion is totally without merit and amounts to stating that although defendants have invested substantial capital in creating their own in-house inventors, this house staff should not receive any special consideration and should be forced to compete against itself! In other words, plaintiffs want to compete against defendants' house inventors upon the condition that the latter do so with one hand tied behind their backs. The Supreme Court has already noted thirty **[**42]** years ago that

> The development of patents by separate corporations or by cooperating units of an industry through an organized research group is a well known phenomenon. However far advanced over the lone inventor's experimentation this method of seeking improvement in the practices of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research.

United States v. Line Material Co., 333 U.S. 287, 310, 68 S. Ct. 550, 562, 92 L. Ed. 701 (1948).

IV. WHETHER PLAINTIFFS LACK STANDING

It is now clear that not every economic injury to a competitor will give rise to a colorable antitrust violation. In *Hawaii v. Standard Oil Company of California, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, the Supreme Court stated that "(t)he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *405 U.S. at 263, n.14, 92 S. Ct. at 891-892, n.14*. Furthermore, it should be remembered that the antitrust laws exist to protect competition **[**43]** and not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 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)*. See also R. H. Bork, Supra, at 58. By not receiving royalties for the use of their

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[11] The patent laws guarantee a patentee the right to "exclude others from making, using, or selling the invention throughout the United States." *35 U.S.C. § 154*.

inventions, plaintiffs are undoubtedly denied the "profit" which they claim is the only incentive for innovation. But as one commentator has remarked:

> All investments are uncertain, all involve risks, and all would be increased if they were made more remunerative. A rational patent system should be able to identify the unique attributes of investment in ideas which qualify them for special treatment as opposed to investment in alternatives.

W. S. Bowman, Supra, at 18. Without opining as to whether the patent system generally undercompensates or overcompensates innovation, it will suffice to observe that seeking patent reward is inextricably connected with the economy's profit system and necessarily involves uncertainty, "uninsurable risks," and what has been called a "moral hazard." See W. S. Bowman, Supra, at 28. Damages in patent litigation will necessarily influence not **[**44]** only the cost of engaging in innovative activity but likewise the costs incurred by society either in purchasing the fruits of that activity or in being deprived of access to such fruits. One commentator has observed, that "(t)he law lets the marketplace determine the value of a new invention and protects the right of the patent owner to receive this value as his reward for his technological advance." J. G. Van Cise, Understanding The Antitrust Laws 187 (1973 ed.).

A. Generally. ***HN6***[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, reads as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may **[*652]** 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 amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

Taken literally, this language could provide relief to all persons whose injuries were in the least amount causally related to an antitrust violation. The courts, however, have refused to adopt such a broad approach. **[**45]** See, e.g., *Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910)* (limiting standing under section 7 of the Sherman Act, predecessor of section 4 of the Clayton Act). Cf. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534, 38 S. Ct. 186, 62 L. Ed. 451 (1918)*. See also L. Green, The Rationale of Proximate Cause 122-23, 195-97 (1927); Polock, The "Injury" and "Causation" Elements of a **[***475]** Treble-Damage Antitrust Action, 57 Nw.U.L.Rev. 691, 697-700 (1963). As the Ninth Circuit Court of Appeals has commented:

> a measured approach has prevailed; courts have impressed a standing doctrine so as to confine ***HN7***[] the availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws. Cf. *Barlow v. Collins, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970)*; *Association of Data Processing v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)*; *Mount Clemens Industries, Inc. v. Bell, 464 F.2d 339, 341-44 (9th Cir. 1972)*. Unfortunately, no "bright line" has yet emerged to divine this group, and courts have formulated varied definitions.

In re Multidistrict Vehicle Air Pollution M. D. L. No. 31, 481 F.2d 122, ***[**46]*** *125 (9th Cir.)*, Cert. denied, *414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973)*. ***HN8***[] The key language in Section 4 has been the phrases "business or property" and "by reason of," which provide the twin requirements for standing. First, a plaintiff must allege an injury to his "business or property" in a strictly commercial sense. See *Hawaii, supra, 405 U.S. at 264, 92 S. Ct. 885* (the words "business or property" refer to commercial interests or enterprises). Second, a plaintiff must allege that his injury resulted "by reason of" an antitrust violation. *Hawaii, supra, 405 U.S. at 263-64, n.14, 92 S. Ct. 885*. In approaching these requirements analytically, courts have tended to adopt one of two methods of analysis: the "direct injury" and the "target area" approaches. [12] See generally L. Sullivan, Antitrust § 227 (1977); A. Stickels,

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[12] The In re Multidistrict Court provided a summary as to how the various circuits had approached this analysis:

We do not mean to imply that each circuit falls neatly into one of the two pigeonholes. Only the Eighth Circuit and ours, for example, have consistently followed the "target area" approach, E.g., *Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970)*; *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-689 (8th Cir. 1966)* (Blackmun, J.), and even they have diverged occasionally. E.g., ***Perkins v. Standard Oil Co., supra, note 6 (396 F.2d 809 (9th Cir. 1968))***. The

Federal Control of Business: Antitrust Laws § 187 (1972); Sherman, **[*653]** Antitrust Standing: From Loeb to Malamud, 51 N.Y.U.L.Rev. 374 (1976); Lytle & Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am.U.L.Rev. 795 (1976). One court has even adopted the **[**47]** "zone of interests" standing test to be considered in more detail Infra. *Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975)*.

[48]** B. The Direct Injury and Target Area Tests

HN9[] The direct injury test looks primarily at the relationship between plaintiff and the alleged antitrust violator. This test has spawned concern over whether an injury is the direct, indirect, consequential or remote result of the alleged violator's behavior and has been most recently treated from the perspective of "passing-on" in the Illinois Brick decision, Supra. Under the target area test, a court will look at the effect of the alleged violator's activities within a particular area of the economy in which plaintiff claims to have been harmed:

> (T)o state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the anti-trust laws.

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), Cert. denied, *342 U.S. 919, 72 S. Ct. 367, 96 L. Ed. 687 (1952)*. It is obvious **[**49]** that the elements of proof required will vary depending on which test is applied. ***HN10***[] The direct injury test raises the issue as to whether consumers have standing to use the passing-on argument offensively, while the target area test presents complications in both identifying real targets and particular areas of the economy which are affected.

In *Perkins v. Standard Oil Co. of California, 395 U.S. 642, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)*, Reh. denied, *396 U.S. 871, 90 S. Ct. 36, 24 L. Ed. 2d 126 (1969)*, the Supreme Court considered whether "fourth level" price discrimination was forbidden under Section 2 of the Clayton Act, as amended by *Section 13* of the Robinson-Patman Act, *15 U.S.C. § 13*. The Supreme Court reversed the Ninth Circuit which had decided the question in the negative, noting that the direct-indirect "limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act." *395 U.S. at 647, 89 S. Ct. at 1874*. The Ninth Circuit has read this opinion (although not speaking directly to Section 4 of the Clayton Act) as constituting direct support for use of the target area test instead of the direct injury test. In *In re Multidistrict, **[**50]** supra*, it said:

> To attain standing, a plaintiff must thus allege that the anti-trust violation injured a commercial enterprise of the plaintiff in the area of the economy in which the elimination of competition occurred. Standing is denied, on the other hand, if the claimant's commercial activity occurred outside that area of the economy.

First, Third, Sixth and Tenth Circuits on the other hand, generally apply the test we label "direct injury." E.g., *Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir. 1973)*; *Kauffman v. Dreyfus Fund, 434 F.2d 727, 732-734 (3d Cir. 1970)*, cert. denied, ***401 U.S. 974, 91 S. Ct. 1190, 28 L. Ed. 2d 323 (1971)***; *Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-395 (6th Cir. 1962)*; *Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299 (D.Mass.)*, aff'd Per curiam, *242 F.2d 758 (1st Cir.)*, cert. denied, ***355 U.S. 828, 78 S. Ct. 38, 2 L. Ed. 2d 41 (1957)***. The Second, Fourth and Fifth Circuits have formulated their own particular mixtures of the two tests, E.g., *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971)*; *Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967)*; *South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966)*, although the approach of the Second more closely resembles the "direct injury" test and that of the Fourth and Fifth, the test of "target area". The Seventh Circuit's approach is uncertain, although it appears closer to "target area". Compare *Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958)* *With Congress Building Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957)*. In ascribing positions to the various circuits, we have ignored self-descriptions and have attempted to analyze their actual approaches.

481 F.2d at 127, n.7.

481 F.2d at 128. [13] Referring to the target area approach as being "logical and flexible," 481 F.2d at 128, the court, reversing in part the district court, held that crop farmers did not have standing to allege that auto manufacturers had conspired

[51]**

> (a) To eliminate all competition among the automobile manufacturers in the research, development, manufacture and installation of motor vehicle air pollution equipment;
>
> **[*654]** (b) To eliminate competition . . . in the purchase of patents and patent rights from other parties covering motor vehicle air pollution equipment.

481 F.2d at 129. In denying standing under Section 4, the court noted that:

> Perkins therefore clarifies any ambiguity inhering in Hawaii's failure to adopt expressly either of the two predominant judicial glosses on the language "by reason of". By repudiating all those aspects of the "direct injury" test that distinguish it from the "target area" approach, and by embracing and applying the latter, the Court in Perkins, at least inferentially, impresses its imprimatur upon the "target area" approach articulated by this court: a plaintiff has standing under section 4 of the Clayton Act if the claimed losses fall "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." E.g., *Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970)*; *Hoopes v. Union Oil Co., 374 F.2d **[**52]** 480, 485 (9th Cir. 1967)*; *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)*; *Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951)* **[***476]** , cert. denied, *342 U.S. 919, 72 S. Ct. 367, 96 L. Ed. 687 (1952)*. A proper application of "by reason of" focuses on whether the anti-competitive conduct directed against an area of the economy injured business operations conducted by the claimant in that sector of the economy. The resulting two-step approach first requires identification of the affected area of the economy and then the ascertainment of whether the claimed injury occurred within that area.

481 F.2d at 129. Although plaintiffs were denied standing under the target area test, the Ninth Circuit threw in a footnote which spoke to certain other possible plaintiffs:

> Examples of plaintiffs falling within one or more of these markets, as appellants concede, include an alleged inventor and a manufacturer of motor vehicle air pollution control equipment who claim losses from asserted inability to market their devices.

481 F.2d at 129, n.10.

Plaintiffs Board and Shapiro rely on In re Multidistrict as "clear precedent for (their having) standing **[**53]** in this case." Plaintiffs' Reply Memorandum at 17. They assert that the words "seat belt" can be substituted for "air pollution" in the above-quoted passage **[***477]** (481 F.2d at 129, n.10), placing plaintiffs clearly within the target area. Furthermore, plaintiffs cite the fact that in In re Multidistrict, even the crop farmers were found to have standing to seek equitable protection under Section 16 of the Clayton Act. 481 F.2d at 131. On its face, In re Multidistrict is a good precedent for plaintiffs to cite especially in light of the dictum in footnote 10; however, the case is of limited value because, on its facts, it did not analyze in detailed fashion the specific concerns of the antitrust-patent law interface, an interface which of necessity impacts upon traditional notions of antitrust standing in the present case.

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[13] The Court also considered standing under § 16 of the Clayton Act:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

15 U.S.C. § 26.

The Fourth Circuit's only decided case on antitrust standing is *South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 418, 419 (4th Cir.)*, Cert. denied, *385 U.S. 934, 87 S. Ct. 295, 17 L. Ed. 2d 215 (1966)*. There, the court held that where raw milk producers incurred depressed profits as a result of retailers combining to sell milk as "loss leaders," plaintiffs **[**54]** had incurred an injury sufficient to allow them standing to sue. The court found plaintiffs to belong to the appropriate target area which was defined as follows:

> If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under section 4.

360 F.2d at 418. Stressing both foreseeability and causation, the court applied the test in the following manner:

> The pivot of decision presently is whether the defendants' asserted conduct was the proximate cause of the plaintiffs' asserted injury. If the damage was **[*655]** merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured "by reason of anything forbidden in the antitrust laws" as contemplated by the Clayton Act.

360 F.2d at 419. While the court found that the combination harmed the dairy industry as a whole, the absence of privity among the parties was not a material factor. As appears obvious from the above-quoted material, the Fourth Circuit's **[**55]** approach to the target area question has been to consider also the nature of the damage done. But in using words like "incidental" and "consequential," the court shows a willingness to consider not only the definition of an area and a party's position within that area, but also the qualitative nature of that harm as well. [14] Such an approach is consistent with the reasoning in *Hawaii, supra*, that not every injury traceable to an antitrust violation must result in damages. *405 U.S. 251, 263, n.14, 92 S. Ct. 885, 31 L. Ed. 2d 184*. See *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 367 F. Supp. 536 (D.C.D.C.1973)*. Furthermore, it is clear that in assessing the nature of the harm in light of the intent of the antitrust laws to provide protection and remedies against certain activities:

[56]**

> (E)ach case . . . must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a court must decide whether this plaintiff is one "whose protection is the fundamental purpose of the antitrust laws."

Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F.2d 501, 506 (3d Cir. 1976). See also the conclusion that the elaboration of the "factual matrix" as proposed in Cromar "recognizes that § 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems." *Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90, 99 (3d Cir.)*, Cert. denied, *434 U.S. 823, 98 S. Ct. 69, 54 L. Ed. 2d 80 (1977)*. See *Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp. 4, 11* ***[**57]*** *(E.D.Pa.1977)*.

In assessing standing from the perspective of litigation involving a proposed **[***478]** patent licensing arrangement, the issues such as target, directness, and even injury become less tangible and more susceptible to

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[14] The Fifth Circuit has developed a two-step approach for focusing on the affected area of the economy. *Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976)*, Cert. denied, ***429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540 (1977)***. See also *Hardwick v. Nu-Way Oil Co., 443 F. Supp. 940, 944 (S.D.Tex.1978)*:

First, the affected area of the economy must be identified. Second, the court must determine whether the claimed injury occurred within that area. *Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1360 (5th Cir. 1976)* (citing In *Re Multidistrict Vehicle Air Pollution M. D. L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973)*, Cert. denied ***Morgan v. Automobile Mfgrs. Ass'n, 414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336***).

what the philosophers call counter-factual reasoning, I. e., "But for X's activities, I would have licensed my patent and become rich." In this patent case, the "but for" element plays a substantial role, since plaintiffs are alleging that but for defendants' royalty-free second source licensing policy, they would have struck a deal with one or more of defendants' suppliers and received the appropriate royalties.

Pastor v. American Telephone & Telegraph Co., 76 F. Supp. 781 (S.D.N.Y.1940), is a case similar in many respects to the instant one. Plaintiff alleged that defendant exercised its power over the telephone industry so as to "influence and control the character and specification of apparatus constituting or used in conjunction with subscribers' stations, and of any apparatus to be connected thereto." *76 F. Supp.* ***[*656]*** *at 782*. Plaintiff was a patent owner of an automatic repertory dial device to be attached to a dial telephone:

> The amended complaint **[**58]** alleges that the defendant is engaged in the telephone business, operating toll telephone lines which carry upwards of 80% Of the long distance telephone traffic in the United States and that the defendant controls a group of corporations engaged in the telephone business and auxiliary fields known as the Bell System.

76 F. Supp. at 782. Plaintiff alleged that defendant's policies had "restrained" his sale of devices to the potential market and had prevented him from marketing the product. In granting summary judgment for the defendant, the court noted that the testimony showed that plaintiff never made any applications to defendant for installation of the device, and, moreover, none of the devices were even manufactured. The court phrased the relevant question as follows:

> Did the refusal of the defendant to buy plaintiff's patent or ask for a license to manufacture devices under his patent, and its failure to make available to the public a similar device constitute a restraint of trade? Counsel for the plaintiff freely acknowledges that the mere refusal of the defendant to deal with the plaintiff does not constitute a violation of the Anti-Trust Laws, but claims that **[**59]** the policy against foreign attachments has resulted in a restraint of trade to the plaintiff's damage. The argument of counsel seems to be that this policy is against the spirit of the Anti-Trust Laws, but there is a failure to show or in fact to allege any specific violation of a prohibition contained in the Sherman and Clayton Anti-Trust Acts. In the absence of any such showing, plaintiff has no cause of action thereunder. *LaChappelle v. United Shoe Machinery Corporation, D.C., 13 F. Supp. 939*.

76 F. Supp. at 784. When plaintiffs Shapiro and Board approached defendants in connection with licensing their patents, they were told to see the defendants' suppliers. This action alone cannot amount to an antitrust violation since defendants had no obligation to serve as licensees. From the pleadings, therefore, there has been no allegation that plaintiffs here, as in Pastor, manufactured the devices themselves, were in a position to do so, or found any promoter willing to do so. Presumably, the failure to find a promoter can be characterized in either of two fashions: (1) Ford and GM would not change their policies so as to grant royalties, or (2) plaintiffs would not accept **[**60]** less money for their invention.

The court in *Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955)*, considered the following question:

> Is a patentee who has granted to another an exclusive license for the term of the patent, upon a royalty basis a "person * * * injured in his business or property" (within the meaning of Section 4 of the Clayton Act) so as to enable him to recover treble damages for loss of royalties on sales that might have been made by its licensee save for the antitrust violations of defendant?

224 F.2d at 679. Holding that he was not, the court stated that

> Those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed, may recover.

224 F.2d at 679. [15] Although plaintiffs claim that defendants' **[***479]** actions were "directly aimed at" them, there is no clear evidence on this matter. The Trico court concluded by remarking that

[61]**

> **[*657]** any financial loss suffered by the plaintiff was only incidental to the acts complained of. Here, too, the appellant has no standing under the anti-trust laws to complain of the incidental loss of royalties by activities of Trico, not directed at it.

224 F.2d at 680.

SCM Corp. v. Radio Corporation of America, 407 F.2d 166 (2d Cir.), Cert. denied, *395 U.S. 943, 89 S. Ct. 2014, 23 L. Ed. 2d 461*, Reh. denied, 396 U.S. 869, 90 S. Ct. 38, 24 L. Ed. 2d 125 (1969), was another case involving the deprivation of royalties. RCA claimed that because of certain activities of SCM, RCA was:

> ". . . immediately injured * * *, in that RCA has been wilfully and maliciously deprived of royalties lawfully due * * * (under Patent "539) and has been put to the burden and expense of defending this law suit." Injunctive relief is sought on the theory that RCA has been prevented from enjoying the full benefits of its patents and, in effect, would have prospered "but for" SCM's acts.
>
> RCA contends that SCM's monopolization "if successful" will deprive it of the fruits of licensing, that "even if SCM must pay some royalty, if it is the only available licensee," SCM might **[**62]** insist on a smaller royalty, that "if that event comes to pass, RCA would be "directly' injured"; and that RCA seeks only to avoid threatened loss "if the threat materializes" (RCA reply brief).

407 F.2d at 170. The court found that RCA had not alleged any injury sufficient to give it standing to sue, and furthermore, that its loss of royalties was not an injury sustained because of the plaintiff's antitrust violations. Id.

The holding in Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339 (D.Md.1974), would appear to provide support for plaintiffs' standing arguments. The case is valuable in providing a nutshell summary of traditional standing doctrines, but, it is distinguishable in light of the particular patent context of the instant case. The plaintiff in Midway sought damages and injunctive relief for alleged wholesale price fixing. The complaint charged defendant and other suppliers of independent service stations of conspiring to raise, fix, maintain, and stabilize the wholesale prices of gasoline in Maryland, Virginia, and the District of Columbia. As a result of defendant's alleged activities, plaintiff claimed it was required to purchase **[**63]** gasoline at excessive prices, and as a direct consequence, suffered losses which led to the destruction of its business. Defendant's motion to dismiss for lack of standing was denied.

In the opinion, the court recognized that "(t)he standing requirement is not satisfied merely by proof that some adverse effect on the plaintiff can be traced to the defendant's unlawful activity." 375 F. Supp. at 1341. Noting that the direct injury test in Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910), had been construed to require the plaintiff to "have direct relations (be in privity of contract) with the defendant," 375 F. Supp. at 1341, the opinion reviewed a number of cases denying standing and concluded that "(i)n each of these cases, the plaintiff was not the party which suffered the immediate injury but whose loss resulted from his relationship with another entity." Id. After explaining the reasons behind the Fourth Circuit's adoption of the "target area test" proposed in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), it concluded that, as opposed to the exaltation of form over

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[15] The court cited approvingly the following passage from the Ninth Circuit's opinion in Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951):

Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm.

substance in the direct injury test, the target area test, by focusing on the plaintiff's **[**64]** relationship to the area of the economy allegedly injured by the defendant, "provides a far more logical and flexible tool to analyze the standing question," *375 F. Supp. at 1344*:

> Standing is denied, however, if the plaintiff's business activity occurs outside that area of the economy. See In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra. The advantage of the "target area" theory, then, is that it examines the circumstances surrounding the purported violation and prevents a defendant from **[*658]** avoiding the sanctions of the antitrust laws by the simple expedient of interposing entities between himself and the plaintiff.

With respect to the facts presented in Midway, the opinion concluded that

> the primary effect of defendant's alleged practices was on the gasoline sold by plaintiff and other independent service stations, which was competitive with that sold by defendant. The ultimate effect **[***480]** was to eliminate the competitive position of the plaintiff and other independents.

375 F. Supp. at 1344.

Plaintiffs have relied on this case in their opposition to defendants' standing arguments. They have argued that since defendants' suppliers were **[**65]** not harmed by the royalty-free second source licensing policy, the full impact of defendants' pricing policies falls upon them. Rather than approach the question from a direct-indirect labeling perspective, plaintiffs actually do rely on the target area standard claiming that they are the Only target since the suppliers are left unharmed. Conceivably, plaintiffs could argue that unlike *Trico, supra*, and the other cases subsequent to *Loeb, supra*, which developed the direct injury test, they suffered the immediate and direct injury due to defendants' pricing policy.

Under a target area test, however, the directness or indirectness of the injury would be of no consequence; the mere fact of the injury and that the victim was a target would appear to suffice. One could, however, suggest that the target area test itself begs the direct-indirect injury question since one would have to come to grips with what Sort of entity could, under the circumstances, constitute a target. Query, for example, as to whether a target amounts to nothing more than an "entity "directly' aimed at" since presumably targets are not indirectly aimed at with any degree of success. The vitality of the target **[**66]** area test in its pristine form may be showing signs of being undermined. See, for example, the holding in *L & H Investments, Ltd. v. Belvey Corp., 444 F. Supp. 1321 (W.D.N.C.1978)*, where the court said:

> After (NBO Industries Treadway Cos., Inc. v.) *Brunswick (Corp., 523 F.2d 262, 273 (3d Cir. 1975))* it is apparently not enough that plaintiff stand somewhere in the threatened sector of the economy; he must also show that his injury is logically related to the violation. The emphasis is shifted from proximate causation to an analysis of the Type of antitrust violation alleged and the anticompetitive effects it is thought likely to produce.

444 F. Supp. at 1324 (emphasis in original). Presumably this variation of the standard target area test may indicate that merely alleging injury in fact will be insufficient in the future. For a critical analysis of standing which recognizes the inconsistencies and confusion in the direct injury and target area tests, see Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 830, 843 (1977) ("in practice most courts treat the target area as a test for directness of injury").

A further problem with the **[**67]** target area test is that by its language, a 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, 72 S. Ct. 367, 96 L. Ed. 687 (1952)*. In the present case, it is unclear whether this test can be applied with any significant meaning. What does it mean, for example, for plaintiffs to show that they are in an area of the economy "endangered by a breakdown of competitive conditions" when they are patentees possessing a statutory monopoly in the first place? They are, by law, placed in the position of being monopolists who are capable of negotiating with oligopolists such as Ford or GM (or their suppliers) to obtain the best price for their inventions. The whole concept of fully competitive conditions must be modified in the patent context where it would seem that if a patentee has something of real value, by virtue of his monopoly, he is automatically placed in a better bargaining position from which to exploit his product. The overall result is **[*659]** one in which "the law **[**68]** lets the marketplace determine the value of a new invention." J. G. Van Cise, Supra.

C. A New Standard

In *Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975)*, the court found that the investment companies' allegation that the failure of a supplier to provide the needed financing for a service station effectively foreclosed their ability to expand their operations was a sufficient allegation of injury to entitle plaintiff to standing. Following the language used by the *Supreme Court in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)*, the court held that the test for standing to sue in a private antitrust action is whether the plaintiff has alleged that the defendant caused him injury in fact and that the interest sought to be protected by the plaintiff is arguably within the zone of interests protected by the antitrust laws. *521 F.2d at 1151*. While the case provides a useful summary of previous standing doctrines, its reliance on Data Processing is surprising since no other case in the intervening five years had even raised the possibility of a zone of interests test outside of the administrative **[**69]** context in which Data Processing arose. See, e.g., Sherman, Antitrust **[***481]** Standing: From Loeb to Malamud, 51 N.Y.U.L.Rev. 374, 378 (1976).

The Malamud court first explored standing as part of the general concept of justiciability, I. e., as a means of controlling access to the federal courts. To meet these requirements, there must be a showing of injury in fact in order to satisfy the Constitution's case or controversy provision. *U.S. Const. art. III, § 2*. Additionally, standing allowed the courts some leeway in determining whether a given plaintiff is "the proper litigant in a suit." *521 F.2d at 1147*. To accomplish this, the court should assess " "the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' " Id., Citing *Flast v. Cohen, 392 U.S. 83, 89, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)*. On these grounds, however, the court rejected the current approaches to standing as being inadequate. Expressing dissatisfaction with the traditional standing doctrine, the opinion stated:

> As we see it . . . by using either approach a court is enabled to make a determination on the Merits of a Claim under the guise of assessing the **[**70]** Standing of the Claimant. Under either theory the entire question of directness is one that must be resolved upon some factual showing, but standing is a preliminary determination ordinarily to be evaluated upon the allegations of the complaint. . . .

Id. at 1150 (emphasis in original) (footnote omitted).

The Sixth Circuit's promulgation of the zone of interests test in Malamud has been criticized on a number of grounds. See generally, Sherman, Supra, and Lytle & Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am.U.L.Rev. 795 (1976). First, the zone of interests standard articulated in Data Processing must be confined to its original context, namely, that of administrative standing. The test was not intended by the Supreme Court to apply across the board to all standing issues, and Sherman has referred to its use by the Malamud court as an "unwarranted excursion into the law of administrative standing." 51 N.Y.U.L.Rev. at 405. Administrative cases, unlike most private antitrust litigation, rarely seek damages, hoping instead to obtain injunctive relief. This likelihood of damages **[**71]** automatically trebled in the antitrust context, *15 U.S.C. § 15* presents the substantial possibility of "overkill", *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971)*, Cert. denied, *406 U.S. 930, 92 S. Ct. 1776, 32 L. Ed. 2d 132 (1972)*, especially when the maintenance of private antitrust actions brought by "private attorneys general" allegedly acting in the public interest poses the increased likelihood of windfall recoveries. To quote Sherman:

> **[*660]** By equating administrative standing with antitrust standing, the Malamud court thus failed to heed Professor Scott's sound advice that "to understand the functions of the doctrine, it is necessary at the outset to distinguish the different contexts in which an issue of standing is said to arise." (Citing Scott, Standing in the Supreme Court A Functional Analysis, 86 Harv.L.Rev. 645, 646 (1973)).

51 N.Y.U.L.Rev. at 378. Focusing on the economic and policy differences presented in the present case distinguishes it from *Midway, supra*, and supports a denial of standing. Moreover, even under a zone of interests test, it is by no means certain that plaintiffs would have standing, **[**72]** since the test explicitly invited consideration of the interests at stake in light of the particular statutory or constitutional guarantee being invoked. *397 U.S. at 153, 90 S. Ct. 827*.

The Supreme Court has recently observed that "although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . it often turns on the nature and source of the claim asserted." *Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975)*. The Malamud court ignored considerations such as these. Given the possibility of treble damages should the plaintiff prevail, one can readily understand that even from the outset, the In terrorem effect of an antitrust complaint has a settlement value to the plaintiff "out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." [16] *421 U.S. at 740, 95 S. Ct. at 1927*.

[*482]** **[**73]** D. The Standing Tests and This Case

HN11[] Any final determination as to standing will necessarily turn on the question of the remoteness of the alleged injury, I. e., the relationship between the alleged antitrust violation and the injury inflicted on plaintiffs. Such a determination must consider not only the policies behind allowing recovery under the antitrust laws but also the complicated interrelationships which arise when antitrust and patent law are presented in the same claim. Plaintiffs have the burden of showing (1) that an antitrust violation occurred, and (2) that they were within the "target area" of the anticompetitive activity. See *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971)*, Cert. denied, *406 U.S. 930, 92 S. Ct. 1776, 32 L. Ed. 2d 132 (1972)*; *Long Island Lighting Co. v. Standard Oil Co. of California, 521 F.2d 1269, 1274 (2d Cir. 1975)*, Cert. denied, *423 U.S. 1073, 96 S. Ct. 855, 47 L. Ed. 2d 83 (1976)* ("even parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental, or if their business was not in the target area of the allegedly **[**74]** illegal acts.") It will be recalled that in terms of substantive violations of the antitrust laws, those found in Parke, Davis and Klor's were substantially less "incidental" than those alleged by plaintiffs here.

The alleged antitrust violation must yield an injury which is "direct" and not "incidental." See *SCM, supra*; *Flood v. Kuhn, 312 F. Supp. 404 (S.D.N.Y.1970)*. The specifics of the "target area" test have been refined and amplified as a result of the opinion in *Calderone, supra.* That case specifically concerned standing under Section 4 **[*661]** of the Clayton Act and involved an action brought by a nonoperating landlord of motion picture theatres for treble damages against movie distributors and exhibitors who charged an antitrust conspiracy to restrain trade in the distribution and exhibition of motion pictures throughout the New York metropolitan area. The Calderone court acknowledged that "while many remotely situated persons may suffer damages in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation." *454 F.2d at 1295*. [17] ***HN12***[] While the **[**75]** court made it clear that a rule of reason approach to standing under Section 4 of the Clayton Act should be used, it went on to observe that

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[16] The quotation is from Mr. Justice Rehnquist's opinion in *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)*, in which the Court upheld the Birnbaum rule limiting private damages for violations of *rule 10b-5*, *17 C.F.R. § 240.10b-5 (1975)*, to purchasers and sellers of securities. Although the context of private antitrust litigation obviously differs from that presented in Blue Chip Stamps, the analogy is a fitting one since it indicates that policy considerations frequently shape a court's evaluation of standing arguments. The Birnbaum rule had, in fact, been criticized as being "an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages which have in fact been caused by violations of *Rule 10b-5*." *Id. at 738, 95 S. Ct. at 1926*. The Court went on to hold that such a limitation was based on "countervailing" policy considerations. *Id. at 739, 95 S. Ct. 1917*.

[17] The court proceeds to define a target as "a person or business against which competitive aim is taken. The line is clearly drawn by requiring that to have standing one must be an object of an antitrust conspiracy." *454 F.2d at 1296 n. 2*.

"(a) plaintiff not a target of any antitrust violation does not become a target by virtue of the culpability of its lessee, patentee, franchisee, supplier, customer, or debtor." *454 F.2d at 1296*.

Under the Court's evaluation of the facts of this case, the injury to plaintiffs Board and Shapiro appears to be both indirect and incidental. While they may consider themselves a "target area," the impact reaches them only as a result of the loss of royalties which, in turn, follows from the business agreement between the licensees (suppliers) and the car manufacturers. In Plaintiffs' Reply Memorandum they state that "(t)he antitrust injury **[**76]** is to plaintiffs' licensing business, not to plaintiffs' patent." Plaintiffs' Reply Memorandum at 25. This is a curious statement, especially in light of the fact that without any initial patent, plaintiffs would not even have any license to grant. Furthermore, the bulk of plaintiffs' complaint as well as their Memorandum opposing defendants' motions for summary judgment address the issue of the serious injury done to the market for innovation and their role as innovators. In light of this relationship between patenting and licensing, a distinction between the two businesses is untenable. Without being licensed, a patent will yield no return for the inventor. What plaintiffs seek to prove is that because of their failure to negotiate a profitable licensing agreement, they likewise cannot earn a profitable return on their seat belt retractor patent. The net result, they claim, is injury to the "market for innovation." Yet the injury to plaintiffs' efforts to turn a profit follows from their own unsuccessful licensing negotiations with defendants' suppliers. In one sense, their failure indicates the value which the marketplace establishes for their invention. They did have a **[**77]** monopoly on the patented product and did not have to license it for free. In the event that defendants required plaintiffs' inventions, the automakers could do one of two things: either pay the royalties demanded or invent around the patent and run the risk of a possible patent infringement suit. A finding that plaintiffs lack standing to bring their antitrust claims will have the effect of **[***483]** narrowing this case to a more appropriate focus, namely, the patent infringement count remaining in the original complaint.

For these reasons, the standing requirements must be narrowly construed, especially in view of the fact that the patent aspects of this case remove it from the straightforward analysis of standing involved in pure antitrust cases. Also, one cannot overlook the patent aspects of the case and the corresponding rights which Mr. Justice Clarke found to be accorded the patentee:

> It has long been settled that ***HN13***[] the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using, or selling that which he has invented. The patent law simply protects him in the monopoly of that which he **[**78]** has invented and has described in the claims of his patent. *United States v. American Bell Tel. (Teleph.) Co., 167 U.S. 224, 239, 17 S. Ct. 809, 42 L. Ed. 144, 154*; *Continental Paper Bag **[*662]** Co. v. Eastern Paper Bag Co., 210 U.S. 405, 424, 28 S. Ct. 748, 52 L. Ed. 1122, 1130*; *Bauer & Cie v. O'Donnell, 229 U.S. 1, 10, 33 S. Ct. 616, 57 L. Ed. 1041, 1043, 50 L.R.A., N.S., 1185*, Ann.Cas. 1915A, 150.

Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502, 510, 37 S. Ct. 416, 418, 61 L. Ed. 871 (1917).

The fact that plaintiffs may be concerned about what happens to their invention "down the line" does not mean that whenever they do not like an outcome they can allege an injury. As one commentator has recently observed:

> ***HN14***[] The holder of a patent has no greater power to restrict the terms upon which a buyer of the patented product resells at the next vertical level than does the owner of any other product. The patentee can obtain the full reward of the patent in the first sale; a right to restrict the goods in more remote channels of trade is not a traditional part of the patent grant nor is it needed in order for the patentee fully to enjoy the **[**79]** monopoly of the patent.

L. A. Sullivan, Antitrust 572 (1978). See also *United States v. Univis Lens Co., 316 U.S. 241, 62 S. Ct. 1088, 86 L. Ed. 1408 (1942)*, where Chief Justice Stone, writing for the Court, said:

> Our decisions have uniformly recognized that ***HN15***[] the purpose of the patent law is fulfilled with respect to any particular article when the patentee has received his reward for the use of his invention by the sale of the article, and that once that purpose is realized the patent law affords no basis for restraining the use and

> enjoyment of the thing sold. *Adams v. Burke, supra, 17 Wall. 453, 456, 21 L. Ed. 700*; *Keeler v. Standard Folding Bed Co., 157 U.S. 659, 15 S. Ct. 738, 39 L. Ed. 848*; *Motion Picture Co. v. Universal Film Co., 243 U.S. 502, 37 S. Ct. 416, 61 L. Ed. 871*, L.R.A. 1917E, 1187 Ann.Cas. 1918A, 959; and see cases collected in General (Talking) Pictures Co. v. (*Western) Electric Co., 305 U.S. 124, 128, n. 1, 59 S. Ct. 116, 118, 83 L. Ed. 81*. ***HN16***[] In construing and applying the patent law so as to give effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant, Morton Salt Co. v. (*G.S.) Suppiger Co., 314 U.S.* ***[**80]*** *488, 62 S. Ct. 402, 86 L. Ed. 363*, the particular form or method by which the monopoly is sought to be extended is immaterial. The first vending of any article manufactured under a patent puts the article beyond the reach of the monopoly which that patent confers. Whether the licensee sells the patented article in its completed form or sells it before completion for the purpose of enabling the buyer to finish and sell it, he has equally parted with the article, and made it the vehicle for transferring to the buyer ownership of the invention with respect to that article. To that extent he has parted with his patent monopoly in either case, and has received in the purchase price every benefit of that monopoly which the patent law secures to him. If he were permitted to control the price at which it could be sold by others he would extend his monopoly quite as much in the one case as in the other, and he would extend it beyond the fair meaning of the patent statutes and the construction which has hitherto been given to them.

316 U.S. at 251-52, 62 S. Ct. at 1094 (Emphasis added). The theory of recovery advanced by plaintiffs would extend the scope of their patent monopoly **[**81]** well into the licensing stage, enabling them to exercise leverage as to the deal eventually concluded between its licensee (supplier) and the automakers, obviously an improper result. The success of such a theory would mean that a patentee could effectively force a form of resale price maintenance scheme upon parties further down the line. Such an effect has been held unlawful in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*. Plaintiffs have already indicated their prior acquiescence in a marketing arrangement in which they voluntarily waived 60% of their royalties. Under plaintiffs' conception of their right to be rewarded for innovation, it would seem that anything less than 100% of the full royalties obtainable would underreward them for their activities.

[*663] Plaintiffs' arguments, taken to their logical conclusion, would mean that they **[***484]** were, in all circumstances, entitled to a minimum royalty which was equal to what they felt was the value of their innovation. Anything less would undercompensate them and tend to destroy the "market for innovation." Yet it remains clear that a royalty is only one form of compensation **[**82]** or reward allowed an inventor. While it is recognized that patent licenses are generally granted in exchange for some form of monetary consideration, that remuneration may be fixed or variable, the latter representing a royalty form. See generally T. Costner, 14 Business Organizations Patents § 3.04(1) (1975). It should also be recalled that the actual royalty basis arrived at may be the hardest aspect of concluding a licensing negotiation. Id. at § 3.01. [18] ***HN17***[] A patentee may negotiate for a minimum royalty payment but a court cannot go beyond the agreement of the parties to establish a minimum royalty where the parties themselves fail to provide one. *DeStubner v. United Carbon Co., 67 F. Supp. 884 (S.D.W.Va.1946)*, *Aff'd, 163 F.2d 735 (4th Cir. 1947)*, Cert. denied, *334 U.S. 829, 68 S. Ct. 1328, 92 L. Ed. 1757 (1948)*. Similarly, *United States v. General Electric Co., 272 U.S. 476, 489, 47 S. Ct. 192, 71 L. Ed. 362 (1926)*, held that a bargained-for royalty in licensing agreements does not have to meet a test of reasonableness. It would seem that in a setting in which marketplace economics determine the ultimate value of a new invention, and where that value is determined by negotiations **[**83]** freely entered into between the patentee-owner and the licensee-manufacturer, that a given outcome should not be challenged by the courts, absent, of course, any clearly prohibited anticompetitive behavior. The law has already recognized that a licensor is free to exact from his licensee a price as high as he can get, *Brulotte v. Thys Co., 379 U.S. 29, 33, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*,

[18] Some of the factors to be considered in such negotiations are: the patent's strength, availability of competing technology, the cost to develop the invention, the savings (or profit) to be realized, the cost of the suit, the nature of the license, negotiation costs, the costs of assembling concomitant technical information for the licensee, costs of servicing the agreement, and the licensee's investment. T. Costner, Supra, at § 3.01.

and a corollary of this ruling in a free market setting would be that a licensee should be accorded the right to bargain for as low a price as he can get, up to and including a zero royalty. [19]

[84]** Given the facts of licensing, plaintiffs have not been denied compensation altogether merely variable compensation has been foreclosed to them. The record even shows, by their own admission, that they have already received some $ 95,000 from American Safety, including a $ 25,000 down payment prior to the termination of this licensing agreement in 1966 before any of plaintiffs' inventions were marketed. Plaintiffs' Memorandum at 21. The negotiation of a licensing agreement is a difficult and often risky enterprise. Parties entering into such negotiations are not guaranteed any return whatsoever. What is strange is the way plaintiffs characterize these initial negotiations with American Safety in 1963:

> Although plaintiffs were not happy with the prospect of losing a large protion (sic) of the potential royalties on their inventions, They were compelled, as a condition of consummating the license agreement with American Safety in 1965, to relinquish their right to 60% of the potential royalties based upon procurement of their inventions by automobile companies, including the defendants.

Plaintiffs' Memorandum at 20 (emphasis added). What do plaintiffs mean when they **[**85]** say they were compelled to give up over half of their royalties? There is no evidence or even innuendo that the result of which plaintiffs complain was anything but the by-product of negotiations freely entered into. Again, the suspicion arises that plaintiffs are upset primarily because they did not receive more money. Receiving $ 95,000 for an invention which was not even marketed and which was produced by a **[*664]** lawyer and a psychiatrist in their spare time is not necessarily a return so insufficient as to deter plaintiffs from ever inventing again.

After the agreement with American Safety was cancelled, plaintiffs conducted licensing negotiations with Hamill a year later, in 1967. Once again they agreed to waive some of their royalties, this time, 50%. By plaintiffs' own admissions, however, and as explained to them by Hamill's attorney, "the burden of paying royalties to plaintiffs and competing with non-royalty-paying suppliers who would benefit from royalty-free licenses under plaintiffs' inventions would be too heavy." Plaintiffs' Memorandum, at 22. One can interpret this remark to mean that plaintiffs' insistence on variable compensation put them at a competitive **[**86]** disadvantage.

V. CONCLUSION

Commenting on the purposes of standing analysis, Berger and Berstein note that it is:

> designed to narrow this broad class of injured persons to a subclass of plaintiffs **[***485]** who are deemed proper parties to sue. ***HN18***[] The scope of antitrust standing should be determined by reference to the special problems created by treble damage actions, such as ruinous or duplicative recoveries. The scope of substantive protection should be determined in each case by analysis of pertinent Substantive antitrust policies.

86 Yale L.J. at 836. They recognize that the "distinction between direct and indirect injury is arbitrary, even metaphysical, since all antitrust injuries are "direct' to a greater or lesser degree." *Id. at 842-43*. The real difficulty with these traditional approaches to standing is their failure to take account of all aspects of antitrust Policy, including the In terrorem effect of treble damages and "overkill" liability, as well as relevant economic and social policies. Such a policy approach to standing analysis must, of necessity, consider the nature and severity of the alleged injury, the parties involved, and the relationship of all of these **[**87]** to substantive ***antitrust law***. Plaintiffs' recovery in this case, if any, must be confined to their claim of patent infringement. Having failed to provide evidence of a conspiracy for purposes of *Section 1* of the Sherman Act, they also lack standing by virtue of the fact that the injury alleged is not one which is cognizable under the antitrust laws. Given the protections already afforded plaintiffs by the patent laws, granting them standing would enable them to obtain benefits far beyond those provided by law. By virtue of their patent monopoly, they are free to negotiate whatever price they can obtain for their invention; however, they cannot invoke the antitrust laws to guarantee that such a return, if any, approximates even their minimum expectations.

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[19] See comment by J. G. Van Cise, Supra.

Thus, in light of the admitted absence of any conspiracy in this case and because plaintiffs as a matter of law lack standing to sue as to counts one and two, defendants' motions for partial summary judgment as to these counts shall be granted. The Court expresses no opinion on the claim by defendants that laches or the statute of limitations bars plaintiffs' action.

Accordingly, it is this 29th day of May, 1979, by the United **[**88]** States District Court for the District of Maryland, ORDERED:

1. That defendants' motions for partial summary judgment be, and the same are hereby GRANTED; and

2. That plaintiffs' motion for partial summary judgment be, and the same is, hereby DENIED.

In re Corrugated Container Antitrust Litigation

United States District Court for the Southern District of Texas, Houston Division

May 30, 1979

M.D.L. No. 310 (All Cases)

Reporter
84 F.R.D. 40 *; 1979 U.S. Dist. LEXIS 12095 **; 1979-1 Trade Cas. (CCH) P62,689

In re Corrugated Container Antitrust Litigation.

Core Terms

antitrust, settlement, cases, joint defense, settling, cross-claims

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Partners > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

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

The deterrent policies underlying the Sherman and Clayton Acts are best served by retaining a rule which can result in any defendant found to have engaged in intentional wrongful acts being held liable for the full sum of injuries caused by its acts and those of its partners. A defendant who is found not be an intentional violator of the antitrust laws will not pay a penny in damages.

Governments > Courts > Judicial Precedent

HN2[] **Courts, Judicial Precedent**

The Supreme Court has listed three factors to consider on the retroactivity of a new rule of law: that it work a substantial change in law upon which parties may have relied; that its policy be furthered by retrospective application; and that such application not be unfair.

Counsel: **[**1]** Stephen D. Susman, Chairman of Plaintiff's Steering Committee, Mandell & Wright, Houston, Tex.

John D. Roady, Chairman of the Settling Defendants, Hutcheson & Grundy, Houston, Tex.

Merrick C. Walton, Chairman of the Non-Settling Defendants, Andrews, Kurth, Campbell & Jones, Houston, Tex.

Opinion by: SINGLETON

Opinion

[*40] MEMORANDUM OPINION:

On May 16, 1979, a pretrial hearing was held before this court on the motions of Westvaco, Packaging Corporation of America, Georgia-Pacific, and Crown Zellerbach for leave to amend their answers to assert cross-claims for contribution against certain other defendants who have entered into settlement agreements with plaintiffs' class. The question presented by these motions is whether, in an antitrust action such as this, contribution among defendants is proper. This question has been very thoroughly briefed and argued. It is the conclusion of the court, after careful consideration of all the arguments presented, that such a claim would not be proper in this case.

The threshold question is whether contribution should be allowed in any antitrust **[*41]** case brought under the federal laws. The Eighth Circuit, in the recent case **[**2]** of *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979)*, has allowed contribution in an antitrust action; no other circuit has done so. In fact, the law has appeared uniformly contrary to the position advanced by Westvaco. *Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960)*; Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. § 61,698 (D.Utah 1977); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. § 61,533 (N.D.Calif.1976); *Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y.1969)*. In recent years, however, it is argued that a trend towards allowing contribution can be discerned. Two cases are currently on appeal before the Fifth Circuit which may clarify this point, *Abraham Construction Corp. v. Texas Industries, Inc., No. 78-1788, 604 F.2d 897*, and Iowa Beef Processors, Inc. v. Spencer Foods, Inc., No. 78-3346; and it has been suggested that this court defer ruling on this question until it has the benefit of that clarification.

It is the court's conclusion, however, that contribution would be inappropriate in these cases even should it be proper in some federal antitrust cases, **[**3]** and for that reason the court will not delay its ruling.

It appears that Westvaco seeks contribution primarily to avoid the coercive impact to it, as a late-settling or non-settling defendant, of the possibility of enormous damages being assessed against it. That this possibility is inherently coercive is indisputable the estimates of total damages in these cases range from just under two hundred million dollars to over one billion dollars, and of course any jury verdict would be subject to the trebling provisions of the Act. Twenty-three defendants, representing approximately 80% Of the market, have entered into settlement agreements for a total sum of almost three hundred million dollars. Even a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial. Movants here seek a means to insure that they will not be ultimately liable for more than their market share, or perhaps than their percentage of culpability, in the event they go to trial and lose.

On the other hand, the settling defendants and class plaintiffs urge that allowing contribution in any case such as this will make settlements impossible to achieve **[**4]** and will thereby contribute to the already notorious complexity and unmanageability of antitrust cases. Defendants have little incentive to buy peace from plaintiffs if they may be obliged to litigate the same claims against other defendants. Further complications to the efficient management of a suit such as this would arise from the processing of the many possible cross-claims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of United States of America v. *International Paper, et al. and United States of America v. Boise Cascade, et al., D.C., 457 F. Supp. 571*; those cases involved the prosecution of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts.

It **[**5]** seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage. Weighing the possible unfairness to a defendant such as Westvaco against the ills which would arise from contribution in such a case as this leads this court to the belief that contribution would be improper and undesirable. The court is also mindful of the arguments advanced by Judge Hanson in his dissent in Professional Beauty Supply that the problems attendant on such a rule would be likely to deter private plaintiffs from exercising their option to serve as private attorneys general in the antitrust area. *594 F.2d at 1189*.

[*42] In addition to the management problems such a rule would present, the court finds Westvaco's arguments unpersuasive in the context of intentional torts. The court notes that even in jurisdictions which allow contribution among joint tortfeasors it is usual to restrict such recovery to negligent joint tortfeasors. ***HN1***[] The deterrent policies underlying the Sherman and Clayton Acts would appear to be best served **[**6]** by retaining a rule which can result in any defendant found to have engaged in such intentional wrongful acts being held liable for the full sum of injuries caused by its acts and those of its partners. It must, of course, be borne in mind at all times that a defendant who is found not be an intentional violator of the antitrust laws will not pay a penny in damages.

For these reasons, the court does not feel that contribution should be allowed in any such antitrust case as this. If, however, the rule were eventually to be otherwise in this circuit, there is a compelling reason not to grant the motions of Westvaco and the three other defendants in this case, at this time. Such a rule should not be applied retroactively where the settling litigants have relied on unvarying past precedent in reaching agreements with the plaintiffs' class and in undertaking joint defense efforts which may have worked very substantially to their detriment should those defendants who have not chosen to settle be allowed to use information gained under the guise of mutual aid to bring cross-claims now. ***HN2***[] The Supreme Court has listed three factors to consider on the retroactivity of a new rule of law: that **[**7]** it work a substantial change in law upon which parties may have relied; that its policy be furthered by retrospective application; and that such application not be unfair. *Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)*. In applying these three factors to the case in hand, it is clear that a holding by this court now, or by the Fifth Circuit on the appeals before it, that contribution claims are proper under federal ***antitrust law*** would be a substantial departure from existing law. If such a rule is ultimately effectuated, the policy behind it must be one of fairness to non-settling defendants; perhaps it could be argued that that policy would be favored by retrospective application, but in this court's view fairness does not require allowing non-settling defendants to participate in joint defense efforts and use information gained there against those who have chosen to settle, in reliance on the then current state of the law. As to the third factor it seems unfair to all parties to change the rules underlying settlement in so complex a case at this stage of the litigation. Settling defendants have paid three hundred million dollars to buy their **[**8]** peace. Almost a year has passed since the first settlement agreement was reached. The settling defendants, under the terms of their settlements, have been cooperating with class plaintiffs in their discovery. As has been mentioned, all defendants, at this court's request, participated in joint defense work. It would be inequitable to apply such a rule retroactively to this case.

For these reasons, the motions of the several non-settling defendants to amend their answers to assert cross-claims for contribution are DENIED.

End of Document

Connecticut v. Levi Strauss & Co.

United States District Court for the District of Connecticut

May 31, 1979

Civ. No. H-78-455

Reporter
471 F. Supp. 363 *; 1979 U.S. Dist. LEXIS 12024 **; 1979-1 Trade Cas. (CCH) P62,672

STATE OF CONNECTICUT v. LEVI STRAUSS & COMPANY

Core Terms

anti trust law, federal law, state law, jurisdictional amount, diversity jurisdiction, state court, purchasers, courts, federal question, citizenship, sovereign, state law claim, federal claim, interstate, preemption, antitrust, commerce, federal court, undue burden, overcharges, diversity, patriae, removal

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN1[] **Specific Cases Removed, Federal Questions**

Generally the plaintiff determines by the allegations of his complaint whether the case is removable as one arising under the laws of the United States, since the existence of a federal question must appear on the face of a complaint. A plaintiff alleging facts that would support both a federal and a state law claim is free to confine his claim to one based on state law and proceed in state court.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN2[] **Removal, Specific Cases Removed**

In the area of ***antitrust law***, Congress has neither expressed the clear intent, nor acted so as to imply, that it has displaced state law from the field.

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

Transportation Law > Interstate Commerce > Federal Powers

HN3[] **Congressional Duties & Powers, Commerce Clause**

The *Commerce Clause* protects the interstate market, not particular interstate firms.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN4[] **Amount in Controversy, Determination**

Diversity jurisdiction requires diverse citizenship and a claim in excess of the jurisdictional amount.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Governments > State & Territorial Governments > Statehood

HN5[] **Diversity Jurisdiction, Citizenship**

A state cannot, in the nature of things, be a citizen of any State.

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

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN6[] **Jurisdiction, Subject Matter Jurisdiction**

A state can act as parens patriae for a circumscribed group of its citizens.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Individuals

HN7[] **Amount in Controversy, Determination**

The aggregation of distinct claims of separate individuals in one suit does not permit an aggregation of the amount of their claims.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

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

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN8[] **Costs & Attorney Fees, State Regulation**

The attorney's fees are an element of damages to be included in satisfying the jurisdictional amount, since they are authorized by statute as recoverable in an antitrust action, *Conn. Gen. Stat. § 35-35*.

Counsel: [1]** Gerard J. Dowling, Asst. Atty. Gen., Hartford, Conn., for plaintiff.

Stephen V. Bomse, Heller, Ehrman, White & McAuliffe, San Francisco, Cal., Robinson, Robinson & Cole, Hartford, Conn., for defendant.

Opinion by: NEWMAN

Opinion

[*365] RULING ON PLAINTIFF'S MOTION FOR REMAND

The State of Connecticut seeks to remand the antitrust damage suit that it brought in state court against Levi Strauss & Company (Levi Strauss), which Levi Strauss removed on both federal question and diversity grounds. *28 U.S.C. § 1441(b)*. Connecticut claims that its suit involves no federal question, *28 U.S.C. § 1331*, and that diversity jurisdiction is unavailable because Connecticut is not a citizen and because the jurisdictional amount requirement has not been met, *28 U.S.C. § 1332*.

The action was filed in the Hartford Superior Court on August 7, 1978. The State charged Levi Strauss with violations of the Connecticut Antitrust Act, *Conn.Gen.Stat. §§ 35-24 to 35-45*, between roughly October 1, 1971, and January 1, 1977. Specifically, Connecticut claims that Levi Strauss acted with co-conspirators to restrain trade in connection with the distribution and retail sale of its products ("jeans" and other **[**2]** casual clothing) to consumers in Connecticut. *Conn.Gen.Stat. §§ 35-26*, *35-28*. Levi Strauss, a large national firm incorporated in Delaware and headquartered in San Francisco, is alleged to have engaged in Connecticut in a continuing contract, combination **[*366]** or conspiracy to fix prices by threatening and coercing its dealers in various ways, by terminating dealers who did not comply, and by refusing to deal with prospective dealers who Levi Strauss believed would not comply. The State has brought the action in its enforcement capacity, *Conn.Gen.Stat. § 35-32(a)*, and as Parens patriae for (or class representative of) its residents who have suffered damages from alleged artificially high prices and impaired competition, *Conn.Gen.Stat. § 35-32(c)*.

Federal Question Jurisdiction

Levi Strauss asserts that the facts alleged in the complaint are sufficient to state a claim within the federal question jurisdiction of this Court. Whatever the statutory label that Connecticut applies to its cause of action, Levi Strauss says that the factual allegations state a claim for violation of the federal antitrust laws. Connecticut acknowledges that the facts would support a federal antitrust **[**3]** claim, if it had chosen to plead a violation of federal law. But

Connecticut insists that it is entitled to exercise its prerogative to plead only a state ***antitrust law*** claim to the exclusion, it contends, of other available claims. [1.]

HN1[] Generally the plaintiff determines by the allegations of his complaint whether the case is removable as one arising under the laws of the *United States, Great Northern Railway v. Alexander, 246 U.S. 276, 282, 38 S. Ct. 237, 62 L. Ed. 713 (1918)*, since the existence of a federal question must appear on the face of a complaint, *Phillips Petroleum Co. v. Texaco, **[**4]** Inc., 415 U.S. 125, 127-28, 94 S. Ct. 1002, 39 L. Ed. 2d 209 (1974)*; *Gully v. First National Bank, 299 U.S. 109, 113, 57 S. Ct. 96, 81 L. Ed. 70 (1936)*. "(T)he party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a "suit arising under' (the laws) of the United States by his declaration or bill." *The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716 (1913)*. A plaintiff alleging facts that would support both a federal and a state law claim is free to confine his claim to one based on state law and proceed in state court. *La Chemise Lacoste v. Alligator Co., 506 F.2d 339 (3d Cir. 1974)*; *Brough v. United Steelworkers of America, AFL-CIO, 437 F.2d 748 (1st Cir. 1971)*; *Peterson v. Brotherhood of Locomotive Firemen and Enginemen, 272 F.2d 115, 119 (7th Cir. 1959)*; *Fischer v. Holiday Inn of Rhinelander, Inc., 375 F. Supp. 1351 (W.D.Wis.1973)*; *Cue Publishing Co. v. Colgate-Palmolive Co., 233 F. Supp. 443 (S.D.N.Y.1964)*; *J. H. Smith Co. v. Jordan Marsh Co., 161 F. Supp. 659 (D.Mass.1958)*; *M. & D. Simon Co. v. R. H. Macy Co., 152 F. Supp. 212 (S.D.N.Y.1957)*; see *Pan American Petroleum Corp. **[**5]** v. Superior Court, 366 U.S. 656, 662-63, 81 S. Ct. 1303, 6 L. Ed. 2d 584 (1961)*; *Hearst Corp. v. Shopping Center Network, Inc., 307 F. Supp. 551, 556 (S.D.N.Y.1969)*; see generally, 1A Moore's Federal Practice P 0.160 at 185 (2d ed. 1974).

Standing in arguable opposition to this substantial line of authority are two decisions within the *Second Circuit, Beech-Nut, Inc. v. Warner-Lambert Co., 346 F. Supp. 547 (S.D.N.Y.1972)*, *Aff'd, 480 F.2d 801 (2d Cir. 1973)*, and *Ulichny v. General Electric Co., 309 F. Supp. 437 (N.D.N.Y.1970)*, both approving removal of what the plaintiffs may have believed were state law claims, on the ground that the complaints pleaded causes of action arising under the Lanham Act, *15 U.S.C. § 1125(a)*. Neither case establishes a sufficient basis for ignoring the settled rule that the pleader may elect to pursue only a state law claim. In Beech-Nut both the District Court, *346 F. Supp. at 548*, and the Court of Appeals, 480 F.2d at 803, observed that the case "could have been" brought in federal court under the Lanham Act. The absence of any discussion obscures whether the courts meant that the facts alleged in the complaint were **[*367]** sufficient to support **[**6]** a federal claim that "could have been" pleaded by the plaintiff, or that the plaintiff did in fact plead a federal claim that "could have been" brought initially in the federal court. In the Court of Appeals the appellee urged the latter position, pointing out that papers attached to the complaint were properly to be interpreted as the pleading of a federal claim. Appellee's Br. 2, 5. Apparently the Court of Appeals agreed with that contention. Ulichny also contains a similar ambiguity. The District Court stated that the "heart of the suit" related to "an integral issue involving federal law." *309 F. Supp. at 440*. If this meant the pleader had alleged a claim that was really federal, the result is consistent with the weight of authority; if it meant that a state claim was pleaded, but a federal claim was available to be pleaded, removal jurisdiction on that basis would be contrary to controlling precedent.

Despite the pleader's intention to plead only a claim under state law, many courts have held that the suit may nonetheless be deemed to arise under federal law if the state law relied on by the pleader has been preempted by federal law. Avco Corp. v. Aero *Lodge No. 735, Int'l **[**7]** Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968)*; *New York v. Local 144, Hotel, Nursing Home & Allied Health Services Union, 410 F. Supp. 225 (S.D.N.Y.1976)*; *Hearst Corp. v. Shopping Center Network, Inc., supra*; *Sylgab Steel & Wire Corp. v. Strickland Transportation Co., 270 F. Supp. 264 (E.D.N.Y.1967)*; *Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870 (S.D.N.Y.1959)*; *Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278 (S.D.N.Y.1951)*. Other courts have noted the rule that preemption is a matter of defense to a state law claim and concluded that

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[1.] Connecticut also suggests that the facts pleaded would support a claim for violation of the Connecticut Unfair Trade Practices Act, *Conn.Gen.Stat. § 42-110a Et seq.*, and of various common law standards. Nevertheless Connecticut prefers to stand or fall on its state ***antitrust law*** claim, an election specified on the face of the complaint. Cf. *Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870, 873 n. 4 (S.D.N.Y.1959)*.

preemption does not convert an invalid state law claim into a sufficient and removable federal law claim. *Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972)*; *Lowe v. Trans World Airlines, Inc., 396 F. Supp. 9, 12 (S.D.N.Y.1975)* (alternate holding); see also *Application of New York, 362 F. Supp. 922, 928 (S.D.N.Y.1973)*. [2.]

[8]** This dispute among the cases concerns the consequences of traditional preemption, I. e., circumstances where the substantive state law relied on by the plaintiff has been entirely displaced by Congress, expressly or impliedly, by the enactment of federal legislation. Preemption in that sense is not present in this case, since ***HN2***[] in the area of ***antitrust law***, Congress has neither expressed the clear intent, see *Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977)*, nor acted so as to imply, *Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942)*, that it has displaced state law from the field. See *Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 131-33, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978)*; *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495, 69 S. Ct. 684, 93 L. Ed. 834 (1949)*; *Standard Oil v. Tennessee, 217 U.S. 413, 30 S. Ct. 543, 54 L. Ed. 817 (1910)*; 1 P. Areeda & D. Turner, ***Antitrust Law*** P 208, at 58-59 (1978) (hereafter "Areeda & Turner"). Even state law that prohibits more than federal antitrust statutes is not necessarily in conflict with, and preempted by, federal law, since the toleration of certain conduct **[**9]** by federal law does not imply an affirmative policy in favor of that conduct. Ibid. [3.]

[*368] Aside from the question of preemption, however, there remains the possibility that Connecticut's ***antitrust law*** has been displaced by the negative implication **[**10]** of the *Commerce Clause*. The statute would be unconstitutional if it operated to impose an undue burden on interstate commerce, I. e., when the significance of the effects on commerce outweigh legitimate local benefits. See *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*; *Flood v. Kuhn, 443 F.2d 264, 267-68 (2d Cir. 1971)*, *Aff'd, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*. Such a balancing test may resemble preemption analysis, see G. Gunther, Constitutional Law 357-60 (9th ed. 1975), but does not involve the often illusory search for congressional intent concerning matters that might never have been considered at the time a federal law was enacted. See 1 Areeda & Turner, Supra, P 220e, at 131-33.

Levi Strauss contends that the Connecticut statutes in issue here do impose undue burdens on interstate commerce. The "local" interests are said to be minimal, in that the objective of attacking price-fixing is not differentiated from other states' interest in the same goal. The burdens, on the other hand, are asserted to be substantial: if state ***antitrust law*** is the same as federal law, Levi Strauss faces a series of what it terms costly **[**11]** and duplicative suits in the courts of different states; to the extent state and federal laws differ and state statutes are more exacting, Levi Strauss fears that it will have to comply with the strictest standard, which would then in effect preempt federal law, Cf. *Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)*.

[2.] It is not clear whether the courts that view preemption as a defense and therefore leave the pleader of a preempted state law claim to proceed (to defeat) in state court would permit the pleader to file a new suit based on the preempting federal law either in state court, from which it would clearly be removable, or directly in federal court. If the claim can be refiled as a federal claim, it seems pointless to remand the losing state law claim. On the other hand, if these courts would hold the pleader to have split his cause of action and would consider the adverse ruling on the state law claim as Res judicata with respect to a subsequent allegation of the same facts as a federal law claim, then a remand, though harsh, is at least dispositive.

[3.] A difference in remedies available under state and federal law is not necessarily a conflict resulting in preemption. See Ohio ex rel. Brown v. Klosterman French Baking Co., (1977-1) Trade Cases (CCH) P 61,361 (S.D.Ohio 1976) (four-year statute of limitations for federal antitrust claims does not preempt longer state statute of limitations and damage period). Thus, the fact that a federal Parens patriae remedy is available only for events after the Hart-Scott-Rodino amendments came into effect in October, 1976, See Pub.L.No.94-435, § 301, 90 Stat. 1394-95 (1976), does not automatically preclude a more severely retroactive application of the Connecticut Parens patriae statute, *Conn.Gen.Stat. § 35-32*, if that law is construed to differ from federal law.

It is not at all clear that the Pike criterion of a "legitimate local interest" requires an objective of Peculiarly and predominantly local character. Price-fixing in a region or a state is no less local because it may also occur elsewhere. Nor is a burden on a company to defend a variety of lawsuits an undue burden (if any burden at all) on commerce. ***HN3***[] The *Commerce Clause* protects the interstate market, not particular interstate firms. Cf. *Exxon Corp. v. Governor of Maryland, supra, 437 U.S. at 127-28, 98 S. Ct. 2207*. Uniformly applied prohibitions of price-fixing would not seem to inhibit the flow of goods between states. Cf. *Procter & Gamble Co. v. City of Chicago, 509 F.2d 69, 77 (7th Cir. 1975)*. Even if Levi Strauss had to meet in Connecticut a stricter standard concerning resale price maintenance than that imposed by other states **[**12]** or by federal law, variation in permissible pricing practices is not inevitably an undue burden on commerce. Such a burden is far less than that of different and possibly conflicting requirements for equipment moving along interstate highways, for example. Cf. *Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959)*.

These issues are not appropriate for resolution at this point, however, because they depend on questions of state law that have not yet been authoritatively answered. In construing the Connecticut Antitrust Act, the courts of Connecticut may be guided by decisions of federal courts concerning similar provisions of the federal antitrust laws. See *Mazzola v. Southern New England Telephone Co., 169 Conn. 344, 348, 363 A.2d 170 (1975)*; *Connecticut Association of Clinical Laboratories v. Connecticut Blue Cross, Inc., 31 Conn.Supp. 110, 115, 324 A.2d 288 (1973)*. But state law will not necessarily be interpreted identically to federal provisions, and the extent of the differences may affect constitutionality.

The uncertainty concerning state law suggests the possibility of abstention. Difficult and undecided questions of state law have been **[**13]** presented "bearing on policy **[*369]** problems of substantial public import whose importance transcends the result in the case . . . at bar. *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (, 79 S. Ct. 1070, 3 L. Ed. 2d 1058) (1959)* . . . . ." *Colorado River Water Conservation District v. United States, 424 U.S. 800, 814, 96 S. Ct. 1236, 1244, 47 L. Ed. 2d 483 (1976)*. Cf. *Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)*. The way Connecticut courts interpret the local ***antitrust law***, virtually unconstrued at present, will have significant effects on business and regulatory practices alike. The sensitive issues presented here should be first considered by the courts of the state.

In the situation presented, the proper course is not for this Court to stay its hand and retain jurisdiction, see *England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)*, but to remand the case entirely. Cf. *Washington v. American League of Professional Baseball Clubs, supra, 460 F.2d at 659-60*. Any construction given Connecticut ***antitrust law*** by a state court would prevent removal to this Court. Were the state **[**14]** court to construe the law in a way that avoids any undue burden on interstate commerce, the case could proceed in state court on the state law claim. See *California v. California & Hawaiian Sugar Co., 588 F.2d 1270 (9th Cir. 1978)* (complaint asserting claims under California ***antitrust law*** found not to state a federal claim, and remanded); *Caraway v. Ford Motor Co., 148 F. Supp. 776 (W.D.Mo.1957)* (common law action for fraudulent misrepresentation and conspiracy, not preempted by federal ***antitrust law***; case remanded); *Massachusetts v. McHugh, 71 F. Supp. 516 (D.Mass.1947)* (complaint alleging violations of state ***antitrust law*** did not present federal question, despite similarity of state and federal laws; remanded).

On the other hand, if the Connecticut court should feel impelled to give the state statute a construction that encounters insurmountable constitutional objections, then that court would have no alternative but to find the state law unconstitutional. In that event, only federal ***antitrust law*** would be available in this case. But any claim resting solely on federal ***antitrust law*** would be within the exclusive jurisdiction of the federal court. The claim would have to be dismissed **[**15]** by a state court, and could not be removed to a federal court. Since a federal court's derivative removal jurisdiction is available only as to a case within a state court's jurisdiction, removal of such a claim from state court would be improper, and dismissal would be required under the anomalous but enduring authority of *Lambert Run Coal Co. v. Baltimore & Ohio Railroad, 258 U.S. 377, 382, 42 S. Ct. 349, 66 L. Ed. 671 (1922)*. See *Freeman v. Bee Machine Co., 319 U.S. 448, 451, 63 S. Ct. 1146, 87 L. Ed. 1509 (1943)*; *Washington v. American League of Professional Baseball Clubs, supra, 460 F.2d at 658-59*; *Meyer v. Indian Hill Farm, Inc., 258 F.2d 287, 290 (2d Cir. 1958)*.

It would be inappropriate to anticipate the results of deliberations by the state court. [4.] As of now, the complaint presents **[*370]** no claim arising under federal law. Any resolution of unsettled issues of state ***antitrust law*** that could lead to presentation of a federal claim should be made by the courts of Connecticut.

[16]** Diversity Jurisdiction

Levi Strauss' contention that Connecticut's claim is removable within the diversity jurisdiction of this Court raises issues concerning the status of the plaintiff as a citizen of a state and the existence of a claim in excess of the required $ 10,000 jurisdictional amount. [5.] Analysis is complicated by the fact that Connecticut seeks several types of monetary awards, and it does so in different ***HN4***[] capacities. Diversity jurisdiction requires diverse citizenship and a claim in excess of the jurisdictional amount. Connecticut's suit does not satisfy both requirements simultaneously with respect to any single element of its monetary claim. Cf. *Title Guaranty & Surety Co. v. Idaho ex rel. Allen, 240 U.S. 136, 140-41, 36 S. Ct. 345, 60 L. Ed. 566 (1916)*.

[17]** Connecticut seeks four types of monetary awards. The basic claim is for recovery of the alleged unlawful overcharges incurred by the citizens of Connecticut who purchased Levi Strauss products. Connecticut intends to return the overcharges to all identifiable purchasers. Second, Connecticut seeks to collect and proposes to keep as state funds all provable overcharges that cannot feasibly be returned to identifiable purchasers. Third, Connecticut sues for $ 250,000 as a civil penalty authorized by *Conn.Gen.Stat. § 35-38*. Finally, Connecticut seeks an award of attorney's fees.

Consideration of the status of the plaintiff in seeking to recover these four elements of the money claim must start with the longstanding, if somewhat metaphysical, principle that "***HN5***[] a state cannot, in the nature of things, be a citizen of any State." *Stone v. South Carolina, 117 U.S. 430, 433, 6 S. Ct. 799, 800, 29 L. Ed. 962 (1886)*; see also *Illinois v. City of Milwaukee, 406 U.S. 91, 97 n.1, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972)*; *Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487, 15 S. Ct. 192, 39 L. Ed. 231 (1894)*. Thus to the extent that Connecticut is suing in its sovereign capacity, its claim **[**18]** cannot be brought within the diversity jurisdiction of a district court. [6.]

[4.] It would be equally inappropriate, and unavailing, for this Court to proceed with construction of the state statute. If this Court construed state law to be constitutional, a remand to proceed under valid state law would occur. If this Court found state law, as construed, unconstitutional, the plaintiff's available claim under federal ***antitrust law*** would still not be within the removal jurisdiction of this Court, because of Lambert Run.

Moreover, any constitutional objection to the validity of the state statute is technically a matter of defense, which traditionally cannot be used as the basis for federal question jurisdiction. *Louisiana & Nashville Railroad v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908)*. A federal court's disregarding the defensive nature of the contention that the state law is unconstitutional, and adjudicating that question before the state court has a chance to do so, would propel it into adjudication not only of the constitutional issue but also, preliminarily, of the contours of the state statute. This is a further reason not to rest federal question jurisdiction on what is in essence a defense contention.

The danger of anticipatory federal court construction of a state statute does not normally arise in cases involving statutory preemption. In those cases the issue is typically whether federal law has filled the field; the focus of inquiry is on the reach and effect of the federal statute, and construction of state statutes is rarely involved. In such a situation, it may be legitimate for a federal court to which a state claim has been removed to adjudicate the contention that state law has been preempted by a federal statute, rather than treat preemption as a defense and remit to the state court what is obviously an important federal question, even though one that occurs in a suit arguably not arising under federal law.

[5.] Although this is a suit between a state and a citizen of another state, it may not be brought under *28 U.S.C. § 1251(b)(3)*. That section, giving original but not exclusive jurisdiction of such suits to the Supreme Court, allows for concurrent jurisdiction in the district courts. But it does not confer jurisdiction on those courts. *Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 498 n.3, 91 S. Ct. 1005, 28 L. Ed. 2d 256 (1971)*; C. Wright, Federal Courts 559 (3d ed. 1976). A specific statutory basis for district court jurisdiction is required, such as the diversity grant of *28 U.S.C. § 1332*.

[6.] Clearly Connecticut would be acting as a sovereign if it were considered to be bringing this suit in its enforcement capacity. Access to diversity jurisdiction is not aided by considering Connecticut as representative of a class, even assuming that

But Levi Strauss contends that this case is different because Connecticut is suing to some extent as Parens patriae for the victims of defendant's allegedly unlawful pricing practices.

If Connecticut were suing as Parens patriae **[**19]** for the benefit of all of its citizens, its capacity would be essentially sovereign, and it would not be a citizen for diversity purposes. But it has long been recognized that ***HN6***[] a state can act as Parens patriae for a circumscribed group of its **[*371]** citizens. Indeed, states seeking to invoke the original jurisdiction of the Supreme Court in their capacities as sovereigns, see *New York v. New Jersey, 256 U.S. 296, 41 S. Ct. 492, 65 L. Ed. 937 (1921)*; *Georgia v. Tennessee Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907)*, have been rebuffed whenever it appeared that their real claim was being brought only on behalf of particular citizens. *Pennsylvania v. New Jersey, 426 U.S. 660, 665-66, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976)*; *Oklahoma v. Atchison, Topeka & Santa Fe Railroad, 220 U.S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911)*; see *Louisiana v. Texas, 176 U.S. 1, 20 S. Ct. 251, 44 L. Ed. 347 (1900)*; *New Hampshire v. Louisiana, 108 U.S. 76, 2 S. Ct. 176, 27 L. Ed. 656 (1883)*. [7.] Presumably, a state's role in suing on behalf of particular citizens sufficiently dispenses with its sovereign capacity not only to bar access to the Supreme Court's original jurisdiction but **[**20]** also to gain access to the district courts' diversity jurisdiction (assuming diverse citizenship of the defendant and jurisdictional amount).

[21]** When Connecticut claims refunds to be distributed to identifiable purchasers, the citizen status of the purchasers rather than the sovereign status of their benefactor controls for diversity purposes. However, while that analysis satisfies the citizenship requirement, it fails to satisfy the requirement of jurisdictional amount. ***HN7***[] The aggregation of distinct claims of separate individuals in one suit does not permit an aggregation of the amount of their claims. See *Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969)* (class actions). Each individual from whom Connecticut seeks a refund has a claim of no more than a few dollars; no one seeks anything close to the $ 10,000 required of each claimant. See *Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1974)*; Cf. *Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 346-48, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*. Insofar as Connecticut presents claims of individuals, and thereby satisfies the citizenship requirement for diversity jurisdiction, it seeks discrete recoveries upon separate proof, and fails to meet the jurisdictional amount requirement.

The second, third, **[**22]** and fourth elements of Connecticut's money claim satisfy the jurisdictional amount requirement, but as to these elements, Connecticut is acting in its sovereign capacity and cannot satisfy the citizenship requirement. In seeking recovery of overcharges, Connecticut is not necessarily limited to evidence of purchases by identifiable buyers. If Connecticut's Parens patriae statute, *Conn.Gen.Stat. § 35-32*, were construed to be the same as the federal provision, Pub.L.No.94-435, § 301, 90 Stat. 1395 (1976), damages could be proved in the aggregate by sampling or other statistical methods, or any other reasonable computation. Any fund thus collected would exceed the refunds available for identifiable purchasers and leave some portion available for disbursement to the state. Cf. *West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1090-91 (2d Cir. 1971)*; see also *In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 281-82 (S.D.N.Y.1971)*. Connecticut's ***antitrust law*** provides for the receipt of such funds. *Conn.Gen.Stat. § 35-32a*. The funds deposited with the state and not returned to purchasers may well exceed $ 10,000.

Connecticut could be a member of a consumer class and its adequate representative, with typical claims. The citizenship of a class is determined by the citizenship of its representative, *Snyder v. Harris, 394 U.S. 332, 340, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969)*; *Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 41 S. Ct. 338, 65 L. Ed. 673 (1921)*, and in pressing any claim of its own as representative of a class, Connecticut would be acting as a sovereign.

[7.] In *Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, which included a Parens patriae claim alleging violations of federal antitrust laws, complaints of injury to the "general economy" of the state did not change the nature of the claim from one in which the state was really putting forth the claims of many individuals. *Id. at 262-64, 92 S. Ct. 885*. The subsequently enacted § 4C of the Clayton Act, added by the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub.L.No.94-435, § 301, 90 Stat. 1394-95 (1976), now authorizes the attorney general of any state to bring a Parens patriae suit, in the name of the state, on behalf of those who have sustained injury through violations of the Sherman Act. But cf. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. A similar provision exists in Connecticut law. *Conn.Gen.Stat. § 35-32*. But those authorizations do not change the nature of the suits.

Moreover, the $ 250,000 sought as a civil penalty obviously **[**23]** exceeds the requisite jurisdictional amount. Finally, ***HN8***[] the attorney's fees Connecticut seeks are an element of damages to be included in satisfying the **[*372]** jurisdictional amount, since they are authorized by statute as recoverable in an antitrust action, *Conn.Gen.Stat. § 35-35*. See *Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 54 S. Ct. 133, 78 L. Ed. 267 (1933)*; *Batts Restaurant, Inc. v. Commercial Insurance Co., 406 F.2d 118, 120 (7th Cir. 1969)*; Cf. *Givens v. W. T. Grant Co., 457 F.2d 612, 614* (2d Cir.), Vacated on other grounds, *409 U.S. 56, 93 S. Ct. 451, 34 L. Ed. 2d 266 (1972)*. The amount of such fees can reasonably be expected to exceed $ 10,000.

However, the claim Connecticut makes for the remainder of overcharges not to be distributed to identifiable purchasers, for civil penalties, and for attorney's fees is brought in its sovereign capacity. These funds are not sought for any specific individuals or group of individuals. The funds would belong to the state. In seeking them, Connecticut cannot satisfy the citizenship requirement of diversity jurisdiction.

Thus, as to no one element of its money claim can Connecticut simultaneously satisfy the citizenship **[**24]** and jurisdictional amount requirements.

Conclusion

Neither federal question nor diversity jurisdiction is properly invoked in this case. The motion of the State of Connecticut to remand is granted.

End of Document

Minnesota by Spannaus v. American Crystal Sugar Co.

United States District Court for the District of Minnesota, Fourth Division.

May 31, 1979, Filed

Civil No. 4-79-116.

Reporter
1979 U.S. Dist. LEXIS 12044 *; 1979-2 Trade Cas. (CCH) P62,839

State of Minnesota by Warren Spannaus, its Attorney General v. American Crystal Sugar Co., a Minnesota agricultural cooperative, American Crystal Sugar Co., a dissolved New Jersey corporation, California and Hawaiian Sugar Co., Holly Sugar Corp., Consolidated Foods Corp., Great Western Sugar Co., The Amalgamated Sugar Co., Amstar Corp., U and I Incorporated, and Imperial Sugar Co.

Core Terms

Removal, laws of the united states, original jurisdiction, civil action, Sherman Act, provisions, documents, remanding, costs

Opinion by: **[*1]** ALSOP

Opinion

Order of Remand

ALSOP, D.J.: This matter came on for hearing before this Court on May 25, 1979, on the motion of plaintiff State of Minnesota, by its Attorney General, for an Order remanding this action to the District Court of the State of Minnesota, Fourth Judicial District, and awarding to plaintiff the costs incurred by reason of the removal of the action to this Court.

This antitrust action was originally filed on February 16, 1979, in the District Court of the State of Minnesota, Fourth Judicial District. The plaintiff State sought relief for itself, for a class of subordinate governmental entities, and for a class of Minnesota consumers on the basis of alleged violations of the Minnesota ***Antitrust Law*** of 1971, *Minnesota Statutes § 325.8011 et seq.*, and its predecessor statute, *Minnesota Statutes § 325.81*. On March 15, 1979, the defendant sugar refiners and processors removed the action to this Court on the basis of a Petition for Removal, which stated that:

[This] action is a civil action of which this Court has original jurisdiction under the provisions of *28 U.S.C. Sections 1331* and *1337* and *15 U.S.C. Section 15*, and is one which may be removed to **[*2]** this Court by Petitioners pursuant to the provisions of 28 U.S.C. Section 1141(b) in that it is founded on a claim or right arising under the laws of the United States including, inter alia, *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*.

Petition for Removal, p. 3, § 6

On March 30, 1979, plaintiff State of Minnesota filed its motion for an Order remanding this action to State court.

The Court has considered the Complaint, the Petition for Removal and accompanying documents, the arguments of counsel, and the memoranda and other documents submitted in connection with the Court's consideration of the pending motion.

On the basis of the foregoing, the Court finds that:

1. This action is not a civil action of which this Court has original jurisdiction under *28 U.S.C. Section 1331*, *1337* or *15 U.S.C. Section 15*.

2. This action is not founded on a claim or right arising under the laws of the United States, including *Sections 1* and *2* of the Sherman Act, *15 U.S.C. Section 1* and *2*.

3. This action is not removable to this Court under *28 U.S.C. Section 1441(b)* and has been removed improperly, improvidently, and without jurisdiction.

4. The removal of the action **[*3]** to this Court was not undertaken by the defendants or their counsel in bad faith.

It Is Therefore Ordered That:

A. This action is hereby remanded, pursuant to *28 United States Code § 1447(c)*, to the District Court of the State of Minnesota, Fourth Judicial District.

B. The request of plaintiff State of Minnesota for an award of attorneys fees as costs under *28 United States Code § 1447(c)* is denied.

C. The Clerk shall mail a certified copy of this Order of Remand to the Clerk of the District Court of the State of Minnesota, Fourth Judicial District, Hennepin County Government Center, Minneapolis, Minnesota.

Optivision, Inc. v. Syracuse Shopping Center Associates

United States District Court for the Northern District of New York

May 31, 1979

No. 79-CV-33

Reporter

472 F. Supp. 665 *; 1979 U.S. Dist. LEXIS 12045 **; 1979-2 Trade Cas. (CCH) P62,874

OPTIVISION, INC., Plaintiff, v. SYRACUSE SHOPPING CENTER ASSOCIATES, a Limited Partnership, International Business & Realty Corporation, Irving H. Rosenberg, and DeWitt's Optical World, Inc., Defendants

Core Terms

lease, Northern, shopping center, landlord, optical, renewal, tenant, merits, mall, interstate commerce, renewal option, Sherman Act, commerce, notice, retail, antitrust, monopolize, preliminary injunction, alternate, customers, relations, violates, appears, rental, relevant market, present record, rule of reason, fairground, products, damages

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

In the Second Circuit a party seeking a preliminary injunction must make a clear showing of either: (1) probable success on the merits, and possible irreparable injury, 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 > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

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

Civil Procedure > Remedies > Injunctions > General Overview

HN2[] Remedies, Damages

The right of a private litigant to injunctive relief in an antitrust action is governed by § 16 of the Clayton Act, *15 U.S.C.S. § 26*. That section states in part that any person, firm, corporation, or association is entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. The standing requirement of § 16 of the Clayton Act is less restrictive than that contained in § 4 of the Clayton Act since the right to sue under the former provision extends to threatened as well as actual injuries, and is not limited to injuries to a party's business or property.

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

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

HN3[] Amendment of Pleadings, Leave of Court

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

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN4[] Clayton Act, Claims

In a suit for treble damages under § 4 of the Clayton Act, a party seeking injunctive relief under § 16 of the Clayton Act, *15 U.S.C.S. § 26*, must demonstrate that the injury he has suffered, or is threatened with, proximately results from the antitrust violation. Thus, there must be 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.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

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

HN5[] Antitrust & Trade Law, Sherman Act

The Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade or commerce among the states. 15 U.S.C.S. § 1. It also outlaws any monopolization of, attempt to monopolize, or combination or conspiracy to monopolize a part of the trade or commerce among the states. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

The "interstate commerce" requirement of the Sherman Act is established if the plaintiff is able to demonstrate either that the alleged anticompetitive conduct occurred in the flow of interstate commerce or that the activity in question, although occurring on a local or state level, has a substantial effect upon interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is. The application of the restraint may be intrastate, as it often is, but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

In making a determination as to whether there is a substantial effect on interstate commerce under the Sherman Act, the court must consider whether there is a sufficient nexus between the complained of conduct and the interstate commerce involved and whether the volume or amount of commerce so affected is substantial.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Regulated Industries, Higher Education & Professional Associations

Section 1 of the Sherman Act proscribes all agreements in restraint of trade. If this provision were to be read literally, all commercial contracts would be regarded as violative of the Act since every agreement binds the contracting parties to its terms, and, accordingly, restrains their commercial dealings to a certain extent. The Supreme Court adopted the rule of reason as the standard of analysis for scrutinizing most business relations under the Sherman Act. Under this rule, all the circumstances presented by a particular case must be evaluated by the trier of fact to determine whether the complained of conduct imposes an unreasonable restraint on competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

In making a determination as to whether an agreement is in restraint of trade in violation of the Sherman Act, consideration must be given to the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, the history of the restraint, and the reasons for its adoption. The focus of the analysis must be upon the impact of the challenged activity on competitive conditions in the relevant market. Any benefits to competition are to be weighed against the competitive evils of the practice in question.

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

HN10[] **Antitrust & Trade Law, Sherman Act**

The rule of reason is used to evaluate the validity of most activity challenged under the Sherman Act. The doctrine of per se illegality has been applied to certain conduct that is manifestly anticompetitive. There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable an inquiry so often wholly fruitless when undertaken.

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**

A price fixing agreement is a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity. The per se rule is applied even if the effect upon prices is indirect. However, not all arrangements that have an impact on prices are per se unlawful as price fixing combinations.

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

Contracts Law > Personal Property > Personalty Leases > General Overview

Real Property Law > ... > Lease Agreements > Commercial Leases > Shopping Center Leases

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 > General Overview

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

HN12[] **Causes of Action, Restraints of Trade**

An exclusivity clause in a shopping center lease is similar, in many respects, to an exclusive dealing arrangement between a manufacturer and a distributor since in both situations a business entity in control of a product restrictively selects the parties to whom it will sell the commodity. Exclusive distributorships between manufacturers and sellers have generally been upheld by the courts under the rule of reason.

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

HN13[] **Regulated Practices, Market Definition**

The geographic market, which is the area of effective competition, must correspond to commercial realities. It has been characterized as the area in which the seller operates, and to which the purchaser can practicably turn for supplies. While the relevant geographic market is often the nation, it can, in an appropriate case, be as small as a city or even part of a city.

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

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

HN14[] **Regulated Practices, Market Definition**

An exclusivity clause will properly be regarded as an unreasonable restraint of trade only if this provision has an adverse impact on competitive conditions as they exist generally in the field of commerce in which the parties engaged. Thus, the significance of the competition eliminated must be viewed in the context of the total competition extant in the relevant market.

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

HN15[] **Monopolies & Monopolization, Conspiracy to Monopolize**

An essential element of a conspiracy to monopolize is proof of specific intent to monopolize the designated segment of commerce. The requisite intent may be proved by circumstantial evidence in an appropriate case.

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

HN16[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A claim of conspiracy to monopolize does not require a showing of power to exclude competition, but the absence of any serious likelihood of successfully achieving monopolization is evidence that can be used to support a finding of lack of specific intent.

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

The mode of analysis utilized under the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, is similar to that developed under the federal Sherman Act. Only agreements which constitute unreasonable restraints of trade are prohibited under the Donnelly Act.

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

HN18[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Not all agreements that restrain trade are proscribed by *N.Y. Gen. Bus. Law § 340*. The test is whether the restraint is unreasonable.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Torts > ... > Liabilities of Lessors > Negligence > General Overview

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

Real Property Law > ... > Lease Agreements > Commercial Leases > General Overview

HN19[] **Defenses, Ambiguities & Mistakes**

Under New York law, notice exercising a lease option is legally effective only if given within the specified time and in the designated manner. A tenant will be relieved from the forfeiture of a valuable leasehold resulting from the tenant's failure to exercise his renewal option in a timely manner if his failure to do so was the result of an honest mistake or similar excusable fault, provided that the landlord will not be prejudiced by the late renewal. This doctrine has been applied where the failure to renew by the designated date was due to an ambiguity in the lease, was due to the tenant's reliance upon the actions of a third party, or where the failure to make a timely renewal was due to the tenant's own negligence or inadvertence. In appropriate circumstances, New York courts have found that a landlord had waived strict compliance with the notice requirements of a renewal option or was equitably estopped from mandating strict adherence to the terms of such a provision.

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

Real Property Law > ... > Lease Agreements > Commercial Leases > General Overview

HN20[] **Types of Contracts, Lease Agreements**

A landlord is not required to give notice to a tenant of the renewal clause in its lease.

Torts > ... > Commercial Interference > Contracts > General Overview

HN21[] **Commercial Interference, Contracts**

An action for tortious interference with a party's contractual relations will lie only if (1) there is a valid contract between the plaintiff and another, (2) the defendant has knowledge of the contract, (3) the defendant intentionally procures the breach of that contract, and (4) damages are suffered. On the other hand, interference with pre-contractual relations is actionable where a contract would have been entered into had it not been for the malicious, fraudulent, or deceitful actions of a third party. The "would have been entered into" standard is a strict one as it is more stringent than "being reasonably certain," or "having a reasonable expectation."

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

Civil Procedure > Remedies > Damages > Monetary Damages

HN22[] **Private Actions, Remedies**

The ability to compute monetary damages in a restraint of trade case establishes that the harm which plaintiff would suffer is not irreparable in nature.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN23[] **Private Actions, Remedies**

A threat that a party will be driven out of business if a preliminary injunction is not granted may constitute irreparable harm in a restraint of trade case.

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

HN24[] **Private Actions, Remedies**

Loss of customer good will may constitute irreparable harm in a restraint of trade case where a distributor is deprived totally of the opportunity to sell an entire line of merchandise.

Counsel: [1]** Hancock, Estabrook, Ryan, Shove & Hust, Syracuse, N. Y., for plaintiff; Paul M. Hanrahan, M. Harold Dwyer, Syracuse, N. Y., of counsel.

Gross, Shuman, Brizdle, Laub & Gilfillan, P.C., Buffalo, N. Y., for defendants Syracuse Shopping Center Associates, International Business & Realty Corp. and Irving H. Rosenberg; Philip B. Abramowitz, Buffalo, N. Y., of counsel.

Vecchio & Clark, North Syracuse, N. Y., for defendant DeWitt's Optical World, Inc.; Howard F. G. Clark, Jr., North Syracuse, N. Y., of counsel.

Opinion by: MUNSON

Opinion

[*670] MEMORANDUM DECISION AND ORDER

On January 15, 1974, Optivision, Inc., which operates a wholesale and retail optical goods business, entered into a lease agreement with Syracuse Shopping Center Associates ("Syracuse Associates") to rent a small commercial unit within the Northern Lights Shopping Center for use as a retail store for the dispensing of eyeglasses, contact lenses, and other optical devices. The lease was for five years, commencing on March 1, 1974 and ending on February 28, 1979. A rider to the lease gave the tenant the option to extend the term for an additional five-year period at a slightly increased rental, and provided that **[**2]** the tenant must give the landlord notice of his exercise of the option at least six months prior to the expiration date of the original term. The lease required such notice to be delivered in person or sent by certified mail to Syracuse Shopping Center Associates at 17 Court Street, Buffalo, New York. There is disagreement among the parties as to whether Optivision validly exercised this renewal option.

On September 6, 1978, the landlord leased a different commercial unit in the Northern Lights Shopping Center to a competitor of Optivision, DeWitt's Optical World, Inc. ("DeWitt"), for use as a retail optical goods store. The lease agreement with DeWitt contains an exclusivity clause, providing that the landlord will not rent space in the shopping center to any other optical store unless the center is expanded to include a third department store.

In this action, Optivision challenges the validity of the exclusivity clause in DeWitt's lease under *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and under the New York State Donnelly Act. *New York General Business Law § 340*. Optivision also asserts that, under the legal or equitable principles applied by the New York courts, the lease **[**3]** should be regarded as having been properly renewed, and further alleges that defendants have tortiously interfered with plaintiff's contractual relations. Optivision seeks declaratory and injunctive relief as well as damages.

Presently before the Court is Optivision's motion for a preliminary injunction to restrain defendants from taking any action to enforce the exclusivity clause contained in the lease between the landlord and DeWitt and to restrain defendants from taking any action to remove plaintiff from its present Northern Lights location, pending a determination on the merits of this lawsuit. An evidentiary hearing was held before the Court on March 27 and 28, 1979. At that time, four witnesses testified: John Ransom, Chairman of the Board of Optivision; John Carter, New York State Regional Manager for Optivision; Irving Rosenberg, President of International Business & Realty Corporation ("International") and the leasing and managing agent for Northern Lights; and Morris DeWitt, President and principal shareholder of DeWitt's Optical World, Inc. Certain documentary proof was received in evidence during the hearing.

It is well established ***HN1***[] in this circuit that a party seeking **[**4]** a preliminary injunction must make a clear showing of either

> (1) probable success on the merits And possible irreparable injury, 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.

Selchow & Righter Co. v. McGraw-Hill Book Co., 580 F.2d 25, 27 (2d Cir. 1978); *State of New York v. Nuclear Regulatory Commission, 550 F.2d 745, 750 (2d Cir. 1977)*; *Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438, 441 n. 2 (2d Cir. 1977)*; *Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973)*.

I.

A.

Initially, defendants argue that plaintiff does not have standing to maintain the antitrust claims since there is not a sufficient **[*671]** causal relationship between the harm to Optivision and defendants' alleged anticompetitive conduct. Defendants argue that the damage suffered by Optivision is a direct and proximate result of its own ineptitude in failing to properly exercise the renewal option in its lease rather than the result of any combination or conspiracy among the defendants.

HN2[] The right of a private **[**5]** litigant to injunctive relief in an antitrust action is governed by § 16 of the Clayton Act, *15 U.S.C. § 26*, [1] which states in pertinent part:

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1. Section 16 of the Clayton Act, *15 U.S.C. § 26*, is not specifically cited in the Complaint, but leave to amend the Complaint to include this statutory provision as a jurisdictional basis could be granted. ***HN3***[] *Rule 15(a), Fed.R.Civ.P.*, provides that leave to amend "shall be freely given when justice so requires."

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . .

See also *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562,* ***[**6]*** *23 L. Ed. 2d 129 (1969)*; *SCM Corp. v. Xerox Corp., 507 F.2d 358, 360 (2d Cir. 1974)*. The standing requirement of § 16 is less restrictive than that contained in § 4 since the right to sue under the former provision extends to threatened as well as actual injuries, and is not limited to injuries to a party's "business or property." *Hawaii v. Standard Oil Co., 405 U.S. 251, 260-62, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*; *DeGregorio v. Segal, 443 F. Supp. 1257, 1265 n. 13 (E.D.Pa.1978)*; 15 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 114.01(1) (1978).

However, as ***HN4***[] in a suit for treble damages under § 4, a party seeking injunctive relief under § 16 must demonstrate that the injury he has suffered (or is threatened with) proximately results from the antitrust violation. *Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989, 992 (5th Cir. 1973)*; *Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 123 (N.D.Cal.1970)*. Thus, "(t)here must be 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." *Bowen v. New* ***[**7]*** *York News, Inc., 522 F.2d 1242, 1255 (2d Cir. 1975)*, Cert. denied, *425 U.S. 936, 96 S. Ct. 1667, 48 L. Ed. 2d 177 (1976)*; *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970)*, Cert. denied, *401 U.S. 923, 91 S. Ct. 877, 27 L. Ed. 2d 826 (1971)*.

On the basis of the present record in this case, the Court concludes that there is a sufficient causal relationship between the harm plaintiff is threatened with and the alleged anticompetitive conduct. While Optivision may not have validly exercised its renewal option, there is a substantial possibility that it would have been able to enter into a new lease agreement with the landlord at an increased rental if the exclusivity clause had not been granted to DeWitt. The nexus between the threatened harm and the activity in question can be seen from the letter sent by the landlord's counsel to the attorney for Optivision in which it is stated that Syracuse Associates have made "lease commitments which preclude their further interest in . . . (Optivision's) staying at Northern Lights." Defendants correctly point out that if Optivision has not properly renewed its lease, it will be in the same position with respect to the enforcement **[**8]** of the exclusivity clause as any other optical goods store in the Syracuse area, but the Court feels that such a party does have standing to seek injunctive relief, provided that there is space available in the shopping center which the landlord refuses to rent because of the exclusivity clause. See Pay Less Drug Stores Northwest, **[*672]** Inc. v. City Products Corp., 1975-2 Trade Cases P 60,385 (D.Ore.1975). [2.]

[9]** Thus, plaintiff has shown a probability of successfully demonstrating that it has standing to maintain this suit.

B.

Defendants also contend that the federal antitrust claims must be rejected, because plaintiff has failed to satisfy the interstate commerce requirement of the Sherman Act. ***HN5***[] That Act prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several States," *15 U.S.C. § 1*, and also outlaws any monopolization of, attempt to monopolize, or combination or conspiracy to monopolize a "part of the trade or commerce among the several States." *15 U.S.C. § 2*.

[2.] The Court believes that, for similar reasons, the causation requirement under New York State ***antitrust law*** is also satisfied in this case. The decision in *Mobil Oil Corp. v. Rubenfeld, 48 A.D.2d 428, 370 N.Y.S.2d 943 (2d Dept. 1975)*, *Aff'd, 40 N.Y.2d 936, 390 N.Y.S.2d 57, 358 N.E.2d 882 (1976)* is not to the contrary since the court in that case did not find that there was an insufficient causal relationship between the landlord's antitrust violations and the tenant's eviction, but rather found that the recognition, in those circumstances, of a retaliatory defense would impose a disproportionate penalty upon the landlord whereas monetary damages would adequately effectuate the purpose of the antitrust laws.

HN6[] The interstate commerce requirement of the Sherman Act will be established if the plaintiff is able to demonstrate either that the alleged anticompetitive conduct occurred in the flow of interstate commerce or that the activity in question, although occurring on a local or state level, has a substantial effect upon interstate commerce. *Burke v. Ford, 389 U.S. 320, 321, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967)*; *Tiger Trash v. Browning-Ferris Industries, Inc., 560 F.2d 818, 825 (7th Cir. 1977)*, Cert. denied, *434 U.S. 1034, 98 S. Ct. 768, 54 L. Ed. 2d 782 (1978)*; *Taxi Weekly, Inc. v.* **[**10]** *Metropolitan Taxicab Board of Trade, Inc., 539 F.2d 907, 909 (2d Cir. 1976)*; *United States v. Greater Syracuse Board of Realtors, Inc., 449 F. Supp. 887, 891 (N.D.N.Y.1978)*.

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

United States v. Women's Sportswear Manufacturers Association, 336 U.S. 460, 464, 69 S. Ct. 714, 716, 93 L. Ed. 805 (1949).

The substantiality of the effect under the affecting commerce theory must be viewed in terms of practical economics. *Goldfarb v. Virginia State Bar, 421 U.S. 773, 784 n. 11, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*; *Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48, 51 (3d Cir. 1973)*; *Rasmussen v. American Dairy Association, 472 F.2d 517, 523 (9th Cir. 1972)*, Cert. denied, *412 U.S. 950, 93 S. Ct. 3014, 37 L. Ed. 2d 1003 (1973)*. HN7[] In making this determination, the court must consider whether **[**11]** there is a sufficient nexus between the complained of conduct and the interstate commerce involved and whether the volume or amount of commerce so affected is substantial. *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *Harold Friedman Inc. v. Thorofare Markets Inc., 587 F.2d 127, 132 (3d Cir. 1978)*; *United States v. Greater Syracuse Board of Realtors, Inc., supra, 449 F. Supp. at 891, 897*; *Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824, 837 (N.D.Ga.1976)*.

Testimony concerning the contacts between Optivision's Northern Lights store and interstate commerce was received at the hearing held in this case. In the Court's opinion, the most significant of those contacts is the purchase of products from out-of-state suppliers for resale in the Northern Lights retail outlet. Both Mr. Ransom and Mr. Carter listed several Optivision suppliers which were located in other states, but the record does not contain the precise figure representing the volume **[*673]** of products sent from outside the state to the Northern Lights store. Mr. Ransom stated that the projected gross retail sales for the Northern Lights store for the year **[**12]** 1979 is $ 200,000, and said that approximately 40% Of the gross retail sales figure is represented by the wholesale cost of the products delivered to that store for resale (which would make the wholesale cost in 1979 $ 80,000). It is unclear exactly what portion of the $ 80,000 wholesale cost reflects the purchase of goods from out-of-state suppliers, but it is reasonable to infer from the testimony that a significant portion of the $ 80,000 figure represents the purchase of out-of-state products since Mr. Ransom stated that Optivision's largest supplier of optical lenses, from which it purchases the great bulk of its lenses, is located in Philadelphia, Pennsylvania, and lenses constitute one of the two principal items bought from wholesalers (the other principal item being frames). [3.]

The Optivision **[**13]** representatives also testified that, while the vast majority of customers going to the Northern Lights store were from the Greater Syracuse Metropolitan Area, a small percentage (perhaps 1 or 2% According to Mr. Carter) came from other states. [4.] In this regard, it was noted that customers of other Optivision stores are given guarantees that will be honored at the Northern Lights retail outlet, and that the Northern Lights Shopping Center is located near several interstate highways.

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3. Mr. Ransom also said that the proportion of out-of-state as opposed to in-state products purchased for the Northern Lights store was probably about the same as that purchased for the other Optivision retail outlets.

4. Testimony was received at the hearing showing that Optivision accepts credit cards from customers, but the Court does not have to consider what significance this might have in establishing the required nexus with interstate commerce, because the witness, who was asked this question, was unable to state where the credit card payments came from.

There was also testimony that materials are sometimes transferred between the Northern Lights store and Optivision stores located outside New York State. Optivision has six stores in Georgia **[**14]** in addition to twelve in New York State. Optivision is also affiliated, under a concept known as Vision World, with stores located in Maryland and the Washington, D. C. area. The stores associated with Vision World engage in joint purchasing and promotional programs.

The alleged anticompetitive conduct here the enforcement of the exclusivity clause in DeWitt's lease will result in a cessation of the interstate movement of supplies and customers to the Northern Lights store operated by Optivision. This will cause a reduction in the total amount of commerce moving between the states or, at least, will cause the diversion of such commerce from Optivision's Northern Lights store to DeWitt's store situated in that shopping center or to retail optical outlets located elsewhere. In either event, there would be the required nexus between the acts in question and the interstate commerce involved. See *Harold Friedman Inc. v. Thorofare Markets Inc., supra, 587 F.2d at 132*; *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1142-43 n. 1* (2d Cir.), Cert. denied, *421 U.S. 1011, 95 S. Ct. 2416, 44 L. Ed. 2d 679 (1975)*. [5.]

[15]** While it is not clear from the present record what the exact amount of interstate commerce implicated here is, it appears that a substantial portion of the $ 80,000 worth of supplies purchased annually by the Northern Lights store comes from companies situated in other states. This factor, either alone, or in combination with the sale of goods to out-of-state customers, the transfer of materials between stores in **[*674]** different states, and other factors that may be demonstrated at a trial on the merits, [6.] **[**17]** may quite possibly be sufficient to show that interstate commerce has been substantially affected. In *Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 539-41 (5th Cir. 1978)*, the Fifth Circuit found that there was a substantial effect upon interstate commerce so as to establish Sherman Act jurisdiction where the principal connections with interstate commerce were the plaintiff's purchases of $ 4,000 or $ 5,000 worth of out-of-state supplies a year, and the plaintiff's receipt of $ 12,000 worth of business a year from out-of-state patients. [7.] Also, in a civil rights case *Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964)* the Supreme **[**16]** Court found a sufficient effect upon commerce so as to bring a restaurant within the purview of Congressional supervision under the *Commerce Clause*, where the restaurant purchased $ 70,000 worth of meat from a local supplier who had procured it from outside the state. The latter case, while not decided under the Sherman Act, is relevant here, because it has repeatedly been held that, in passing the Sherman Act, Congress intended to exercise the fullest extent of its constitutional power to regulate commerce. See, e.g., *United States v. American Building Maintenance Industries, 422 U.S. 271, 278, 95 S. Ct. 2150, 45 L. Ed. 2d 177 (1975)*; *United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298, 65 S. Ct. 661, 89 L. Ed. 951 (1945)*; *United States v. South-Eastern Underwriters Association, 322 U.S. 533, 558, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*.

While the present record has certain deficiencies, the Court believes that it is likely that the plaintiff will be able to successfully demonstrate, at a trial on the merits, that the complained of conduct substantially affects interstate commerce. [8.]

C.

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5. While there is a sufficient nexus between the complained of conduct and the interstate commerce engaged in by the Northern Lights store, there would not be an adequate nexus between the activities in question and the other seventeen retail stores owned and operated by Optivision, at least in the absence of proof that Optivision will be driven out of business by the defendants' actions. There is no evidence that Optivision as a corporate entity will be so affected.

6. The purchases which DeWitt makes from out-of-state suppliers could also be considered in determining the substantiality of the effect which the complained of conduct has upon interstate commerce, see *Harold Friedman Inc. v. Thorofare Markets Inc., supra, 587 F.2d at 132-33*, but no proof in this regard was introduced at the hearing.

7. The interstate connections in Mohammad also included very limited payments received from out-of-state insurance companies and relatively small amounts spent on interstate travel by the plaintiff's officers or employees.

8. Since the Court believes that it is likely that the plaintiff will be able to prevail on the "affecting commerce" theory, it is unnecessary to consider the "in commerce" theory.

Optivision contends that exclusivity clauses in shopping center leases should be treated as Per se unlawful under § 1 of the Sherman Act, and, in the alternative, argues that if the Court decides to apply a rule of reason analysis, the exclusivity clause in DeWitt's lease **[**18]** should be found to be unreasonable in the circumstances of this case.

HN8[] *Section 1* of the Sherman Act proscribes all agreements "in restraint of trade." If this provision were to be read literally, all commercial contracts would be regarded as violative of the Act since every agreement binds the contracting parties to its terms, and, accordingly, restrains their commercial dealings to a certain extent. *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*. Recognizing that it was not Congress' intention to prohibit all contracts nor even all contracts that cause an insignificant or attenuated restraint of trade, the Supreme Court adopted the rule of reason as the standard of analysis for scrutinizing most business relations under the *Sherman Act. Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *United States v. Topco Associates, Inc., 405 U.S. 596, 607, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619* ***[**19]*** *(1911)*. Under this rule, all the circumstances presented by a particular case must be evaluated by the trier of fact to determine whether the complained of conduct imposes an unreasonable restraint **[*675]** on competition. *Continental T. V., Inc. v. GTE Sylvania Inc., supra 433 U.S. at 49, 97 S. Ct. 2549*; *White Motor Co. v. United States, 372 U.S. 253, 261, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*; *Hunt v. Mobil Oil Corp., 465 F. Supp. 195, 213 (S.D.N.Y.1978)*.

HN9[] In making this inquiry, consideration must be given to "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *United States v. Topco Associates, Inc., supra, 405 U.S. at 607, 92 S. Ct. at 1133*. See *Chicago Board of Trade v. United States, supra, 246 U.S. at 238, 38 S. Ct. 242*; *National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 960 (2d Cir. 1978)*. The focus of the analysis must be upon the impact of the challenged activity on competitive conditions in the relevant market. *National Society of Professional Engineers v. United States, supra, 435 U.S. at 688-92, 98 S. Ct. 1355*; *American* ***[**20]*** *Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1247 (3d Cir. 1975)*. Any benefits to competition are to be weighed against the competitive evils of the practice in question. *Gough v. Rossmoor Corp., 585 F.2d 381, 388-89 (9th Cir. 1978)*.

While ***HN10***[] the rule of reason is used to evaluate the validity of most activity challenged under the Sherman Act, the doctrine of Per se illegality has been applied to certain conduct that is manifestly anticompetitive. Thus, in *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*, the Supreme Court stated,

> (T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of Per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history **[**21]** of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable an inquiry so often wholly fruitless when undertaken.

See also *Continental T. V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. at 50, 97 S. Ct. 2549*; *United States v. Topco Associates, Inc., supra, 405 U.S. at 607, 92 S. Ct. 1126*. Courts have been willing to classify specific types of business relationships as Per se violations only after having had considerable experience in evaluating them. *Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1*, -- , *441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *White Motor Co. v. United States, supra, 372 U.S. at 263, 83 S. Ct. 696*; *Evans v. S.S. Kresge Co., 544 F.2d 1184, 1191 (3d Cir. 1976)*, Cert. denied, *433 U.S. 908, 97 S. Ct. 2973, 53 L. Ed. 2d 1092 (1977)*. Examples of activity held to be Per se unlawful include price fixing, *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*, group boycotts, *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, and horizontal divisions of markets. *Timken Roller Bearing Co. v.* ***[**22]*** *United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*.

The Court believes that this is not an appropriate case to apply a Per se rule. There has not been extensive judicial experience with exclusivity clauses in shopping center leases. There have been only a limited number of reported opinions dealing with such clauses. Most of those opinions involve rulings on preliminary motions, and do not contain a detailed economic evaluation of this type of activity. See *Harold Friedman Inc. v. Thorofare Markets Inc., supra, 587 F.2d at 141* & n. 56. Moreover, while the Federal Trade Commission, see, e.g., *Tysons Corner Regional Shopping Center, 85 F.T.C. 987, 1973-76* FTC Complaints & Orders P 20,933 (1975); Gimbels Brothers, Inc., 1973-76 FTC Complaints & Orders P 20,478 (1974), and at least one commentator, Note, The Antitrust Implications of Restrictive **[*676]** Covenants in Shopping Center Leases, 86 Harv.L.Rev. 1201 (1973), have taken the position that restrictive covenants in shopping center leases should be subject to the Per se doctrine, all courts considering this matter have indicated that a rule of reason approach should be applied. *Harold Friedman Inc. v. Thorofare **[**23]** Markets Inc., supra*; *Borman's, Inc. v. Great Scott Super Markets, Inc., 433 F. Supp. 343 (E.D.Mich.1975)*; Dart Drug Corp. v. Peoples Drug Stores, Inc., 1977-1 Trade Cases P 61,281 (D.D.C.1977); Pay Less Drug Stores Northwest, Inc. v. City Products Corp., supra. See also *Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962)*, Cert. denied, *372 U.S. 911, 83 S. Ct. 725, 9 L. Ed. 2d 719 (1963)*; *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F. Supp. 988, 995* (D.D.C.), *Aff'd, 139 U.S.App.D.C. 22, 429 F.2d 206 (1970)*.

The Court rejects plaintiff's suggestion that exclusivity clauses should be treated as veiled attempts at price fixing. [9.] ***HN11***[] A price fixing agreement is "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity." *United States v. Socony-Vacuum, supra, 310 U.S. at 223, 60 S. Ct. at 844*. See also *United States v. Parke, Davis & Co., 362 U.S. 29, 47, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*; *United States v. Nu-Phonics, Inc., 433 F. Supp. 1006, 1011 (E.D.Mich.1977)*. The Per se rule will be applied even if the effect upon prices is indirect. *United States v. General **[**24]** Motors Corp., 384 U.S. 127, 147, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Simpson v. Union Oil Co., 377 U.S. 13, 16-22, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*. However, not all arrangements that have an impact on prices are Per se unlawful as price fixing combinations. *Broadcast Music, Inc. v. CBS, Inc., supra, 441 U.S. 1* at -- , *99 S. Ct. 1551*; L. Sullivan, Antitrust § 73 (1977). Here there is no indication that the purpose of the complained of conduct was to fix prices, and any effect, which this activity might have upon prices, will be merely incidental, and will depend upon the market power of DeWitt. Therefore, the Court is of the opinion that it would be inappropriate to treat an exclusivity clause as a Per se unlawful price fixing arrangement.

[25]** Moreover, the Court is unable to conclude that exclusivity clauses in shopping center leases are unreasonable in all possible circumstances. The competitive impact of such arrangements may vary considerably depending upon the availability of suitable alternate locations in the relevant market, and upon the strength of the remaining competition. In addition, there is a possible economic justification for a provision of this nature. In some situations, it may be necessary to include such a clause in a shopping center lease in order to attract to the center a certain type of store which might be unwilling to commit itself to a lease with high rentals if it knows that a competing store will be present in the center.

Also, the impact upon competitive conditions may differ depending upon the type of exclusivity clause involved. A provision that is to be enforceable for a set period of time or one that is to remain in effect until the shopping center expands (i. e., until an additional department store is added) does not necessarily have as great an effect upon competition as one not so limited in duration. Thus, the Court concludes that the validity of the exclusivity clause in DeWitt's **[**26]** lease with the landlord must be determined under the rule of reason rather than under a Per se approach. [10.]

[9.] In support of its argument that exclusivity clauses are, in essence, sophisticated attempts at price fixing, plaintiff relies upon State of Ohio ex rel. Brown v. Zayre of Ohio, Inc., 1974-2 Trade Cases P 75,232 (Ohio Ct.Comm.Pl.Cuyahoga Co.1974). This Court notes that while the decision in Zayre discussed federal precedents, it was actually based upon state ***antitrust law***.

[10.] ***HN12***[] An exclusivity clause in a shopping center lease is similar, in many respects, to an exclusive dealing arrangement between a manufacturer and a distributor since in both situations "a business entity in control of a product restrictively selects the parties to whom it will sell the commodity." *Harold Friedman Inc. v. Thorofare Markets Inc., supra, 587 F.2d at 142*. See also

[*677] It **[**27]** appears that the relevant product market in which the alleged anticompetitive conduct must be examined involves the retail sale of eyeglasses, contact lenses, and other optical devices along with the customer services pertaining thereto. However, there is disagreement among the parties concerning the relevant geographic market. Defendants contend that the geographic market is the Greater Syracuse Metropolitan Area while plaintiff argues that the relevant market is the vicinity of the Northern Lights Mall or the North Syracuse area. ***HN13***[] The geographic market, which is the area of effective competition, must correspond to commercial realities. *Brown Shoe Co. v. United States, 370 U.S. 294, 336, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. It has been characterized as the area "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 (1961)*. See also *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., supra, 510 F.2d at 1144 n. 2*; L. Sullivan, Supra, § 19. While the relevant geographic market is often the nation, it can, in an appropriate case, be as **[**28]** small as a city or even part of a city. *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)* (City of Lorain), *William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945)* (Central theatre district of Philadelphia).

The Court concludes, on the basis of the present record, that the relevant geographic market is the northern part of the Greater Syracuse Metropolitan Area. This conclusion is supported by the testimony of Mr. Carter, Mr. Rosenberg, and Mr. DeWitt. Mr. Carter described the North Syracuse-Mattydale-Liverpool region as being the primary marketing area of the Northern Lights store; Mr. DeWitt characterized the same general vicinity as the drawing area for Northern Lights; and Mr. Rosenberg indicated that commercial properties in that area are in competition with Northern Lights for tenants.

The record now before the Court reveals that there are numerous commercial properties in the relevant geographic market which are suitable as alternate locations for a retail optical store. Several such properties were listed by Mr. Rosenberg in his testimony given at the hearing. The availability of such market alternatives is an important **[**29]** factor that supports a determination that the exclusivity clause here does not unreasonably restrain competition. See *Borman's, Inc. v. Great Scott Super Markets, Inc., supra, 433 F. Supp. at 351*. See also *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972)*. It is significant that in the only case in which an exclusivity clause in a shopping center lease was invalidated Pay Less Drug Stores Northwest, Inc. v. City Products Corp., supra the court found that alternate sites in the area were unavailable, and that a site within the shopping center in question was the only place from which the plaintiff could effectively compete in the market. This is not the case here.

Optivision contends that the restraint in question is an unreasonable one since the Northern Lights Shopping Center, from which plaintiff is being excluded, is an enclosed regional mall while the other commercial properties in the area (with the exception of Penn Can Mall where DeWitt already has a retail optical store) are strip shopping centers or plazas. However, there is not an adequate basis for the Court to compare accurately the alternate locations in question. While certain **[**30]** very basic information concerning the Northern Lights Shopping Center was received in evidence, there is no indication in the record of the size or configuration of the various strip **[*678]** centers or plazas in the relevant market area. Also, plaintiff has offered no proof concerning the amount of traffic passing by the Northern Lights regional mall in comparison to that passing by the strip centers and plazas or the amount of business which an optical store located in one of these strip centers or plazas has been able to generate in comparison to the amount of business done by a retail optical outlet located in Northern Lights. The only evidence in the record on this question is adverse to the plaintiff. Mr. DeWitt testified, based upon his experience with a store in the K-Mart Plaza, that a store in one of the strip centers in that area was exposed to the same volume of traffic as a store in the Northern Lights Mall. [11.] It is possible that, upon a trial on the merits, plaintiff will

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Borman's, Inc. v. Great Scott Super Markets, Inc., supra, 433 F. Supp. at 351. Exclusive distributorships between manufacturers and sellers have generally been upheld by the courts under the rule of reason. b *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978)*; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)*, Cert. denied, ***396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)***; *Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc., 375 F. Supp. 1206 (S.D.N.Y.1974)*.

be able to establish that a store in Northern Lights is exposed to a larger volume of traffic than a store in one of the strip centers or that the amount of business done by an optical store in **[**31]** Northern Lights is greater than that generated by a retail outlet in a strip center. However, this will not necessarily establish the unreasonableness of the restraint involved here. The extent of the disparity between the amount of traffic passing by or business done at the different locations will have to be considered.

Moreover, ***HN14***[] the exclusivity clause in DeWitt's lease will properly be regarded as an unreasonable restraint of trade only if this provision has an adverse impact on competitive conditions as they exist generally in the field of commerce in which plaintiff is engaged. *Gough v. Rossmoor Corp., supra, 585 F.2d at 386*. Thus, the significance of the competition eliminated must be viewed in the context of the total **[**32]** competition extant in the relevant market. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 615, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Associated Press v. United States, 326 U.S. 1, 27, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)* (Frankfurter, J., concurring); *American Motor Inns, Inc. v. Holiday Inns, Inc., supra, 521 F.2d at 1247*; 1 J. Von Kalinowski, Supra, § 6.02(4)(a).

According to Mr. DeWitt (and there is no evidence to the contrary), there are nine or ten retail optical stores competing in the northern part of the Greater Syracuse Metropolitan Area. [12.] In addition, Mr. Ransom acknowledged that the retail sale of optical goods is a highly competitive business. It seems doubtful to the Court, in view of the prevailing market conditions, that the elimination of one retail outlet would have a significant competitive impact. [13.] It has frequently been stated 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, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)* (Emphasis in original). See also *Gough v. Rossmoor Corp., supra, 585 F.2d at 386*; *Oreck Corp. v. Whirlpool **[**33]** Corp., 579 F.2d 126, 134 (2d Cir. 1978)*.

The type of exclusivity clause involved in this case should also be considered. The provision in question provides:

> Landlord agrees that after the date of execution of this lease, Landlord will not execute any new leases or renew any existing leases for any other **[**34]** optical store in the shopping center or mall, or any **[*679]** other adjacent building owned, operated or managed by Landlord, or any other such building owned or operated by Landlord situated within three blocks of the premises leased herein, except in the event that the shopping center is expanded to add a third department store, in which case one more optical store could be added, but Tenant shall have first right of refusal on the leasing of such additional store. Landlord states that he has not made or renewed any lease of any other optical store as of date of this agreement.

This clause does not exclude competition from the Northern Lights Mall under all circumstances since an additional optical store will be permitted if a third department store is added. However, the potential effect of this portion of the clause is limited by the fact that DeWitt is given the first right of refusal on the leasing of such additional store.

Another factor that should be considered is whether there is an economic justification for the exclusivity clause in his case. As previously noted, it is possible that high rentals in a regional mall such as Northern Lights would make it necessary **[**35]** for the landlord to provide a particular type of specialty store with an exclusivity provision in order to attract it as a tenant. Mr. DeWitt testified that he would not have entered into a lease for the rental of space in Northern Lights if he knew that another optical store would be present in the mall. He indicated that other

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11. Mr. Ransom testified that the volume of traffic passing by Northern Lights was significant, but when asked by plaintiff's counsel to compare the amount of traffic going by Northern Lights with that on Route 11, he was unable to do so because of his lack of familiarity with the area.

12. There are perhaps thirty or more optical stores in the Greater Syracuse Metropolitan Area.

13. Of course, when a Per se violation of the Sherman Act has been established, the applicability of the antitrust laws is not affected by the fact that only one competitor has been eliminated, *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*, but the Court has previously indicated that a Per se Approach is not appropriate here. Also, it should be pointed out that Optivision is not being completely eliminated as a competitor. It has another retail outlet in the market area a small store adjacent to its factory in Liverpool. Moreover, Optivision has four other stores in the Greater Syracuse Metropolitan Area.

shopping centers provide optical stores with protection similar in nature to that provided by the clause in question here. [14.] On the other hand, it is not known whether any other specialty stores in Northern Lights have exclusivity provisions in their leases, [15.] although it appears that at least some of them do not, since the mall contains a number of shoe stores and several stores specializing in women's fashions. If an exclusivity provision is necessary to attract an optical store, such a clause has a beneficial impact on competition that will have to be considered along with any adverse competitive effects. On the basis of the present record, the Court is unwilling to reach a conclusion concerning the economic necessity for the exclusivity provision here. However, the fact that a particular restraint does not provide an affirmative benefit to competition **[**36]** does not necessarily mean that the activity violates *§ 1*, provided that the harm to competition is not significant. See *Gough v. Rossmoor Corp., supra, 585 F.2d at 389*.

The Court concludes that plaintiff has not shown a probability **[**37]** of successfully demonstrating, at a trial on the merits, that the exclusivity clause in DeWitt's lease violates *§ 1* of the Sherman Act. It is unlikely that Optivision will be able to establish the applicability of the Per se doctrine or be able to prove that the restraint in question violates the rule of reason. In finding that the complained of conduct is probably not an unreasonable restraint of trade, the Court places particular emphasis upon the facts that there are numerous alternate locations, which are suitable for a retail optical store, and that substantial competition remains in the relevant market despite the enforcement of this clause. The Court also questions whether plaintiff has raised sufficiently serious issues concerning the validity under *§ 1* of the present exclusivity clause to make them a fair ground for litigation, but it is unnecessary to decide definitely whether the issues raised are of such doubt and magnitude since (as will be discussed **[*680]** later) it is clear that the balance of hardships does not tip decidedly in plaintiff's favor.

D.

Optivision also alleges that the exclusivity clause in DeWitt's lease violates *§ 2* of the Sherman Act as a combination **[**38]** or conspiracy to monopolize trade or commerce.

HN15[] An essential element of a conspiracy to monopolize is proof of specific intent to monopolize the designated segment of commerce. *Bowen v. New York News, Inc., supra, 522 F.2d at 1258*; *Lewis v. Pennington, 400 F.2d 806, 811* (6th Cir.), Cert. denied, *393 U.S. 983, 89 S. Ct. 450, 21 L. Ed. 2d 444 (1968)*; L. Sullivan, Supra, § 49. The present record does not contain evidence from which the Court could find the existence of such a specific intent on part of the defendants. Of course, the requisite intent may be proved by circumstantial evidence in an appropriate case, 2 J. Von Kalinowski, Supra, § 9.02(5), but the Court does not believe that the existence of an agreement between the landlord and DeWitt to exclude other retail optical stores from one specific shopping center is sufficient, by itself, to show an intent to monopolize the relevant segment of commerce. [16.]

[39]** Moreover, there is no indication that defendants have the power to control the market for the retail sale of optical goods in the northern part of the Greater Syracuse Metropolitan Area, but, rather, there appears to be vigorous competition among a number of different competitors which have stores in that region. Of course, ***HN16***[] a claim of conspiracy to monopolize does not require a showing of power to exclude competition, *American Tobacco Co. v. United States, 328 U.S. 781, 789, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*, but the absence

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[14.] Mr. DeWitt stated that other shopping centers will not put in a second optical store until there are two or three department stores. He said that his lease at Penn Can Mall does not contain an exclusivity clause, but does provide him with the first right of refusal if a second optical store is to be opened there. It is also noted that there is an exclusivity clause in Optivision's lease although Optivision states that, if it is allowed to remain at Northern Lights, it would not seek to enforce this provision.

[15.] Mr. Rosenberg testified that he was not aware of exclusivity clauses in any other leases at Northern Lights, but he also said that he was not responsible for negotiating provisions of that nature. Such negotiations are apparently conducted directly by the landlord.

[16.] In view of the vigorous competition in the relevant market and the lack of any other evidence of specific intent, the Court is also unwilling to infer specific intent on the part of DeWitt from the fact that DeWitt, in addition to securing an exclusivity clause in its Northern Lights lease, has received assurance of the first right of refusal on the leasing of a second optical store in Penn Can Mall.

of any serious likelihood of successfully achieving monopolization is evidence that can be used to support a finding of lack of specific intent. *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., supra, 510 F.2d at 1144*.

The Court concludes that, with respect to plaintiff's *§ 2* claim, [17.] Optivision has demonstrated neither a probability of success on the merits nor sufficiently serious questions going to the merits to make them a fair ground for litigation.

[40]** E.

Another claim asserted by Optivision is that the exclusivity clause in DeWitt's lease violates the New York State Donnelly Act. *New York General Business Law § 340*. [18.] The Donnelly Act was modeled after the Sherman Act, and, therefore, ***HN17***[] the mode of analysis utilized under the state statute is similar to that developed under the federal legislation. *State v. Mobil **[*681]** Oil Corp., 38 N.Y.2d 460, 463, 381 N.Y.S.2d 426, 428, 344 N.E.2d 357, 359 (1976)*; *Hsing Chow v. Union Central Life Insurance Co., 457 F. Supp. 1303, 1308 (E.D.N.Y.1978)*. Only those agreements which constitute unreasonable restraints of trade are prohibited under the *Donnelly Act. Dawn to Dusk, Ltd. v. Frank Brunckhorst Co., 23 A.D.2d 780, 258 N.Y.S.2d 746, 748 (2d Dept.1965)*; *Triple D & E, Inc. v. Van Buren, 72 Misc.2d 569, 339 N.Y.S.2d 821, 830 (S. Ct.Nassau Co.1972)*, *Aff'd, 42 A.D.2d 841, 346 N.Y.S.2d 737 (2d Dept.1973)*; *Big Toy Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 64 Misc.2d 894, 315 N.Y.S.2d 897, 905 (S. Ct.Westchester Co.1970)*, *Aff'd, 36 A.D.2d 582, 318 N.Y.S.2d 924 (2d Dept.1971)*. In *Peoples Savings Bank v. County Dollar Corp., 43 A.D.2d 327, 351 N.Y.S.2d 157* (2d Dept.), *Aff'd, 35 N.Y.2d 836, 362 **[**41]** N.Y.S.2d 864, 321 N.E.2d 784 (1974)*, an exclusivity clause in a shopping center lease was upheld under the rule of reason. In doing so, the court emphasized the existence of alternate locations where the excluded merchant could do business:

> ***HN18***[] Not all agreements which restrain trade are proscribed by statute (General Business Law, *§ 340*). The **[**42]** test is whether the restraint is unreasonable (*Dawn to Dusk, Ltd. v. Brunckhorst Co., 23 A.D.2d 780, 258 N.Y.S.2d 746*). The City of Yonkers is the fourth largest city in the State of New York, with a population in excess of 200,000. The Cross County Shopping Center is but a small part of the City of Yonkers and there are many other locations within that city where Seamen's can locate a branch without violating the restrictive covenant in question. Indeed (and this was conceded on the argument of the appeal), there are sites on Central Avenue, only a short distance from the Cross County Shopping Center, but just outside of the restricted area, upon which Seamen's can locate a branch bank. Clearly, therefore, the covenant under review, limited as it is to the lessor's holdings in a small area, is a reasonable restriction.

[17.] From the wording of the *§ 2* claim in the Complaint, it is possible that plaintiff may be alleging that defendants' conduct constitutes attempted monopolization as well as a conspiracy to monopolize, but a letter sent by plaintiff's counsel to the Court after the hearing appears to disclaim this theory. In any event, the Court's discussion of the failure to establish proof of a conspiracy to monopolize shows that the two essential elements of an attempt to monopolize specific intent to build a monopoly and dangerous probability of success have not been demonstrated in this case. See *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48*, (2d Cir. 1979); *Bowen v. New York News, Inc., supra, 522 F.2d at 1252 n. 7*.

[18.] The Court has pendent jurisdiction over this claim and the other causes of action arising under New York State law. While plaintiff has not made a sufficient showing on the merits to be entitled to preliminary injunctive relief on the federal antitrust claims, those claims are not properly characterized as wholly insubstantial or patently frivolous. Therefore, the federal causes of action form a sufficient basis upon which to predicate pendent jurisdiction over the state claims. See *Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*; *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 n. 3 (2d Cir. 1977)*.

351 N.Y.S.2d at 161. With respect to the present case, it has been shown that there are numerous alternate sites for the location of a retail optical store in the relevant market area, and, therefore, the restraint in question would probably be regarded as a reasonable one under the Donnelly Act.

Thus, plaintiff has not established a probability of success **[**43]** on the merits with regard to its Donnelly Act claim, and it is questionable whether sufficiently serious issues going to the merits have been raised to make them a fair ground for litigation.

II.

In addition to arguing that the exclusivity clause in DeWitt's lease violates federal and state antitrust laws, Optivision maintains that, under controlling legal or equitable principles of New York State law, it should be regarded as having properly exercised the option to renew its Northern Lights lease for the five-year period following February 28, 1979.

HN19[] Under New York law, notice exercising an option is legally effective only if given within the specified time and in the designated manner. *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc., 42 N.Y.2d 392, 396, 397 N.Y.S.2d 958, 960, 366 N.E.2d 1313, 1315 (1977)*; *Sy Jack Realty Co. v. Pergament Syosset Corp., 27 N.Y.2d 449, 452, 318 N.Y.S.2d 720, 721, 267 N.E.2d 462, 463 (1971)*; *Goldberg v. Himlyn, 121 Misc. 580, 201 N.Y.S. 837, 841 (Kings Co.Ct.1923)*; 34 N.Y.Jur., Landlord and Tenant § 419 (1964); 1A Corbin on Contracts § 264 (1963). However, the New York courts will relieve a tenant from the forfeiture of a valuable leasehold resulting **[**44]** from the tenant's failure to exercise his renewal option in a timely manner if his failure to do so was the result of an honest mistake or similar excusable fault, provided that the landlord will not be prejudiced by the late renewal. *Sy Jack Realty Co. v. Pergament Syosset Corp., supra*; *Jones v. Gianferante, 305 N.Y. 135, 111 N.E.2d 419 (1953)*; *Rizzo v. Morrison Motors, Inc., 29 A.D.2d 912, 289 N.Y.S.2d 903 (4th Dept.1968)*; *Gallagher v. Marconi, 68 Misc.2d 319, 326 N.Y.S.2d 697 (Dist.Ct.Suffolk Co.1971)*; *Gordon v. Barash, 67 Misc.2d 764* ***[*682]*** *325 N.Y.S.2d 213 (Civil Ct.N.Y.C.1971)*. This doctrine has been applied where the failure to renew by the designated date was due to an ambiguity in the lease, *Jones v. Gianferante, supra*; *Rizzo v. Morrison Motors, Inc., supra*; *Ringelheim v. Karsch, 112 N.Y.S.2d 130 (S. Ct.Kings Co.1952)*; *Application of Topp, 81 N.Y.S.2d 344 (S. Ct.Queens Co.1948)*, or was due to the tenant's reliance upon the actions of a third party. *Sy Jack Realty Co. v. Pergament Syosset Corp., supra* (reliance upon the United States Postal Service to deliver mail); *Eva Donut Shop, Inc. v. Pace, 54 A.D.2d 575, 387 N.Y.S.2d 139 (2d Dept.1976)* (reliance upon assignor to renew **[**45]** the lease). In *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc., supra*, the New York Court of Appeals extended this principle to a situation where the failure to make a timely renewal was due to the tenant's own negligence or inadvertence. See also *Blake Service Center v. J.C.R. Realty Corp., 59 A.D.2d 931, 399 N.Y.S.2d 444 (2d Dept.1977)*; *George W. Millar & Co. v. Wolf Sales & Service Corp., 65 Misc.2d 585, 318 N.Y.S.2d 24 (Civil Ct.N.Y.C.1971)*.

In addition, the New York courts have found, in appropriate circumstances, that a landlord had waived strict compliance with the notice requirements of a renewal option or was equitably estopped from mandating strict adherence to the terms of such a provision. *Modlin v. Town & Country Tux, Inc., 42 A.D.2d 586, 344 N.Y.S.2d 703 (2d Dept.1973)*; *Adelman v. Applefield, 22 Misc.2d 95, 203 N.Y.S.2d 602 (Mun.Ct.N.Y.C.1959)*.

The evidence received in the present case establishes that Optivision did not provide notice of the exercise of its renewal option to Syracuse Associates at 17 Court Street, Buffalo, New York either in person or by certified mail prior to August 31, 1978. Thus, it is clear that notice has not been given in accordance with the **[**46]** terms of the lease between Optivision and Syracuse Associates.

However, a more detailed consideration of the evidence is necessary to determine whether there is an equitable basis for finding that Optivision has properly renewed its lease. Sharply conflicting testimony was received on certain crucial questions, and, therefore, the resolution of this matter requires the Court to make a careful assessment of the witnesses' credibility.

In early August, 1978, Mr. Ransom and Mr. Carter met with Mr. Rosenberg in a trailer, used by Mr. Rosenberg as an office at the Northern Lights Shopping Center, to discuss the options available to Optivision for leasing space at Northern Lights. Mr. Ransom and Mr. Carter both testified that Mr. Ransom informed Mr. Rosenberg, at that time, of

Optivision's decision to exercise the renewal provision of its lease, and thereby keep its store location in the mall. Mr. Ransom further said, that shortly after the meeting, he sent a letter to Mr. Rosenberg, confirming the substance of the conversation. Defendants dispute plaintiff's account of what was said at the early August meeting. Mr. Rosenberg testified that he was not informed, at that time, of a decision **[**47]** by Optivision, but, rather, was told by the Optivision representatives that they would get back to him later. Also, Mr. Rosenberg denied receiving any letters concerning exercise of the renewal option by Optivision.

After carefully considering all the testimony, as well as the documentary evidence before it, the Court concludes, for purposes of the present proceeding, that Mr. Rosenberg's account of the August meeting was essentially correct, and that the Optivision representatives did not tell Mr. Rosenberg, at that time, that they intended to exercise the renewal option. In particular, the Court notes that this conclusion is supported by the language used in the letter written by Mr. Ransom after the August meeting. The letter, dated August 15, 1978, states, in pertinent part:

> Thanks for the discussion with us of our options regarding our space in Northern Lights. We have decided to renew our lease and remain where we are. I think you will be pleased with the total renovation of our store that we plan.
>
> Please, therefore, consider this letter notice of our formal renewal of our lease **[*683]** in the Northern Lights Shopping Center for a period of five years, commencing **[**48]** at the expiration of the initial term of our lease, February 28, 1979.

The foregoing language suggests that Optivision intended to inform the landlord of its decision to exercise the renewal option by means of that letter, and that it was not merely confirming a decision it had previously informed the landlord of.

The Court also observes that, immediately after the meeting with Mr. Rosenberg, Mr. Carter and Mr. Ransom (while riding in an automobile) had a discussion concerning the alternate courses of action which were open to Optivision, and it is likely that a decision with respect to the exercise of the renewal option was not made prior to this conversation.

The parties have argued, at considerable length, as to whether plaintiff has adequately proven whether the August 15, 1978 letter, signed by Mr. Ransom, was actually mailed. However, the Court feels that, in the present posture of this case, it is unnecessary to resolve that question. [19] The Court finds that, even if the letter was mailed, it was not received by either Mr. Rosenberg or by Syracuse Associates. The letter was addressed:

[49]**

> Mr. Irving Rosenberg
> Syracuse Shopping Center Associates
> Northern Lights Shopping Center
> North Syracuse, NY 13202

This address is improper. While the management of Northern Lights regularly receives mail at its offices in the shopping center, such mail is addressed to International Business & Realty Corporation or simply to Northern Lights Shopping Center rather than to Syracuse Shopping Center Associates. As previously indicated, Syracuse Associates have their offices at 17 Court Street, Buffalo, New York. Also, the proper zip code for the Northern Lights Mall was not used in the above address, and Mr. Ransom acknowledged that it was quite possible that there was no return address on the envelope. Of course, there is no presumption that an incorrectly addressed letter was duly received, cf. *Nassau Insurance Co. v. Murray, 46 N.Y.2d 828, 414 N.Y.S.2d 117, 386 N.E.2d 1085 (1978)*, and the Court accepts Mr. Rosenberg's testimony that the letter signed by Mr. Ransom was not received by himself or by Syracuse Associates.

The Court concludes that the landlord did not receive notice (oral or written) of Optivision's intention to exercise the option in its lease until October, **[**50]** 1978. Evidently, Optivision became aware of the exclusivity clause in

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[19] At the time of the hearing, the Court reserved decision on the admissibility of Mr. Ransom's letter of August 15, 1978. The Court now rules that the letter is admissible to establish the propositions discussed in the text.

DeWitt's lease sometime during the fall of 1978, and then decided to find out if anything was wrong with the purported renewal of its own lease. Optivision representatives contacted Mr. Rosenberg in October, 1978, concerning this matter, [20] and were advised by Mr. Rosenberg that he had not received a letter from them, and were told to contact Mr. Weinstein in Buffalo. For purposes of deciding the present motion, it is particularly significant that the landlord did not receive notice of Optivision's decision to renew its lease until after the signing of the lease between the landlord and DeWitt on September 6, 1978 which was also after the August 31, 1978 contractual deadline. The Court finds that the landlord entered into the arrangement with DeWitt in the good faith belief that Optivision had not exercised its option. While the negotiations with Mr. DeWitt, for the rental space in Northern Lights, began before August 31, 1978, the terms of the lease, including the exclusivity clause, were not agreed upon until after that date. It appears that the landlord would be liable in damages to DeWitt for breach of the exclusivity **[**51]** clause if Optivision is allowed to remain **[*684]** in Northern Lights. [21] Hence, the landlord changed its position before learning of Optivision's decision on renewal. Because of the prejudice, which the landlord would suffer by giving effect to Optivision's late renewal, this case is distinguishable from the previously cited cases in which the New York courts granted equitable relief to tenants who exercised options to renew in an untimely manner.

Contrary to the suggestion made by Optivision, the landlord was under no duty to advise the tenant that the time for exercising the renewal provision **[**52]** had passed. In certain limited circumstances (i. e., when renewal is automatic, *New York Gen.Oblig.L. § 5-905*), a landlord is required to advise a tenant of the contents of a renewal clause, but the Court is not aware of any statutory provision that is applicable here. The principle that ***HN20***[] a landlord is not required to give notice to a tenant of the renewal clause in its lease is supported by the New York Court of Appeals' decision in *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc., supra.* In that case, the landlord, throughout the term of the leasehold, regularly informed the tenant of its obligations under the lease, but did not advise it of the time limitation on the exercise of the renewal option. Nonetheless, the court, in remanding the case for a new trial, said that the tenant would not be entitled to relief if the landlord, relying on the agreement had, in good faith, made other commitments before receiving notice from the tenant of its decision on renewal.

Moreover, there is no basis for finding a waiver or an estoppel under the facts appearing in the present record. The Court determines that the landlord did not take any actions which would show that it did not expect strict **[**53]** compliance with the requirements of the renewal provision nor did it take any actions that should have caused Optivision to believe that its lease had been properly renewed. The record reveals that a letter, dated September 28, 1978, was sent by Mr. Rosenberg to Optivision, concerning the Shopping Center's "Mall Sign Criteria" that were to be followed in the installation of exterior signs, but this was a form letter sent to all tenants at Northern Lights, and in any event, Optivision did not take any action in reliance upon it. Prior to receipt of the "Mall Sign Criteria" letter, Optivision entered into a contract with the Garfield Construction Company for the making of permanent renovations to its Northern Lights store, but it failed to obtain the landlord's approval for the making of such improvements, as is required by terms of the lease between Optivision and Syracuse Associates.

Accordingly, the Court concludes that plaintiff has failed to demonstrate a probability of success on the merits with respect to its claim that it should be regarded as having properly exercised its renewal option under legal or equitable principles of New York law. However, because of the difficult credibility **[**54]** questions involved, the Court does find that Optivision has raised sufficiently serious questions going to the merits to make them a fair ground for litigation.

III.

Plaintiff also asserts a cause of action for alleged tortious interference by DeWitt with the contractual relations between Optivision and Syracuse Associates. ***HN21***[] An action for tortious interference with a party's contractual

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[20] There is a conflict in the testimony as to whether the contact in October, 1978 between Optivision representatives and Mr. Rosenberg was in person or by telephone, but it is unnecessary to resolve this conflict.

[21] This is based upon the assumption that the exclusivity clause itself is valid. If the provision were found to be invalid, DeWitt presumably would not be able to collect any damages for its breach.

relations will lie only if there is a valid contract between the plaintiff and another; the defendant has knowledge of the contract; the defendant intentionally procures the breach of that contract; and damages are suffered. *Israel v. Wood Dolson Co., 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 5, 134 N.E.2d 97, 99 (1956)*; *Bryce v. Wilde, 39 A.D.2d 291, 333 N.Y.S.2d 614, 616* (3d Dept.), *Aff'd, 31 N.Y.2d 882, 340 N.Y.S.2d 185, 292 N.E.2d 320 (1972)*; *Welch v. Campbell, 197 Misc. 165, 94 N.Y.S.2d 860, 864 (S. Ct.Otsego Co.1950)*, *Aff'd, 278 App.Div. 605* **[*685]** *102 N.Y.S.2d 51 (3d Dept.1951)*. On the other hand, interference with pre-contractual relations is actionable where a contract would have been entered into had it not been for the malicious, fraudulent, or deceitful actions of a third party. *A. S. Rampell,* ***[**55]*** *Inc. v. Hyster Co., 3 N.Y.2d 369, 376, 165 N.Y.S.2d 475, 481, 144 N.E.2d 371, 375 (1957)*; *Susskind v. Ipco Hospital Supply Corp., 49 A.D.2d 915, 373 N.Y.S.2d 627, 629 (2d Dept.1975)*; *Franklin Enterprises Corp. v. King Refrigerator Corp., 207 Misc. 956, 141 N.Y.S.2d 734, 736 (S. Ct.Queens Co.1955)*. The "would have been entered into" standard is a strict one as it is more stringent than "being reasonably certain" or "having a reasonable expectation." *Union Car Advertising Co. v. Collier, 263 N.Y. 386, 401, 189 N.E. 463, 469-70 (1934)*; *DeSantis v. City of Troy, 83 Misc.2d 195, 371 N.Y.S.2d 310, 316 (S. Ct.Rensselaer Co.1975)*.

The evidence considered earlier shows that plaintiff did not properly exercise its renewal option, and, therefore, there does not exist a valid lease agreement between Optivision and the Syracuse Associates for the five-year period after February 29, 1979. Since there is not a valid contract in existence, a claim for tortious interference with contractual relations is not viable. Even if a valid lease renewal had been effected, there is no showing that DeWitt had knowledge of that. In addition, a claim for tortious interference with pre-contractual relations will **[**56]** not lie since there is no showing that DeWitt engaged in malicious, fraudulent, or deceitful actions. Rather, it appears that DeWitt had a legitimate business motivation in seeking an exclusivity clause. Also, it is questionable whether the contract (new lease agreement) would necessarily have been entered into if it had not been for DeWitt's actions in negotiating an exclusivity clause. While the record shows that the landlord would have evidently been willing to negotiate with Optivision concerning a new lease agreement if the exclusivity provision had not been included in DeWitt's lease, it is not absolutely clear that the negotiations would have been successfully concluded since a new rental amount would have to have been agreed upon. [22.]

[57]** The Court concludes that, with respect to a claim for tortious interference with contractual or pre-contractual relations, plaintiff has not established either a probability of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation.

IV.

The Court has found that plaintiff has not demonstrated a probability of success on any of the causes of action it has asserted, but even if a likelihood of success were shown on one or more claims, Optivision's motion for a preliminary injunction would have to be denied because of its failure to demonstrate irreparable harm. Optivision's principal claim of harm is that it will lose a valuable business asset the location of its Northern Lights store and the good will of the customers who patronize that retail outlet. However, this claim is essentially one for lost profits. It appears that, if plaintiff prevails at trial, it will be possible to compute, with a reasonable degree of certainty, the damages it will suffer. In fact, at the hearing, Mr. Ransom was able to predict the approximate annual dollar volume of sales that Optivision would expect to receive under the conditions then prevailing **[**58]** at the Northern Lights Shopping Center. ***HN22***[] The ability to compute monetary damages establishes that the harm which plaintiff would suffer is not irreparable in nature. *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, at 72 (2d Cir. 1979)*; *Triebwasser & Katz v. American* ***[*686]*** *Telephone & Telegraph Co., 535 F.2d 1356, 1359-60 (2d Cir. 1976)*; *SCM Corp. v. Xerox Corp., supra, 507 F.2d at 363*; *American Brands, Inc. v. Playgirl, Inc., 498 F.2d 947, 949-50 (2d Cir. 1974)*.

[22.] The causation requirement for tortious interference with pre-contractual relations appears to be more stringent than the causation requirement under the antitrust laws. See section I.A. of the text Supra. Thus, it is quite possible that there might be a sufficient causal relationship between the activity in question and the asserted injury to establish antitrust standing even though there is not a sufficient degree of certainty that plaintiff would have received the contract to establish the tort of intentionally interfering with pre-contractual relations.

HN23[] A threat that a party will be driven out of business if a preliminary injunction is not granted may constitute irreparable harm, *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 28-29 (2d Cir. 1978)*; *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970)*, but there is no evidence that the plaintiff here would suffer such consequences. In addition to its Northern Lights store, Optivision has a number of other retail outlets in New York State and Georgia. The continued operation of Optivision as a corporate entity does not appear to be threatened.

Also, *HN24*[] loss of customer good will may constitute irreparable harm where a distributor is deprived totally of the opportunity **[**59]** to sell an entire line of merchandise, *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., supra, 588 F.2d at 29*; *Jacobson & Co. v. Armstrong Cork Co., supra, 548 F.2d at 444-45*; *Interphoto Corp. v. Minolta Corp., 417 F.2d 621, 622 (2d Cir. 1969)*, but that is not the situation here. Optivision will continue to be able to provide its customers with a full line of optical goods at locations other than the Northern Lights Shopping Center.

As previously indicated, plaintiff has shown, with respect to at least one of its causes of action, sufficiently serious questions going to the merits to make them a fair ground for litigation. However, because of its failure to demonstrate irreparable harm, plaintiff has failed to satisfy the second test of the Second Circuit preliminary injunction standard as well as the first. See *State of New York v. Nuclear Regulatory Commission, supra, 550 F.2d at 750*; *Triebwasser & Katz v. American Telephone & Telegraph Co., supra, 535 F.2d at 1359*. The second test is not satisfied here for the further reason that the balance of hardships does not tip decidedly in plaintiff's favor. If a preliminary injunction is not granted, Optivision will suffer a loss **[**60]** of profits by not being able to do business in the Northern Lights Shopping Center and will have to pay a small amount of damages to the Garfield Construction Company, [23.] but if a preliminary injunction is granted, the Syracuse Associates will lose the higher rentals that could be obtained by leasing Optivision's store site to another tenant and will lose the opportunity to obtain a different kind of tenant (perhaps a type of store not already represented in the mall) who might make the shopping center a more attractive place to shop. Also, the granting of an injunction will cause DeWitt to experience lost sales and correspondingly, lost profits. [24.] **[**61]** It cannot be said that the balance tips sharply in plaintiff's favor. [25.]

Accordingly, plaintiff's motion for a preliminary injunction is denied.

It is so ordered.

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23. The contract with Garfield Construction Company is for $ 17,502, of which $ 2,000 constitutes a down payment and $ 5,000 represents work already commenced. Thus, Optivision's liability to Garfield will be $ 7,000 plus the construction company's profit margin.

24. The landlord would probably be liable to DeWitt for such lost profits if the validity of the exclusivity clause were upheld and an injunction were issued solely on the state law claims.

25. Defendants contend that since Optivision's lease, as well as the one to which DeWitt is a party, contains an exclusivity clause, the doctrines of unclean hands and In pari delicto require the motion for a preliminary injunction to be denied. It is unnecessary to consider the extent to which these doctrines might be relevant to a motion for preliminary injunctive relief since the Court has determined that an exclusivity clause, in the circumstances presented here, is probably not unlawful.

Far Eastern Coconut Co. v. Sun Ripe Coconut Corp.

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

June 1, 1979, Filed

No. 76 C 470.

Reporter

1979 U.S. Dist. LEXIS 12013 *; 1979-2 Trade Cas. (CCH) P62,878

Far Eastern Coconut Co., Inc. v. Sun Ripe Coconut Corp., Sun Ripe Coconut Products, Inc., McKee Lau, and Francisco Chua.

Core Terms

coconut, Sherman Act, conspirators, unfair trade practice, unfair competition, summary judgment, purchases

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

See *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

See the Donnelly Act, *N.Y. Gen. Bus. Law § 340*.

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

Torts > Business Torts > Unfair Business Practices > General Overview

HN3[] **Regulated Practices, Trade Practices & Unfair Competition**

A New York common law tort claim of unfair competition and unfair trade practices contemplates some type of commercial misappropriation or misrepresentation.

Counsel: **[*1]** For plaintiff: Baron & Vesel (Edward Vesel, of counsel), Forest Hills, N.Y. For defendants: Rosenman Colin Freun Lewis & Cohen (Gilbert S. Edelson and Jeffrey L. Braun, of counsel), New York, N.Y.

Opinion by: NICKERSON

Opinion

Memorandum and Order

NICKERSON, D.J.: Plaintiff, a jobber of coconut products, brought this suit under *15 U.S.C. § 15*, alleging that commencing in May 1972 defendants conspired to boycott plaintiff with intent to damage its business and drive it out of the competitive market by refusing to sell it desiccated, sweetened and toasted coconut in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*). The complaint also alleges that defendant's conduct violated the Donnelly Act (*New York General Business Law § 340*) and constituted unfair trade practices and unfair competition.

The defendants are: Sun-Ripe Coconut Products, Inc. ("Sun-R9p5/Manila"), a family owned and operated Philippine corporation which processes and exports coconut products; Sun-Ripe Coconut Corporation ("Sun-Ripe/New Jersey"), a New Jersey corporation which is owned and operated largely by the same family and imports and sells the products exported by the Philippine corporation; Francisco **[*2]** Chua, a resident of the Philippines, who is the president and chief operating officer and a director and shareholder of both corporate defendants; and McKee Lau, a New York resident, who is treasurer of Sun-Ripe/New Jersey and was, until December 1977, a director of that corporation.

Defendants have moved for summary judgment. They say that they are all part of one entity and that as a matter of law they could not have entered into a "contract, combination, or conspiracy"within the meaning of *Section 1* of the Sherman Act. They also claim that in any event plaintiff has neither alle7ed nor can show the unreasonable impact on competition required under the "rule of reason" said to be applicable in this case. Defendants assert that the same considerations apply with respect to the Donnelly Act claim, and that plaintiff's common law tort claims of unfair trade practices and unfair competition are insufficient since they do not allege commercial misappropriation.

Section 1 of the Sherman Act provides, in pertinent part, that ***HN1***[] "[every] contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign **[*3]** nations, is declared to be illegal." The individual defendants are officers of the corporated defendants and cannot conspire under the Sherman Act with the corporations of which they are officers. *Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952)* cert. denied *345 U.S. 925 (1953)*; *Person v. New York Post Corp., 427 F.Supp. 1297 (E.D.N.Y. 1977)*. Thus Chua and Lau, who were officers of Sun Ripe/New Jersey at the time of the alleged boycott, to the extent they both acted on behalf of that corporation cannot be held as conspirators between themselves or with the corporation. But acting in their official capacities on behalf of one of the corporate defendants they can conspire with another corporation.

Defendants say that the two corporate defendants could not have conspired because, for purposes of the Sherman Act, Sun-Ripe/New Jersey and Sun-Ripe/Manila constitute essentially a single economic entity. See, e.g., *Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979)*; *Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976)*. Defendants claim that the two corporations are owned and managed by the same family, do not compete with each other, and are part of a single enterprise which produces coconut in the **[*4]** Philippines and sells it here. An affidavit of Arthur Kesselhart, former vice-president of Sun-Ripe/New Jersey, states that from the beginning the New Jersey corporation was always viewed as the sales arm or agency of the Manila corporation and that all of the policies of the New Jersey corporation were controlled and governed by the Manila corporation, specifically by Francisco Chua who was president of both corporations. corporations is owned by a single individual. Compare *Harvey v. Fearless Farris Wholesale, Inc., supra.* While 90% of the stock of each corporation is owned in the same proportions by Francisco Chua, his son Joseph, his brothers Antonio and Gabriel, and Gabriel's wife Josephine, the remaining 10% of Sun-Ripe/New Jersey by Francisco Chua's sister Mary Chua. There are thus differing economic interests among the shareholders of the two corporations. Some members of the two boards of directors are different.

Defendants acknowledge that Sun-Ripe/Manila does from time to time make sales of its desiccated coconut to American purchasers other than Sun-Ripe/New Jeresey. Similarly, Sun-Ripe/New Jersey occasionally purchases coconut from suppliers other than Sun-Ripe/Manila.

[*5] On this record the court cannot find that the two corporate defendants constitute a single economic entity incapable of violating the Sherman Act. Having availed themselves of the privilege of doing business through separate corporations, the defendants must also bear the attendant liabilities. *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981 (1968)*.

Defendants argue that, even if there were a conspiracy cognizable under the Sherman Act, the boycott alleged would not have been illegal per se because the relationship between the alleged corporate conspirators is vertical not horizontal, and that, if the "rule of reason" is applied in assessing the alleged refusal to deal, there is no Sherman Act claim because plaintiff has not shown an unreasonable impact on competition.

Defendants say that Sun-Ripe/Manila is the smallest Philippine coconut exporter and Sun-Ripe/New Jersey is the smallest United States importer selling mainly to end-users of coconut. In addition, defendants maintain that Sun-Ripe/New Jersey supplied less than 5% of plaintiff's purchases prior to the alleged refusal to deal and that alternate suppliers of coconut were readily **[*6]** available to plaintiff, which was able to increase its coconut purchases by more than 400% during the period of the alleged boycott.

Plaintiff argues that increased dollar figures of plaintiff's purchases merely reflect the more than three-fold increase in coconut prices during the period in question. Plaintiff also asserts that the other five importer-distributors do not have excess stocks of coconut available for sale and do not offer a realistic alternative source of supply for plaintiff.

Thus, even assuming arguendo that the "rule of reason" applies, there are triable issues of fact as to the impact on competition of defendants' actions. Summary judgment on the Sherman Act claim is thus denied.

The same is true with regard to the Donnelly Act claim. The act provides, in pertinent part, that

HN2[] Every contract, agreement, arrangement, or combination whereby

* * *

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained

* * *

is hereby declared to be against public policy, illegal and void. (*N.Y. Gen. Bus. Law § 340*)

The Donnelly Act is modelled **[*7]** after the Sherman Act, and both acts are addressed to similar kinds of activities. For the reasons given for denial of summary judgment on plaintiff's Sherman Act claim, summary judgment is denied as to the Donnelly Act claim.

HN3[] A New York common law tort claim of unfair competition and unfair trade practices contemplates some type of commercial misappropriation. See, e.g., *Dior v. Milton, 155 N.Y.S.2d 443 (1st Dept. 1956)* (unfair competition); *Findlay v. Findlay, 18 N.Y.2d 12*; *271 N.Y.S.2d 652 (1966)* (unfair trade practices). misappropriation, or misrepresentation. Plaintiff's allegations of a refusal to sell do not involve this type of deception or misappropriation and are insufficient to sustain a claim under New York law.

Defendants' motion for summary judgment is granted with respect to the claims of unfair competition and unfair trade practices but denied in all other respects. So ordered.

End of Document

Arizona v. Maricopa County Medical Soc.

United States District Court for the District of Arizona.

June 5, 1979.

No. CIV-78-800 PHX WPC.

Reporter

1979 U.S. Dist. LEXIS 11918 *; 1979-1 Trade Cas. (CCH) P62,694

State of Arizona v. Maricopa County Medical Society, Maricopa Foundation for Medical Care, Pima County Medical Society, and Pima Foundation for Medical Care.

Core Terms

professions, rule of reason, Sherman Act, antitrust, anti trust law, subject-matter, policyholders, underwriting, maximum, interstate commerce, state line, plans, insurance business, per se rule, practices, partial summary judgment, participating, exemption, spread, insurance company, price-fixing, premiums

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN1[] **Scope, Exemptions**

The McCarran-Ferguson Act exempts from the Sherman Act that conduct which constitutes the business of insurance and which is regulated by state law. *15 U.S.C.S. § 1011 et seq* . To be within the McCarran-Ferguson Act exemption, the conduct must involve the underwriting or spreading of a risk.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Transportation Law > Interstate Commerce > Federal Powers

HN2[] **Procedural Matters, Jurisdiction**

Subject-matter jurisdiction under federal ***antitrust law*** is co-extensive with the Congressional power under the Constitution to regulate interstate commerce. Whether a court has subject-matter jurisdiction over the complaint depends on whether the acts allegedly restrained by the acts complained of occur in the flow of commerce, or whether those acts, although local, substantially affect interstate commerce.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Transportation Law > Interstate Commerce > Definition of Commerce

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN3[] **Procedural Matters, Jurisdiction**

Interstate insurance transactions fall within the definition of interstate commerce as that term is applied pursuant to federal antitrust regulation, and if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

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

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN4[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Although the question of subject-matter jurisdiction is normally addressed by a motion to dismiss and a finding of lack of subject-matter jurisdiction requires dismissal, finding jurisdiction does not preclude entering partial summary judgment on that issue.

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

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

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Price-fixing has for some time been viewed as per se unlawful. Under the per se approach, there is no inquiry into whether the challenged practice actually has an anticompetitive effect. The per se rule has been applied to fixing maximum prices as well as minimum prices.

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 approach, an inquiry is made to determine whether the purpose or effect of the practice in question would significantly hamper competition. Although the per se approach avoids inquiry into difficult economic issues, a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the ***antitrust law***.

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

A court will no longer have to wear per se blinders in passing upon the many business restrictions which do have "redeeming virtues" and may actually help to promote competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

HN8[] Antitrust & Trade Law, Sherman Act

The professions differ fundamentally from ordinary commercial businesses and, consequently, merit more liberal treatment under the antitrust laws. The essence of the concept of "profession" is the power to self-regulate and to promote standards of practice that benefit the public at large as well as the individual practitioners. The United States Supreme Court has recognized the distinction between a purely commercial business and a profession. The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently. Conduct of professions allegedly in violation of the antitrust laws may be subjected to a Rule of Reason analysis. Certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context.

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

To survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, viz. to serve the public. That is, it must contribute directly to improving service to the public. Those which only suppress competition between practitioners will fail to survive the challenge.

Counsel: [*1] For plaintiff: Kenneth R. Reed, Chief Counsel, Antitrust Div., Patricia A. Metzger, Asst. Atty. Gen., Antitrust Div., Phoenix, Ariz. For defendants: Daniel J. McAuliffe, of Snell & Wilmer, Phoenix, Ariz., for Maricopa County Medical Society; Jennifer Beaver and Philip P. Berelson, of Brown & Bain, Phoenix, Ariz., for Maricopa Foundation for Medical Care; Robert O. Lesher, of Lesher, Kimble & Rucker, P.C., Tucson, Ariz., for Pima County Medical Society and Pima Foundation for Medical Care.

Opinion by: COPPLE

Opinion

Memorandum and Order

COPPLE, D.J.: The State of Arizona has charged the Maricopa County Medical Society, Maricopa Foundation for Medical Care, Pima County Medical Society and Pima Foundation for Medical Care with violations of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and the Arizona Uniform State Antitrust Act, *A.R.S. §§ 44-1401 et seq.* Arizona, in particular, asserts that the defendants have combined and conspired with others to fix, raise and maintain prices charged by doctors, and to establish and maintain systems for determining prices charged by doctors which include establishing and maintaining relative value schedules and conversion factors. Maricopa Foundation **[*2]** for Medical Care and Pima Foundation for Medical Care are associations of doctors. The foundations approve and administer insurance plans underwritten by private insurers. The foundation-approved insurance plans allegedly offer an alternative to health maintenance organizations.

It is undisputed that the foundations set the maximum amount to be paid physicians who agree to provide services to patients who are enrolled in insurance plans approved by the foundations. It is further undisputed that the doctors who agree to participate in the foundation-approved plans are free to set the prices they charge their patients.

Maricopa Foundation has moved to dismiss the complaint for failure to state a claim, arguing that any conduct that would otherwise constitute an antitrust violation is exempt from antitrust liability by virtue of the McCarran-Ferguson Act, *15 U.S.C. § 1012*. Arizona has moved for partial summary judgment determinations as to subject-matter jurisdiction and liability.

HN1[] The McCarran-Ferguson Act exempts from the Sherman Act that conduct which constitutes the business of insurance and which is regulated by state law. See *15 U.S.C. § 1011 et seq* . The Supreme **[*3]** Court has recently narrowly construed the statutory phrase "the business of insurance" to exclude an arrangement where insurance companies agreed with pharmacists on the maximum amount that the pharmacists would be reimbursed for prescriptions they filled. See *Group Life & Health Ins. Co. v. Royal Drug Co., Inc., 99 S. Ct. 1067(1979)*. The Court held that to be within the McCarran-Ferguson Act exemption, the conduct must involve the underwriting or spreading of a risk. *Id. at 1073-74*.

The defendants have argued that the agreements between physicians participating in the foundation-approved plans and the insurers underwriting the plans spread the risk that the cost of providing services to a foundation policyholder will be more than the maximum amount a participating physician would receive. Yet every contract for the sale of goods or services in the future at a specified price protects the parties against future fluctuations in the market price. Such an underwriting of a risk is not peculiar to the "business of insurance."

The risk that is peculiar to the "business of insurance" is the risk that policyholders cannot afford the services of a physician when needed. The participating **[*4]** insurance companies underwrite or assume this risk in return for the payment of premiums. The effect is that the risk is spread among all policyholders such that the magnitude of the risk to the individual policyholder is reduced. Merely because an insurance company acts to reduce the risk that it has underwritten does not directly further underwrite or spread the risk that the policyholders sought to insure against.The obligations that the participating insurance companies have incurred remains constant. How they go about satisfying that obligation does not involve the business of insurance since a reduction in liability and thus the risk they have assumed does not change the risk against which the policyholder obtained insurance. The Supreme Court in Royal Drug wrote in relevant part:

The fallacy of the petitioners' position is that they confuse the obligations of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its **[*5]** underwriting obligations….

The… Agreements… do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield…. Such cost savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance."

Group Life & Health Ins. Co. v. Royal Drug Co., Inc., supra, 99 S. Ct. at 1074-75. Because the agreements between the defendants and the insurance companies underwrite or spread no risk peculiar to the business of insurance, the McCarran-Ferguson Act exemption does not apply to exempt the defendants' conduct from possible antitrust liability and the defendants' motion to dismiss is denied.

HN2[] Subject-matter jurisdiction under federal ***antitrust law*** is co-extensive with the Congressional power under the Constitution to regulate interstate commerce. *United States v. South-Eastern Underwriter's Ass'n, 322 U.S. 533, 558-59, 64 S. Ct. 1162, 88 L. Ed. 1440(1944)*. Whether the Court has subject-matter jurisdiction over the complaint depends on whether the acts allegedly restrained by the acts **[*6]** complained of occur in the flow of commerce, or whether those acts, although local, substantially affect interstate commerce. See *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743, 96 S. Ct. 1848, 1851-52, 48 L. Ed. 2d 338 (1976)*. The alleged price-fixing of services, goods and products sold by participating physicians to foundation policyholders presumably restrains the sale of the services, goods and products sold by the participating physicians. The sales are not interstate transactions, since the sales occur wholly within the state. No services cross state lines and any goods or products that cross state lines are no longer in the flow of interstate commerce when sold at retail. See P. Areeda & D. Turner, ***Antitrust Law*** P31-32 (1978). That the doctors are paid with funds that cross state lines according to contracts that cross state lines or prescribe drugs that cross state lines does not make the services or products they sell something that is in the flow of interstate commerce.

However, it cannot be disputed that health insurance is an interstate business where premiums and payments on claims cross state lines. The alleged price-fixing affects the **[*7]** sale of services by physicians and the sale of services rendered by physicians directly affects the premiums and payments that cross state lines. It is undisputed that the amount of premiums and payments on claims that annually cross state lines exceeds the amounts involved in *Hospital Building Co. v. Trustees of Rex Hospital, supra* . Thus, the criteria of *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 575 (1975)*, that there must be both substantial interstate commerce and a necessary or integral relationship between the allegedly restrained activity and the interstate commerce are satisfied, thereby establishing subject-matter jurisdiction. See *Ohio v. Ohio Medical Indemnity, Inc., 1976-2 TRADE CASES (CCH) P61,128 (S.D. Ohio 1976)*. See also *De Voto v. Pacific Fidelity Life Ins. Co., 516 F. 2d 1, 5 (9th Cir.)*, cert. denied, *423 U.S. 894* ***HN3***[] ("Interstate insurance transactions fall within the definition of interstate commerce as that term is applied pursuant to federal antitrust regulation, and '[if] it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'").

HN4[] Although the question of subject-matter **[*8]** jurisdiction is normally addressed by a motion to dismiss and a finding of lack of subject-matter jurisdiction requires dismissal, finding jurisdiction does not preclude entering partial summary judgment on that issue. See *Page v. Work, 290 F. 2d 323 (9th Cir.)*, cert. denied, *368 U.S. 875 (1961)*. Because the Court finds it has subject-matter jurisdiction over the plaintiff's antitrust claim, the motion by the plaintiff for partial summary judgment on the issue of subject-matter jurisdiction is granted.

Based on the affidavit of Anthony D. Mitten, it is clear that the defendant Maricopa Foundation for Medical Care (and presumably the Pima Foundation for Medical Care as well) sets the maximum fees paid by the insurance companies underwriting foundation-approved plans to the physicians associated with the foundation for services, performed by them on patients covered by the Foundation-endorsed plans. That the participating physicians are free to charge whatever price they wish is of no consequence as they have agreed in advance to accept in full satisfaction the amount determined by the medical foundation when the amount they charge exceeds that established by the foundation. ***HN5***[]

[*9] Price-fixing has for some time been viewed as per se unlawful. See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. Under the per se approach, there is no inquiry into whether the challenged practice actually has an anticompetitive effect. The per se rule has been applied to fixing maximum prices as well as minimum prices. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*. No evidence has been submitted that the insurance companies individually determined the maximum prices to be paid and that the physicians individually agreed to those terms which presumably would preclude finding any antitrust violation even under a per se analysis. See Department of Justice Clearance Letter, January 15, 1968, Appendix E, Amicus Curiae Brief of the Blue Shield Association, Group Life and Health Ins. Co. v. Royal Drug Co., Inc. (1977).

The defendants urge that the challenged practices should be analyzed under the "Rule of Reason" approach. ***HN6***[] Under the Rule of Reason approach, an inquiry is made to determine whether the purpose or effect of the practice in question would significantly hamper competition. **[*10]** See Sullivan, Handbook on Antitrust §§ 68-72 (1977). Although the per se approach avoids inquiry into difficult economic issues, a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the ***antitrust law***. See *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (vertical restraints, formerly per se violations, are now to be analyzed under the Rule of Reason be analyzed under the Rule of Reason approach); General Glass Co., Inc. v. Globe Glass and Trim Co., TRADE CASES 75,487, 75,490 (N.D. Ill. 1978) ("That all price-fixing is per se violative of antitrust laws is a concept that is presently being revised in favor of a 'rule of reason' approach."). See also Handler, "Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term -- 1977," 77 Columb. L. Rev. 979, 989 (1977):

Sylvania marks not only the reinstatement of the rule of reason, but also a reawakening to the requirements of business… It is clear… that ***HN7***[] the courts will no longer have to wear per se blinders in passing upon the many business restrictions which **[*11]** do have "redeeming virtues" and may actually help to promote competition.

Additionally, the two Supreme Court cases invalidating maximum price-fixing, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra* and *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)*, need not be read as establishing a per se rule. According to one commentator,

[most] writers have determined that Kiefer-Stewart and Albrecht should not be read to denounce maximum RPM [resale price maintenance] under the per se rule. Unlike normal per se cases, these decisions were not the culmination of a long series of rulings establishing that the challenged practice can rarely, if ever, be justified and that the usual evidentiary inquiry into purpose, power and effect would be wasteful. Nor did these decisions discuss the possible benefits and detriments to efficiency and competition posed by the restraint under attack, so as to conclude that virtually no defense would be successful, as have most per se cases. It is plan, moreover, that the results of Kiefer-Stewart and Albrecht can be explained by rule of reason analysis.Consequently, there is no need to read them as per se holdings **[*12]** condemning maximum RPM.

Kallstrom, "Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act," 1978 Duke L.J. 645, 666-68.

Another consideration in determining whether to apply the Rule of Reason approach is that a profession is involved here.

It has long been recognized that ***HN8***[] the professions differ fundamentally from ordinary commercial businesses and, consequently, merit more liberal treatment under the antitrust laws. Courts have generally assumed that the professions exist for reasons in addition to the profit motive. The essence of the concept of "profession" is the power to self-regulate and to promote standards of practice that benefit the public at large as well as the individual practitioners.

Comment, "The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act," 11 U. Mich. J. L. Reform 387, 394 (1978). See also Note, "Application of the Antitrust Laws to Anticompetitive Activities by Physicians," 30 Rutgers L. Rev. 991, 1019 (1977) ("Recognizing that the per se rules were fashioned in a wholly commercial context, courts traditionally have not included highly regulated but traditionally noncommercial **[*13]** industries within the scope of those rules."). The Supreme Court has recognized the distinction between a purely commercial business and a profession, commenting in *Goldfarb, supra* :

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities and automatically apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. at 788 N. 17, *95 S. Ct. at 2013*.

In *National Society of Professional Engineers v. United States, 435 U.S. 679, 68 S. Ct. 1355 (1978)*, the Supreme Court further indicated that conduct of professions allegedly in violation of the antitrust laws may be subjected to a Rule of Reason analysis. Although the Court concluded that no elaborate industry analysis was necessary to find that the challenged **[*14]** conduct was in violation of the antitrust laws, the Court did discuss at length the Rule of Reason, stating that "certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context." Id. 435 U.S. at , 98 S. Ct. at 1362. Nowhere did the Court state that the defendant could assert no defense that the conduct challenged was reasonable, only that the particular defense of protecting against inferior work was legally insufficient.

The Ninth Circuit, when confronted with an alleged tying arrangement, normally a per se violation, by a profession, wrote:

[The] Supreme Court does not require that the practices challenged here be treated the same as would be proper if dentistry were merely a commercial enterprise.

As we interpret the Court, ***HN9***[] to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, viz. to serve the public. That is, it must contribute directly to improving service to the public. **[*15]** Those which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of the ends that both the professions and the Sherman Act serve.

Boddicker v. Arizona State Dental Ass'n 549 F. 2d 626, 632 (9th Cir.), cert. denied, *434 U.S. 825 (1977)*. Reversing the dismissal of the case and remanding the case for further proceedings to permit the defendants to show how the challenged conduct promoted the improvement of professional services to the public indicates that the Rule of Reason is to be applied when analyzig practices of professions alleged to be in violation of the antitrust laws. See also *Mackey v. National Football League 543 F 2d 606 (8th Cir. 1976)* (the challenged rule characterized as a refusal to deal and a group boycott was held to be more appropriately tested under the Rule of Reason than to be declared per se violative of the Sherman Act). It has been aptly observed that

[although] no firm consensus exists as to the social and economic goals of the Sherman Act, it is at least clear that per se rules arose out of the courts' experience with commercial activities whose purposes and anticompetitive **[*16]** effects differ significantly from those of the professions. The mechanical application of per se rules of illegality in the professional setting contradicts the basic rule that only unreasonable restraints are condemned by the Sherman Act... [Without] the benefit of long experience with the professions in the antitrust arena, the conclusions garnered from traditional commercial practices should not be carried over unthinkingly to professional practices.

Comment, supra, 11 U. Mich. J.L. Reform, at 415.

In light of the above, the Court concludes that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case. Choosing the Rule of Reason approach precludes granting the plaintiff's motion for partial summary judgment on the issue of liability because there is insufficient evidence as to the purpose and effect of the allegedly unlawful practices and the power of the defendants. As a consequence of adopting the Rule of Reason, the December 18, 1978, order of the Court denying defendant Maricopa Foundation's motion for an order compelling discovery of certain information and documents such as the relative value schedules, unit conversion **[*17]** factors or fee schedules used by the plaintiff is vacated. Under the Rule of Reason approach, such information is relevant in determining the purpose and effect of the challenged conduct. Therefore,

It Is Ordered:

1. The defendants' motion to dismiss based on the McCarran-Ferguson Act exemption is denied.

2. The plaintiff's motion for partial summary judgment on the issue of subject-matter jurisdiction is granted.

3. The plaintiff's motion for partial summary judgment on the issue of liability is denied with leave to file a similar motion based on additional evidence if appropriate.

4. The December 18, 1978, order of the Court denying defendant Maricopa Foundation's motion for an order compelling discovery is vacated.

LexisNexis®

Zenith Radio Corp. v. Matsushita Elec. Indus. Co.

United States District Court for the Eastern District of Pennsylvania

June 6, 1979

Civ. A. Nos. 74-2451, 74-3247, M.D.L. No. 189

Reporter

478 F. Supp. 889 *; 1979 U.S. Dist. LEXIS 11916 **; 27 Fed. R. Serv. 2d (Callaghan) 834; 28 Fed. R. Serv. 2d (Callaghan) 391; 1979-2 Trade Cas. (CCH) P62,753; 1979-2 Trade Cas. (CCH) P62,893

ZENITH RADIO CORPORATION v. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.; NATIONAL UNION ELECTRIC CORPORATION v. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.; IN RE: JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION

Subsequent History: **[**1]** Memorandum and Order of Certification August 21, 1979. As Amended September 14, 1979.

Later proceeding at *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1980 U.S. Dist. LEXIS 17173 (E.D. Pa., 1980)*

Vacated by, Remanded by *In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1980 U.S. App. LEXIS 15944 (3d Cir. Pa., 1980)*

Core Terms

cases, jury trial, juries, equitable, right to a jury trial, accounting, parties, courts, matters, suits, jury demand, law and equity, conspiracy, decisions, damages, common law, complicated, defendants', trial by jury, limitations, questions, grounds, merger, court of equity, special jury, antitrust, remedies, rights, equitable claim, equity jurisdiction

LexisNexis® Headnotes

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

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN1[] **Private Actions, Remedies**

Antitrust claims for treble damages are triable by jury on timely demand of a party.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

HN2[] Case or Controversy, Constitutional Questions

Before deciding the constitutional question, it is incumbent on courts to consider whether statutory grounds might be dispositive.

Admiralty & Maritime Law > Maritime Forfeitures & Penalties > Constitutional Implications

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Admiralty & Maritime Law > Maritime Contracts > General Overview

Bankruptcy Law > Procedural Matters > Jury Trials

Civil Procedure > Trials > Bench Trials

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN3[] Maritime Forfeitures & Penalties, Constitutional Implications

The right to jury trial may, of course, be expressly provided by the terms of a federal statute. Because there is no constitutional right to a nonjury trial, the *Seventh Amendment* does not prevent either judicial or legislative extension of the right to jury trial, and such statutes raise no constitutional difficulties.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN4[] Jury Trials, Right to Jury Trial

When a statute creating new rights or remedies is silent as to the mode of trial, the availability of a jury as of right generally becomes a *Seventh Amendment* question. Courts fit the statutory claim into the nearest historical analogy to determine whether there is a constitutional right to jury trial.

Civil Procedure > Trials > Jury Trials > Jury Demands

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN5[] Jury Trials, Jury Demands

The *Seventh Amendment* does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN6[] **Fundamental Rights, Trial by Jury in Civil Actions**

See *U.S. Const. amend. VII*.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN7[] **Jury Trials, Right to Jury Trial**

The scope of the *Seventh Amendment* has traditionally been determined by applying a comparatively static, historical test, which looks to the English common law as it existed in 1791, when the *Seventh Amendment* became part of the constitution.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

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

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN8[] **Jurisdiction Over Actions, Concurrent Jurisdiction**

The grounds which permit the exercise of the equitable jurisdiction in cases with concurrent law and equity jurisdictions, are the existence of some distinctively equitable feature of the controversy which cannot be determined by a court of law, or some fraudulent or otherwise irregular incidents of the legal proceedings sufficient to warrant their being enjoined, or the necessity of a discovery, either of which grounds would render the legal remedy inadequate. This rule results in part, in the United States, from the provisions of the national and state constitutions securing the right to a jury trial.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN9[] **Jury Trials, Right to Jury Trial**

Fed. R. Civ. P. 38(a) requires only that the right as declared by the *Seventh Amendment to the Constitution* or as given by a statute shall be preserved to the parties inviolate.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

HN10[] **Right to Jury Trial, Actions in Equity**

Where both legal and equitable issues are presented in a single case, only under the most imperative circumstances, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > Judicial Officers > References

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN11[] **Masters, Appointment of Masters**

The constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, the plaintiff must be able to show that the accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them. In view of the powers given to district courts by *Fed. R. Civ. P. 53(b)* to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met.

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN12[] **Preliminary Considerations, Equity**

Mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Real Property Law > Purchase & Sale > Remedies > Specific Performance

HN13[] **Preliminary Considerations, Equity**

Equity could properly resolve corporate claims of any kind, including normally legal claims, without a jury when properly pleaded in derivative suits complying with the equity rules.

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

HN14[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Claims for treble damages the relief sought by the plaintiffs in this suit have traditionally been among those properly cognizable only at law.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN15[] **Jury Trials, Right to Jury Trial**

Where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The *Seventh Amendment* question depends on the nature of the issue to be tried rather than the character of the overall action.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN16[] **Jury Trials, Right to Jury Trial**

The available evidence shows that the Supreme Court never intended that the Ross footnote be a "test" for *Seventh Amendment* questions. The proposed "test" is unworkable and application of the Ross "test" in the manner proposed would be fundamentally inconsistent with the policies underlying the role of the jury in civil actions in the United States.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN17[] **Trials, Judgment as Matter of Law**

The courts must examine the record in a light most favorable to the party against whom the verdict is to be directed, and review the specific evidence in the record and all inferences reasonably capable of being drawn therefrom. The courts must determine whether, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief. If the evidence is of such character that reasonable men, in the impartial exercise of their judgment may reach different conclusions, the case should be submitted to the jury. Because a directed verdict motion deprives a party of jury fact-determination, it should be granted sparingly and circumspectly. Nevertheless the federal courts do not follow the rule that a scintilla of evidence is enough. The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.

Counsel: Edwin P. Rome, William H. Roberts Blank, Rome, Comisky and McCauley, Philadelphia, Pa., for Zenith Radio Corp. and National Union Elec. Corp.

Philip J. Curtis, John Borst, Jr., Edward McCausland, Glenview, Ill., for Zenith Radio Corp.

Morton P. Rome, Philadelphia, Pa., for National Union Elec. Corp.

Donald J. Zoeller, John P. Hederman, Thomas P. Lynch, Mudge, Rose, Guthrie & Alexander, New York City, Patrick T. Ryan, Drinker, Biddle & Reath, Philadelphia, Pa., for Toshiba.

A. Paul Victor, Joel B. Harris, Weil, Gotshal & Manges, New York City, Miles W. Kirkpatrick, Morgan, Lewis & Bockius, Philadelphia, Pa., for Matsushita.

Charles F. Schirmeister, Robert J. Lynch, Reid & Priest, New York City, for Mitsubishi Intern. & Mitsubishi Corp.

Peter J. Gartland, Peter A. Dankin, Wender, Murase & White, New York City, for Sharp.

Asa D. Sokolow, Rosenman, Colin, Freund, Lewis & Cohen, New York City, Franklin Poul, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for Sony Corp. of America & Sony Corp.

E. Houston Harsha, Thomas P. Coffey, Kirkland & Ellis, Chicago, Ill., for Motorola.

Opinion by: [2]** BECKER

Opinion

[*891] OPINION

TABLE

[*892] I. Preliminary Statement

Certain defendants in these consolidated antitrust cases, alleging that they are so "extraordinarily complex," "so massive as to make them unique in the annals of United States antitrust and trade regulation litigation," and "beyond the practical abilities and limitations of a jury," have moved for an order striking the jury demands of the plaintiffs, Zenith Radio Corporation ("Zenith") and National Union Electric Corporation ("NUE"). [1] This opinion will address and deny defendants' motion.

NUE **[**3]** is the corporate successor to Emerson Radio Co., one of the pioneers in the radio and TV industry. NUE ceased all production of television receivers in February, 1970; [2] that December, it filed the first of these suits, [3] **[**4]** alleging that the Japanese defendants and others had conspired to take over the American consumer electronic products industry and to drive NUE out of business. In 1974, after experiencing large operating losses, Zenith filed an action making similar allegations. [4] The NUE action was then transferred to this district for coordinated or consolidated pretrial proceedings with the Zenith action. See *In re Japanese Electronic Products*

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[1] The motion to strike the jury demand was first filed by Mitsubishi Corp. and the Toshiba, Matsushita, and Sony defendants. Motorola, Inc., and the Sharp defendants subsequently joined in the motion. The Mitsubishi Electric Corporation ("Melco"), Hitachi, Sanyo and Sears defendants have not participated in this motion. Except where the context indicates otherwise, "defendants" will be used herein to mean only the moving defendants.

[2] After ceasing production of television receivers, NUE then resold television receivers purchased from other manufacturers until discontinuing its television business entirely in 1972.

[3] National Union Electric Corp. v. Matsushita Electric Industrial Co., Civil No. 1706-70 (D.N.J., filed December 21, 1970).

[4] Zenith Radio Corp. v. Matsushita Electric Industrial Co., Civil Action No. 74-2451 (E.D.Pa., filed Sept. 20, 1974).

Antitrust Litigation, 388 F. Supp. 565 (J.P.M.D.L.1975). [5] **[*893]** In Pretrial Order # 182, filed this date, we made the transfer of the NUE action to this district unconditional, and consolidated it for trial with the Zenith action.

The ten principal defendants are Mitsubishi Corporation, a Japanese trading company; Matsushita Electric **[**5]** Industrial Co., Ltd., Toshiba Corporation, Hitachi, Ltd., Sharp Corporation, Mitsubishi Electric Corporation (Melco), Sanyo Electric Co., Ltd., and Sony Corporation, all Japanese manufacturers of consumer electronic products; and two American companies, Motorola, Inc. and Sears, Roebuck & Co. Fourteen other defendants are subsidiaries of the principal Japanese defendants. Of the twenty-four defendants, fifteen are defendants in both suits, seven in the Zenith action only, and two in the NUE action only. [6] In addition to the twenty-four named defendants, the plaintiffs have identified close to 100 alleged co-conspirators whose business operations span the globe, ranging from dozens of Japanese companies, large and small, to such world industrial giants as N.V. Phillips Gloeilampenfabrieken and General Electric Co.

[6]** In capsule form, plaintiffs' complaints allege that the Japanese defendants and their co-conspirators are and have been participants in a conspiracy which, by artificially lowering export prices, has for more than twenty years sought the methodical destruction of the United States' domestic consumer electronic products industry. [7] The defendants are accused of carrying out the aims of this conspiracy by flooding the United States' market with imported goods at prices so attractive to consumers that domestic producers suffered serious losses, and were either unable to compete or able to do so only by moving some or all of their own production facilities to Mexico and the Far East. [8]

[7]** The particular offenses charged in the complaints span the laws of antitrust. The overall conspiracy is alleged to violate *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and *§ 73* of the Wilson Tariff Act, *15 U.S.C. § 8*. [9] **[**8]** However, the cornerstone of **[*894]** the plaintiffs' case is the allegation that the Japanese defendants have

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[5] This case was transferred to our docket from the docket of Judge A. Leon Higginbotham, Jr., following his elevation to the Court of Appeals. Although the progress of the case had been slowed by the illnesses and subsequent deaths of two judges to whom the case had previously been assigned, Judge Higginbotham moved the litigation forward vigorously. One of the most important events of Judge Higginbotham's stewardship was the filing of an opinion, based on a voluminous record, disposing of the defendants' challenges to jurisdiction and venue, and to the constitutionality of the 1916 Antidumping Act. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co., 402 F. Supp. 251 (E.D.Pa.1975)* (opinion on constitutionality of antidumping act); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., 402 F. Supp. 262 (E.D.Pa.1975)* (opinion on jurisdiction and venue).

[6] Sony Corporation and its sales subsidiary, Sony Corporation of America, were originally named in both suits. However, they were dismissed from the Zenith action after settling with Zenith in April, 1977, and are defendants now only in the NUE action.

The seven other principal Japanese defendants are named in both actions, as are eight of their subsidiaries: Matsushita Electric Corporation of America, Toshiba America, Inc., Hitachi Sales Corporation of Japan, Hitachi Sales Corporation of America, Sharp Electronics Corporation, Sanyo Electric, Inc., Sanyo Electric Trading, Inc., and Mitsubishi International Corporation.

Sears and Motorola are named only in the Zenith suit, as are Melco Sales, Inc., Sanyo Manufacturing Co., Matsushita Electronics Corporation, Matsushita Electric Trading Co., Ltd., and Quasar Electronics Corp., also a Matsushita subsidiary.

[7] The NUE suit is limited to television receivers; the lines of commerce encompassed in the Zenith complaint also include radios, phonographs, tape and audio equipment, televisions, and electronic components. We refer to all of these collectively as "consumer electronic products."

[8] Every major television manufacturer, including Zenith and RCA, now operates production facilities outside the United States.

[9] That act provides:

§ 8. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any violated the 1916 Revenue Act, better known as the 1916 Antidumping Act, *15 U.S.C. § 72*, [10] **[**9]** by "commonly and systematically" selling their products in this country for substantially less than their actual market value or wholesale price in Japan, and with predatory intent. The defendants are also charged with violating the Robinson-Patman Act, *15 U.S.C. § 13(a)*, by discriminating in price among American purchasers. [11] Finally, Zenith charges that Sears, Motorola, and the Matsushita and Sanyo defendants violated § 7 of the Clayton Act, *15 U.S.C. § 18*, in connection with the Japanese companies' acquisitions of interests in domestic consumer electronic products manufacturers. [12]

Plaintiffs' claims, adumbrated above, have been spelled out in greater detail in **[**10]** two preliminary pretrial memoranda totalling 410 pages, as well as in answers to numerous contention interrogatories. The plaintiffs' papers seek to portray a worldwide conspiracy said to have lasted over a period of some 30 years and to have involved close to 100 manufacturers, exporters, and importers of consumer electronic products of various national origins.

The defendants maintain that, notwithstanding their voluminous submissions, plaintiffs have failed to elucidate their claims with any degree of precision. They also deny both the legal and factual validity of the plaintiffs' claims. Additionally, certain of the defendants have asserted counterclaims against Zenith.

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manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $ 100 and not exceeding $ 5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

[10] *§ 72*. Importation or sale of articles at less than market value or wholesale price

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: Provided, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $ 5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for 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 sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

[11] The original complaints included counts alleging that price discrimination between Japanese and American purchasers violated the Robinson-Patman Act. These counts were dismissed for failure to state a claim upon which relief may be granted. *Zenith Radio Corp. v. Matsushita Electric Industrial Co., 402 F. Supp. 244 (E.D.Pa.1975)* (Higginbotham, J.).

[12] Zenith challenges two acquisitions. The first is the 1974 sale by Motorola of its consumer electronic products division and its "Quasar" tradename to Matsushita. The other is the 1976 acquisition by Sanyo of a majority interest in Warwick Electronics, Inc. Warwick had manufactured television receivers for sale to U.S. private label customers, the largest of which was Sears. Sears owned 25% Of Warwick's common shares, and after the transactions was 25% Owner of Warwick's successor, Sanyo Manufacturing Co. (an American corporation). Zenith alleges that Sears has contracted to purchase 70% Of its console color television requirements from Sanyo Manufacturing.

The counterclaims attack Zenith on two fronts. First, they allege that Zenith, acting alone and in combination and conspiracy with others, used territorial allocations, price discrimination, horizontal and vertical price fixing arrangements and certain "key dealer preferences" in violation of the Robinson-Patman Act and *§§ 1* and *2* of the **[*895]** Sherman Act. Second, they accuse Zenith and its co-conspirators of seeking to interfere with its competitors, including the counterclaimants, "by every means available, **[**11]** including the submission of complaints, petitions, testimony and other information to various federal governmental agencies and officials, federal courts, and the United States Congress which were based upon sham, false and misleading allegations and information, without regard to the truth or merits of the claims made." The counterclaiming defendants thus invoke the "sham litigation" theory of antitrust liability recognized in *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*. Defendants have likewise filed extensive preliminary pretrial memoranda detailing their counterclaims. [13]

We are now approaching the end of pretrial discovery. To say that the discovery has been massive would be a considerable understatement. To **[**12]** date over 20 million documents have been produced for inspection. A considerable number of these have had to be translated from Japanese into English. The deposition transcripts completed to date total well over 100,000 pages, and many depositions remain to be taken. The interrogatory practice has been voluminous, coming in wave after wave. We have been inundated with a plethora of discovery motions; in the past few months we have dealt with over 50 Rule 37 motions of various descriptions, and pretrial conferences with counsel for the parties are consuming at least 3 full days per month, mostly to resolve discovery problems. We have entered a comprehensive pretrial order which fixed discovery deadlines and times for filing annotated final pretrial statements and other pretrial material, and set the case for trial in February, 1980. [14] It is anticipated that the trial will consume approximately one year.

[13]** Following the filing of the motion to strike the jury demand, we heard extensive argument thereon. Since it appeared to us that a helpful way of framing the complexity issue was to request the parties to prepare proposed forms of special interrogatories which might be submitted to a jury, we did so and defendants made extensive submissions. Numerous legal memoranda have been filed in connection with the motions, many of them dwelling upon the rash of recent cases where complexity has led to the striking of timely jury demands. We address defendants' motion at this time because we are satisfied that we have an adequate record on which to decide it and because we believe it to be fair to decide the issue sufficiently in advance of trial that the losing party may attempt to obtain appellate review.

We write at length for a number of reasons. First is the current importance of the problem, which appears on the agenda of almost every seminar on class actions, ***antitrust law*** and federal practice concerning which we have recently received brochures. Second, we suspect that given the enormous scope of contemporary class action and antitrust litigation, this will not be the last occasion on **[**14]** which the enormous tension between the demands of these massive cases and the mandate of the *Seventh Amendment* will generate a motion to strike a jury demand on grounds of complexity. Hence, our discussion of the case law may be of help to the bench and bar. [15]

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[13] The counterclaims described in the text are asserted by certain of the Matsushita, Mitsubishi, Hitachi, Sharp, Sanyo, and Toshiba defendants. In addition, Sears asserts a counterclaim against Zenith based on the Lanham Act, *15 U.S.C. §§ 1051-1127*.

[14] The time remaining before trial will be devoted to the disposition of numerous motions for summary judgment, and to the preparation by counsel of annotated final pretrial statements setting forth all facts to be proved, and trial briefs.

[15] We draw much sustenance from the excellent discussions of this problem already extant in the literature. Among the cases which we find particularly helpful are *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y.1978)* (Brieant, J.); *Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D.Ill.1977)* (Marshall, J.); and *In re U.S. Financial Securities Litigation, 75 F.R.D. 702 (S.D.Cal.1977)* (Turrentine, J.). Of equal value is an article by Judge Patrick Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex.L.Rev. 47 (1977).

[*896] We consider herein only the defendants' arguments that the jury trial demand should be struck on grounds of complexity. We find the other two asserted **[**15]** grounds for their motion plainly without merit, and reject them out of hand. [16]

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[16] These grounds are that plaintiffs have waived a jury and that the plaintiffs have engaged in a publicity campaign so prejudicial to the defendants that striking the jury demand is appropriate both as a sanction for this alleged misbehavior and because the publicity has made it impossible to impanel an impartial jury.

The defendants concede that both plaintiffs made timely demands for jury trial. Their waiver argument is based instead on excerpts from the transcripts of numerous pretrial conferences.

In several of these colloquies, plaintiffs' counsel indicated a willingness to agree to a non-jury trial if All parties so agreed, but "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." *Rule 38(d), Fed.R.Civ.P.* 39(a) permits the withdrawal of jury demands "by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record . . . ." See *Collins v. Government of the Virgin Islands, 366 F.2d 279* (3d Cir.) Cert. denied, ***386 U.S. 958, 87 S. Ct. 1026, 18 L. Ed. 2d 105 (1966)***.

We have carefully reviewed the cited portions of the record, and find that at no time did the plaintiffs state an unequivocal much less irrevocable intention to withdraw their jury demands. Even if they had, it would be manifestly unjust to treat an unaccepted offer to enter into a Rule 39(a) stipulation as irrevocable throughout the pendency of the pretrial stages in any case. Moreover, at no time have all parties agreed to dispense with a jury, and several defendants continue to join the plaintiffs in seeking a jury trial. The alleged "waiver" or "withdrawal" therefore fails to meet the clear requirements of the Federal Rules.

Defendants' argument based on allegations of plaintiff-inspired prejudicial publicity fails for several reasons.

First, we simply do not believe that the "massive publicity campaign" characterized by the Sharp defendants as "a plan to corrupt the minds of the ultimate triers of fact" could possibly have more than a marginal effect on the venire in this district. The 40-odd press clippings presented as evidence of "Zenith's publicity crusade" are, for the most part, collected from the inner pages of the Japan Times, Home Furnishings Daily, Electronics News, the Chicago Tribune, and other periodicals of limited circulation in this area. Even if every single one of the allegedly prejudicial articles had been published on the front pages of the general circulation Philadelphia dailies, they would not even begin to compare with the press coverage given to Watergate or the My Lai massacre yet impartial juries were selected in cases dealing with those events. See *United States v. Haldeman, 181 U.S.App.D.C. 254, 282-294, 559 F.2d 31, 59-71 (1976)* Cert. denied, sub noms. Ehrlichman v. ***United States and Mitchell v. United States, 431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)***; *Calley v. Callaway, 519 F.2d 184, 203-13 (5th Cir. 1975)* (en banc) Cert. denied, ***423 U.S. 888, 96 S. Ct. 182, 46 L. Ed. 2d 119 (1976)***. Moreover, this district is comprised of 10 counties, in most of which the Philadelphia newspapers are not widely read. There has been no evidence of publicity on radio and television.

Second, in the absence of prejudicial publicity so outrageous and pervasive that "any subsequent court proceedings in (the) community . . . could be but a hollow formality," *Rideau v. Louisiana, 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L. Ed. 2d 663 (1963)*, any conclusion as to the impact of publicity on prospective jurors in this case now, almost a year before trial, would necessarily be speculative. See *Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 563, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)*. The Voir dire will provide an opportunity to determine whether the prospective jurors have, in fact, been prejudiced; it would clearly be improper to strike the jury demand on no more than speculation.

Third, a variety of less drastic measures may be available to cure or ameliorate any prejudice which might be found. See, e.g., *id. at 563-64, 96 S. Ct. 2791*. The alternatives listed in Nebraska Press must be carefully considered before resort may be had to a step as extreme as denying the constitutional right to jury trial.

If at Voir dire we find that Zenith's "publicity campaign" has in fact "corrupted the minds" of the potential jurors, and if we also find the prejudice so substantial that the defendants' right to a fair trial can best be protected by a remedy as drastic as striking the plaintiffs' jury demands, we would then have to confront a number of difficult constitutional questions. Several courts have recently discussed the extent to which the paramount interest in preserving the integrity of the judicial process can justify interference with activities normally protected by the *First Amendment*. See, e.g., *Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979)*; *In re Halkin, 194 U.S.App.D.C. 257, 598 F.2d 176 (1979)*; *Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976)*; *CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975)*; *Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975)* Cert. denied, ***427 U.S. 912, 96 S. Ct. 3201, 49 L. Ed. 2d 1204 (1976)***. Because the possibility that the Voir dire will uncover substantial prejudice is remote at best, we need not decide the *First Amendment* issues now, and express no opinion thereon.

[16]** **[*897]** II. The Parties' Contentions Regarding the Size & Complexity of the Litigation

The defendants' motion is based, as we have noted, on the contention that this litigation is so extraordinarily massive and complex as to be beyond the practical abilities and limitations of a jury. In support of this contention, the defendants emphasize the nature of the conspiracy charged, the statutory claims asserted, the procedural posture of the case, and the anticipated length of trial. The defendants provided the following summary of their contentions in their first memorandum in support of their motion to strike the jury demand:

> 1. The alleged conspiracy is claimed to have been worldwide, to have lasted over a period of 30 years and to have involved more than 97 manufacturers, exporters and importers of consumer electronic products ("CEP's") of various national origins.
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> 2. Over seventy of the alleged co-conspirators are not defendants in this proceeding. Necessarily plaintiffs will attempt to produce evidence to support their allegations that the non-defendant co-conspirators participated in the alleged conspiracy with the various defendants who are charged in the complaints. **[**17]** This will create complicated and confusing issues for the jury as to whether the defendants and alleged non-defendant co-conspirators knew of, joined and participated in the alleged conspiracy. More confusing will be the question of whether evidence presented as to specific defendant(s) and specific non-defendant co-conspirator(s) has been connected to and is admissible against the various defendants in the litigation.
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> 3. The plaintiffs assert violations based upon various sophisticated and esoteric antitrust and trade regulation laws which few American lawyers let alone untrained laymen or jurors can understand and interpret. The allegations are further complicated by the fact that one of the laws, the Wilson Tariff Act (*15 U.S.C. § 18*), is rarely used and interpreted in litigation, and the 1916 Antidumping Act (*15 U.S.C. § 72*) has never been construed or interpreted in a trial situation in its over 60 year history. Even if appropriate and legally sufficient instructions are given to the jury as to the meaning of these laws and the standards of proof which must be met, application of complicated and detailed accounting, marketing, economic and legal evidence to such legal standards **[**18]** and guidelines would be mindboggling for a jury.
> 4. The trial of these litigations is anticipated to last at least one year.
> 5. The majority of the defendants are Japanese, their native language has no common basis with the English language and their business records and therefore much of the evidence in these litigations will be Japanese language documents.
> 6. At the time the trial commences almost nine years of discovery will have been completed, including the production of untold millions of documents and literally hundreds of depositions which will constitute the evidence to be presented. As noted above, a major portion of these documents are in Japanese and will require translation and interpretation. Further, much of the documentation whether in English, Japanese or other languages is of a highly technical engineering and accounting nature.
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> 7. The evidence at trial will consist in part of the testimony of expert witnesses as to the nature of competition and marketing practices in both the United States and Japan CEP industries, accounting practices in both the United States and Japan CEP industries, the engineering and scientific developments of CEPs in both the Japanese **[**19]** and United States markets which will have to be applied to the vast quantity of factual information which will be introduced in both English and Japanese.
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> 8. The cases involve overlapping and different products (the NUE case deals only with television receivers; while the **[*898]** Zenith case deals not only with television receivers but also with radios, stereos, audio equipment, tape recorders and components of such products); the injury claims involve overlapping and different time periods of the alleged conspiracy (NUE 1966 to 1970 and Zenith, 1968 to 1977). Further, the Zenith case challenges the acquisition by two Japanese manufacturers of failing American CEP manufacturers (Matsushita's acquisition of Motorola's color television receiver business and Sanyo's acquisition of Warwick). The Zenith case also includes charges of violations of the Robinson-Patman Act (*15 U.S.C. 13(a)*) which the NUE case does not.
> 9. The cases involve overlapping and different parties. The Zenith action involves six parties who are not parties in the NUE action. The Sony defendants are a party to the NUE action but not the Zenith action.

> 10. The defendants have asserted extensive counterclaims **[**20]** against plaintiff Zenith charging it with engaging in marketing practices in violation of the United States antitrust laws and in a conspiracy with certain other American CEP manufacturers, distributors, labor unions and others to prevent and impede the ability of the defendants in these litigations, particularly the Japanese defendants, from competing in the United States CEP industries through a series of sham and harassing charges, allegations, investigations and legal proceedings. The counterclaims involve highly sophisticated and technical legal and factual evidence which will require the presentation of vast quantities of materials.
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> 11. While these cases are individually extraordinarily complex and involve diverse claims as to products, parties, statutes involved and damage periods, plaintiffs claim they involve a single conspiracy against the defendants and the alleged non-defendant co-conspirators. In such a situation consolidation for trial might seem a logical and efficient utilization of counsels' and the Court's time. However, to consolidate cases which individually are incapable of comprehension by a jury for a trial before a jury would exacerbate and expand the complexity **[**21]** of the trial by a geometric progression which defies quantification.

This summary has been expanded and supplemented in a lengthy affidavit and numerous other submissions.

In their affidavit, the defendants assert that they have produced more than ten million pages of documents; that the plaintiffs have copied one million pages and "expect to introduce several thousand documents into evidence." For their own part, the defendants plan to offer an undefined "major portion" of the 2 million pages they have copied from the more than twenty million pages produced by the plaintiffs.

The defendants' views are also illustrated by the sample special interrogatories submitted so that we might identify the issues to be decided by the jury and assess their complexity.

With respect to the conspiracy claims, the defendants' proposed sample interrogatory contains 23 subparts, to be asked of the jury "for each of the 24 defendants with respect to each of the 108 other defendants and alleged co-conspirators." Together with other subparts which may be required, the defendants suggest that the jury might therefore be asked "over 15,000 separate interrogatories for each relevant product market" **[**22]** as to the conspiracy claims alone. In addition, the defendants argue that because of the thousands of models of consumer electronics products imported and sold by each of the defendants, thousands upon thousands of special interrogatories will have to be propounded to the jury on the dumping claims as well as the other statutory causes of action asserted by the plaintiffs.

The plaintiffs' response to these contentions is simply that the case is large, but not complex. First, they emphasize that they charge only one conspiracy, not many. Therefore, it would serve no purpose to ask the jury to answer a complete set of conspiracy interrogatories for each of the 2,316 **[*899]** possible pairings of each defendant with every other co-conspirator. Instead, they suggest posing "simply the question whether the plaintiffs have proved that the individual defendants have been engaged in an unlawful combination or conspiracy in restraint of trade." As regards the thousands of special interrogatories which defendants say would have to be propounded on the dumping claims, plaintiffs submit that the jury need not decide separately whether there has been dumping as to each of the thousands of models **[**23]** of consumer electronic products involved, and need not perform a separate computation of dumping margins for each of these models.

According to the plaintiffs, the jury's task will be simplified by other factors. First, although there are 24 defendants, they are grouped into no more than ten separate enterprises. Second, the difficulties attending class actions are not present here. Third, plaintiffs note that there are only two cases involved, compared with the 18 separate cases involved in one litigation in which a jury demand has been struck. [17] In sum, the plaintiffs conclude,

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[17] See *In re U. S. Financial Securities Litigation, 75 F.R.D. 702 (S.D.Cal.1977)* (striking jury demand in litigation involving eighteen cases consolidated for trial in which five classes had been certified). Permission to appeal from the order of the District Court was granted by the Ninth Circuit on August 29, 1977. That appeal is currently pending.

> the fact remains that the present litigation involves classic conspiracy claims **[**24]** and proof of exactly the same nature as that which has been presented in dozens and dozens of private antitrust actions and criminal prosecutions across the nation. . . . The issues of motive, intent and conspiracy . . . are of the type routinely submitted to juries in the federal courts on a daily basis. As in most cases involving a number of discrete transactions, the jury will be assisted by presentation of the evidence in a summarized format easily grasped by individual jurors.

We expect that the actual size and complexity of this litigation falls somewhere in between the two extremes portrayed by the parties. We are skeptical of the plaintiffs' efforts to portray this litigation as an essentially simple, "single conspiracy" case, although of course we express no opinion as to what they may be able to prove at trial. We are equally skeptical of the defendants' contentions regarding the number of documents they will introduce and the number of special interrogatories which would have to be submitted to a jury. [18] By any yardstick, this case is at least as large and complex as the others in which jury demands have been struck. See pp. 923-925 Infra. However, resolution of these **[**25]** disputes as to the Degree of complexity of this case is unnecessary in light of our discussion of the legal issues, to which we now turn.

III. Discussion

A. Introduction

The issue before us is whether trial by jury, usually available as of right **[**26]** in private, treble-damage antitrust cases, is guaranteed even in a case so massive and complex as to be beyond "the practical abilities and limitations of juries."

The plaintiffs, relying heavily on the decision of the Supreme Court in *Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 36 S. Ct. 233, 60 L. Ed. 505 (1916)*, argue vigorously that the *Seventh Amendment* guarantees their right to a jury trial, regardless of considerations of size and complexity. **[*900]** In Fleitmann, the Court held that a shareholders' derivative action could not be brought in equity when the underlying corporate claim was one for treble damages for violation of the antitrust laws, because to permit equity jurisdiction over such actions would deprive the defendants of their right to trial by jury:

> (T)he inquiry . . . arises why the defendants' right to a jury trial should be taken away . . . .
> (W)e agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law.
>
> On the contrary, it plainly provides the latter **[**27]** remedy, and it provides no other.

Id., 240 U.S. at 28-29, 36 S. Ct. at 234. [19] Since the Fleitmann decision, it has been regarded as "well settled" that ***HN1***[] antitrust claims for treble damages are "triable by jury on timely demand of a party." *Ring v. Spina, 166*

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[18] In this respect, we note that Rule 52(a) requires the judge in a bench trial to find both ultimate and subsidiary facts with "detail and exactness." See *EEOC v. United Virginia Bank, 555 F.2d 403 (4th Cir. 1977)*; *O'Neill v. United States, 411 F.2d 139, 146 (3d Cir. 1969)*; *Roberts v. Ross, 344 F.2d 747, 751 (3d Cir. 1965)*. The number of findings which a court would have to make might therefore equal or exceed the number of interrogatories which would have to be submitted to a jury. If this number were a mere 50,000 a number well within the defendants' projections and if the finder of fact were to work 40 hours a week without respite, spending a mere five minutes on each, it would take the court or jury two full years just to make the requisite findings of fact.

[19] At the time that the Fleitmann suit was brought, only the government could seek an injunction to restrain an antitrust violation. Before the Supreme Court issued its decision, the Clayton Act extended that right to private parties; however, the Court rejected the notion that this effected any change in the right to a jury trial on treble damage claims. *240 U.S. at 29, 36 S. Ct. 233, 60 L. Ed. 505*.

F.2d 546, 550 (2d Cir.) Cert. denied, *335 U.S. 813, 69 S. Ct. 30, 93 L. Ed. 368 (1948)*. See, e.g., *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)*; *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 690* (9th Cir.) Cert. denied, *429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976)*; *Siegfried v. Kansas City Star Co., 298 F.2d 1* (8th Cir.) Cert. denied, *369 U.S. 819, 82 S. Ct. 831, 7 L. Ed. 2d 785 (1962)*; *Hartford-Empire Co. v. Glenshaw Glass Co., 3 F.R.D. 50 (W.D.Pa.1943)*.

[28]** The defendants concede "the applicability of the *Seventh Amendment* to all but the most lengthy and complex damage actions." They frame the issue as "whether or not there is a certain small class of cases which are too lengthy and complex to be handled by a jury, and, therefore, must be tried before the Bench." In support of their argument that this litigation can be placed in such a class of cases without offending the constitution, the defendants first argue that complex cases were historically tried in equity. Moreover, they urge us to follow the example of several courts which have recently struck jury demands in large and complex actions, including two antitrust cases. See pp. 923-925, Infra. These courts have found the *Seventh Amendment* inapplicable to such matters, largely on the authority of dicta in a recent Supreme Court decision implying that the constitutional right to a jury trial in civil actions may sometimes depend on "the practical abilities and limitations of juries." *Ross v. Bernhard, 396 U.S. 531, 538 n. 10, 90 S. Ct. 733, 738, 24 L. Ed. 2d 729 (1970)*.

B. Construction of the Antitrust Statutes: Need We Reach the *Seventh Amendment* Issue ?

Although the parties have **[**29]** treated the issue before us as depending solely on the scope of the *Seventh Amendment* right to jury trial, we must first determine whether it is necessary to reach the constitutional issue. " "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154, 89 L. Ed. 101 (1944)*. ***HN2***[] Before deciding **[*901]** the constitutional question, it (is) incumbent on . . . courts to consider whether . . . statutory grounds might be dispositive." *New York City Transit Authority v. Beazer, 440 U.S. 568, 582, 99 S. Ct. 1355, 1364, 59 L. Ed. 2d 587 (1979)*. See *Ashwander v. TVA, 297 U.S. 288, 346-48, 56 S. Ct. 466, 80 L. Ed. 688 (1936)* (Brandeis, J., concurring).

HN3[] The right to jury trial may, of course, be expressly provided by the terms of a federal statute. See, e.g., Great Lakes Act, *28 U.S.C. § 1873* (tort and contract actions in admiralty jurisdiction involving shipping on the Great Lakes); *28 U.S.C. § 1874* (jury to assess sum due on forfeiture of bond); 11 U.S.C. § 42(a) **[**30]** (right of involuntary bankrupt to jury trial). Because there is no constitutional right to a Nonjury trial, the *Seventh Amendment* does not prevent either judicial or legislative extension of the right to jury trial, and such statutes raise no constitutional difficulties. See e.g., The Propeller Genesee *Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459-50, 13 L. Ed. 1058 (1852)* (Great Lakes Act); 9 Wright and Miller, Federal Practice and Procedure § 2302, at 15 (1971).

On the other hand, ***HN4***[] when a statute creating new rights or remedies is silent as to the mode of trial, the availability of a jury as of right generally becomes a *Seventh Amendment* question. Courts fit the statutory claim "into the nearest historical analogy to determine whether there is a (constitutional) right to jury trial." James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 656 (1963); *Ross v. Bernhard, 396 U.S. 531, 543 n. 1, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* (Stewart, J., dissenting); *Patzig v. O'Neil, 577 F.2d 841, 848 (3d Cir. 1978)*; *Nedd v. Thomas, 316 F. Supp. 74, 77 (M.D.Pa.1970)*; 5 Moore's Federal Practice P 38.11(7), at 128-128.4 (2d ed. 1978); 9 Wright and Miller, Federal Practice and Procedure **[**31]** §§ 2302, 2316 at 16, 79-80 (1971). See, e.g., *Pernell v. Southall Realty, 416 U.S. 363, 375-76, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)*; *Curtis v. Loether, 415 U.S. 189,*

The plaintiff in Fleitmann sought relief in equity because shareholder derivative suits were purely equitable actions, not cognizable at law. See *United Copper Co. v. Amalgamated Copper Co., 244 U.S. 261, 37 S. Ct. 509, 61 L. Ed. 1119 (1917)* (shareholder had no standing to sue at law on a corporate cause of action).

The merger of law and equity, effected by the adoption of the Federal Rules of Civil Procedure in 1938, eliminated the dilemma. The legal claims in a derivative action can now be tried by a jury after a court determination of the plaintiff's right to proceed on the corporation's behalf. See *Ross v. Bernhard, 396 U.S. 531, 535-37* & n. 6, *90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)*.

193-97, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974); Porter v. Warner Holding Co., 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946); Luria v. United States, 231 U.S. 9, 34 S. Ct. 10, 58 L. Ed. 101 (1913); United States v. Jepson, 90 F. Supp. 983 (D.N.J.1950); Olearchick v. American Steel Foundries, 73 F. Supp. 273 (W.D.Pa.1947). As the Court said in Curtis :

> (W)e have often found the Seventh Amendment applicable to causes of action based on statutes. See, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477, 82 S. Ct. 894, 899, 8 L. Ed. 2d 44 (1962) (trademark laws); Hepner v. United States, 213 U.S. 103, 115, 29 S. Ct. 474, 479, 53 L. Ed. 720 (1909) (immigration laws); Cf. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 36 S. Ct. 233, 60 L. Ed. 505 (1916) (antitrust laws), and the discussion of Fleitmann in Ross v. Bernhard, 396 U.S. 531, 535-536, 90 S. Ct. 733, 736-737, 24 L. Ed. 2d 729 (1970). Whatever doubt may have existed should now be dispelled. **HN5**[] The Seventh Amendment does apply to actions enforcing **[**32]** statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

415 U.S. at 193-94, 94 S. Ct. at 1008 (footnotes omitted).

Thus, if in enacting the antitrust laws Congress has granted the right to trial by jury in antitrust damage suits regardless of their size and complexity, any such limitation to the scope of the Seventh Amendment would be irrelevant. But if the antitrust laws do not themselves guarantee trial by jury on demand, we would have to decide the constitutional issue. [20]

[33]** **[*902]** Private damage suits for relief under the antitrust laws are authorized by § 4 of the Clayton Act, 15 U.S.C. § 15, which replaced § 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890). Neither section makes any express mention of trial by jury, but the matter does not end there. In Lorillard v. Pons, 434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978), the Court interpreted the Age Discrimination in Employment Act of 1967 as requiring a jury trial on demand, even though that statute is also silent on the issue. In drafting the ADEA, Congress incorporated by reference the remedial provisions of the Fair Labor Standards Act, which courts had held to carry a constitutional right to trial by jury. Because of this, the Court held, the statutory scheme showed that congress "intended that in a private action under the ADEA a trial by jury would be available where sought by one of the parties." 434 U.S., at 585, 98 S. Ct. at 872. The Court's analysis thus applied the "principle of reenactment," a settled canon of statutory construction which presumes that when language with an accepted meaning derived from judicial or administrative interpretation is thereafter used in **[**34]** a statute, Congress intended the language to carry its accepted meaning

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[20] Although decisions of the Supreme Court have necessarily assumed that there is a right to a jury trial in antitrust suits, the Court has never had to decide whether the right is grounded in the statute or in the Seventh Amendment. The rather oblique statement of the Court in Fleitmann that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury . . . . (but) it plainly provides the latter remedy, and it provides no other," 240 U.S. at 29, 36 S. Ct. at 234, can be read as finding the right in the statute, or it could be read as confirming and adding to the clear holding of the Court of Appeals in that case that the right is constitutional, See Fleitmann v. United Gas Improvement Co., 211 F. 103 (2d Cir. 1914), Aff'd sub nom. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 36 S. Ct. 233, 60 L. Ed. 505 (1916), especially in view of the settled principle that "courts of equity do not award . . . damages penal in character without express statutory authority" Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 427-28 (2d Cir.) Cert. denied, ***277 U.S. 594, 48 S. Ct. 530, 72 L. Ed. 1005 (1928)***.

Later decisions of the Court have been equally ambiguous. In Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), the Court discussed the right to a jury trial on the issues presented by an antitrust counterclaim. At one point in its opinion the jury trial right in antitrust cases is described as "an essential part of the congressional plan for making competition rather than monopoly the rule of trade . . .," id., at 504, 79 S. Ct. at 953 (dictum); at another the Court refers to the right involved as constitutional. Id., at 510, 79 S. Ct. 948 (dictum). In Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970), the Court described Fleitmann and said, "Although the decision had obvious Seventh Amendment overtones, its ultimate rationale was grounded in the antitrust laws." Id., at 536, 90 S. Ct. at 737 (dictum). See id., at 547, 90 S. Ct. 733 (Stewart, J., dissenting).

into the statute. See United States v. Board of Commissioners, 435 U.S. 110, 132-35, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 278-79, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977).

Although the legislative history of the Sherman and Clayton Acts may be susceptible to a similar interpretation, the effort would be somewhat strained. Scattered remarks of several Senators during the debates prior to passage of the Sherman Act show that they assumed that jury trials would be available in antitrust damage actions. See 21 Cong.Rec. 1767 (1890) (remarks of Sen. George); id., at 2643 (remarks of Sen. Gray); id., at 3149 (remarks of Sens. Morgan and George). A belief that parties in treble damage antitrust litigation were entitled to jury trial as a matter of constitutional right is also evident in the remarks of several members of Congress during the debates prior to passage of the Clayton Act. See 51 Cong.Rec. 1466, 88 (1914) (remarks of Reps. Scott and Volstead); id., at 9489 (remarks of Reps. Floyd and Volstead); id., at 9491 (remarks of Reps. Green and Scott). [21] Moreover, **[**35]** because damages and especially penal damages were a traditional remedy of the courts of law, See pp. 921-922, Infra, Congress was almost certainly aware that litigants in antitrust damage suits would be entitled to trial by jury as a matter of constitutional right. However, mindful of "the difficulty of discerning congressional intent where the statute provides no express answer," Lorillard v. Pons, 434 U.S. at 585, 98 S. Ct. at 872, we find this evidence insufficient to allow an extension of the reasoning of Lorillard to the antitrust statutes.

[*903] We note first that since Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 7 L. Ed. 732 (1830), it has been clear and Congress has presumably been aware that the constitutional jury trial right attaches to statutory causes **[**36]** of action involving "legal" rights and remedies. [22] See Pernell v. Southall Realty, 416 U.S. 363, 374-75, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974); Curtis v. Loether, 415 U.S. 189, 193-94, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974). In spite of this, and with the sole exception of Lorillard v. Pons, the Supreme Court has consistently used constitutional analysis to determine the availability of trial by jury when the statute creating a cause of action is silent on the subject. This resort to Seventh Amendment analysis for most causes of action based on statutes implies strongly that mere congressional Awareness of the applicability of the Seventh Amendment, like that evident in the legislative history of the antitrust laws, is not enough to make jury trial available as a matter of statutory construction.

[37]** By way of contrast, the legislative history of the ADEA provides much stronger evidence that Congress was not only aware of, but intended that jury trials be available.

In Lorillard, the Court stressed Congress' deliberate choice of certain of the FLSA's remedial provisions, and its rejection both of other portions of the FLSA and of the remedial provisions of Title VII, which, though they accord similar relief, do so in terms not held to carry a right to jury trial. Clearly, Congress could have chosen to incorporate instead the remedial provisions of Title VII, thereby entitling plaintiffs to virtually identical relief, but without a jury.

The Congresses that enacted the antitrust laws were in a very different position. Unlike the backpay available under Title VII, the damages available for antitrust violations cannot be fairly described as "restitution" or other equitable relief. See Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66-67 (S.D.N.Y.1978). And in suits for penal damages, the right to a jury was then as much a part of the constitutional landscape as it is now in trials for criminal offenses punishable by lengthy imprisonment and large fines. When Congress defines **[**38]** certain conduct as a serious offense, it certainly "intends" that the conduct be severely punished, and necessarily Assumes that defendants would have the right to trial by jury. However, it need not "intend" this to be the case; indeed, it might devoutly wish just the opposite, but feel constrained by the constitution.

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[21] Prior to consideration of the Clayton Act, it had been held that damage suits under the Sherman Act were actions at law in which the parties were entitled to trial by jury. See Meeker v. Lehigh Valley R. R., 162 F. 354 (C.C.S.D.N.Y.1908).

[22] The presumption that Congress intends to "reenact" the meaning given to language by judicial interpretation is particularly strong when the interpretation at issue is that of the Supreme Court. Ward v. Northern Ohio Telephone Co., 251 F. Supp. 606, 610 (N.D.Ohio 1966) Aff'd. per curiam 381 F.2d 16 (6th Cir. 1967). See Shapiro v. United States, 335 U.S. 1, 16, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948); Hecht v. Malley, 265 U.S. 144, 153, 44 S. Ct. 462, 68 L. Ed. 949 (1924).

Such constraint was evidently felt by the Congress that passed the Clayton Act; the discussion there of trial by jury showed less concern for the right to a jury trial than for the constitutionality of the proposed changes in the antitrust laws then being debated. See, e.g., 51 Cong.Rec. 9491 (1914) (remarks of Reps. Green and Scott). [23] Whereas Congress in the ADEA deliberately **[*904]** chose statutory language known to carry a right to a jury trial when it could instead have provided equivalent "equitable" relief, Congress in enacting the antitrust laws had no such choice, because equity had no remedy equivalent to treble damages. Clearly, it makes much more sense to discern an "intention" in the first situation than in the second.

[39]** Thus, because the legislative history of the antitrust laws does not yield the positive evidence of congressional intent required to hold that the plaintiff's right to a jury trial is guaranteed by the statute, we must address the constitutional issue. [24]

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[23] The debates in the House concerned a proposal that final judgments in suits brought by the government have conclusive collateral estoppel effect, both for and against the defendant, in subsequent private actions. Since there would be no right to a jury in suits brought by the government in equity to restrain antitrust violations, Congress was concerned that the statute might unconstitutionally foreclose presentation of those issues to a jury in later damage suits.

The colloquy included the following statement by Representative Green:

I am not entirely clear as to whether this section is constitutional even as against the defendant corporation, but I am inclined to think that the provision might stand in that respect. . . . The suit commenced by a third party might be a suit for damages commenced in a case at law, in which either party is entitled to a trial by jury. . . . (T)he trial by jury will still go on as to the extent of the damages; . . . (b)ut I agree with the gentleman from Texas (Mr. BEALL) in saying that even as to that matter the section is of doubtful constitutionality. . . . He can use, presumably, and obtain the same evidence which the Government has used, even though the decree be not made conclusive in his favor; but if it is possible, if it can constitutionally be made conclusive in his favor, I would be in favor of having it done. In any event, the amendment of the gentleman from Minnesota (Mr. VOLSTEAD) ought to be agreed to. . . ." (Emphasis added)

And this response from Representative Scott:

I think there is a grave question also as to the constitutionality of the statute, even if changed to conform to the amendment offered by the gentleman from Minnesota. However, I am not clear upon that question. I am satisfied, however, that the matter never will be settled until it reaches the Supreme Court of the United States. When you enact into this statute a provision which deprives a corporation of the right to a hearing before a jury as provided by the Constitution you will find that statute challenged and you will never know what the law is upon the question until the court of last resort speaks the last word. . . .

However, upon no course of reasoning could it be held that this statute in its present form would be constitutional, and, therefore, I believe that the amendment of the gentleman from Minnesota should prevail.

The proposal being debated was eventually rejected in favor of what is now *15 U.S.C. § 16(a)*, providing that the judgment in a government suit is only prima facie evidence, and only against the defendant.

[24] Even if we were able to find the right to jury trial implicit in the statutory scheme, it would still be necessary to address the constitutional question in order to determine the scope of the statutory right, because the right incorporated by such an exercise of statutory construction Is the constitutional right. We might also have to decide whether the right thus incorporated is "frozen" despite later changes in what the *Seventh Amendment* is thought to require, or whether the statutory right is now whatever the *Seventh Amendment* now requires, even if it was thought to require something else at the time of enactment of the statute in question. For example, at the time that the Clayton Act became law, Congress doubtless thought not only that treble damage actions required juries, but that they required juries of twelve. See e.g., *Capital Traction Co. v. Hof, 174 U.S. 1, 13-14, 19 S. Ct. 580, 43 L. Ed. 873 (1899)*; *Maxwell v. Dow, 176 U.S. 581, 586, 20 S. Ct. 448, 44 L. Ed. 597 (1900)* ("And as the right of trial by jury in certain suits at common law is preserved by the *Seventh Amendment*, such a trial implies that there shall be a unanimous verdict of twelve jurors in all Federal courts where a jury trial is held."). Now that the *Seventh Amendment* is known Not to require a jury of twelve, See *Colgrove v. Battin, 413 U.S. 149, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973)*, courts in districts that do not make a jury of twelve available as of right would need to decide whether such juries must nevertheless be available to the parties in antitrust suits and other actions based on statutes whose legislative histories show some expectation that the constitution would require juries of twelve.

[40]** C. The *Seventh Amendment* and the Historical Test

HN6[] The *Seventh Amendment* provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Although the continuing vitality of the *Bill of Rights* after nearly two centuries may be partly due to our courts' recognition of the need to read twentieth-century **[*905]** meanings into eighteenth-century terms, [25] *HN7*[] the scope of the *Seventh Amendment* has traditionally been determined by applying a comparatively static, "historical test," which looks to the English common law as it existed in 1791, when the *Seventh Amendment* became part of the constitution. [26] See, e.g., *Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*; *Curtis v. Loether, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)*; *Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657, 55 S. Ct. 890, 891, 79 L. Ed. 1636 (1935)* ("The right of trial by jury thus preserved is the right which existed under the English **[**41]** common law when the amendment was adopted."); *Dimick v. Schiedt, 293 U.S. 474, 476, 55 S. Ct. 296, 79 L. Ed. 603 (1935)*. See generally F. James & G. Hazard, Civil Procedure § 8.1 at 347 (1977); 5 Moore's Federal Practice P 38.08(5), at 79-80 (2d ed. 1978). [27]

This type of puzzle would be presented here by the alternate possibilities that there was a "complexity" exception to the jury trial rule at the time that the antitrust laws were enacted, (a possibility suggested by the defendants' reliance on *Kirby v. Lake Shore & M. S. R. R., 120 U.S. 130, 7 S. Ct. 430, 30 L. Ed. 569 (1887)*, decided just three years before the Sherman Act), or that such an exception was first recognized to be of constitutional dimension in *Ross v. Bernhard, 396 U.S. 531, 538 n. 10, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)*. The decisions of the Court in Colgrove and in *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*, would seem to imply that the statutory right is whatever the constitution would require, complete with exceptions and limitations, but that issue is not before us.

[25] See, e.g., *Jackson v. Bishop, 404 F.2d 571, 578-79 (8th Cir. 1968)* (Blackmun, J.) (scope of the *Eighth Amendment* ban on cruel and unusual punishment is determined by society's "evolving standards of decency").

[26] The first ten amendments were submitted to the states by Congress on September 25, 1789, 1 Stat. 97 (1789), and became effective on December 15, 1791, when Virginia brought to eleven the number of states approving them. See Wolfram, The Constitutional History of the *Seventh Amendment*, 57 Minn.L.Rev. 639, 725-726 (1973).

[27] The historical test may have evolved almost by accident. See generally, Wolfram, Supra, note 26 at 639-642. The reference to the law of England appears to have been first used by Justice Story in *United States v. Wonson, 1 Gall. 5, 28 F.Cas. 745, 750 (C.C.D.Mass.1812)*:

Beyond all question, the common law here alluded to (in the *Seventh Amendment*) is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

According to Wolfram, this rule has never been seriously questioned: "perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious." Wolfram, Supra, 57 Minn.L.Rev. at 641. Nevertheless, Wolfram's thorough canvass of the debates in the Constitutional Convention and in the state ratification conventions demonstrates that the reference to English law could hardly have been "obvious." See *id., at 712-18, 721-22, 734*.

Once the use of English common law had become settled, the historical test followed, though not until the end of the nineteenth century. See id., at 642. Wolfram suggests that this is because earlier cases involved issues as to which changes in the English common law were irrelevant. Id. However, since England had no parallel constitutional guarantee, Parliament was free to change the scope of the right to a jury, and it did. The Judicature Acts of 1873-75 permitted the court "to dispense with a jury in chancery cases, cases requiring review of voluminous documents, and cases requiring any scientific or other type of investigation not conveniently made with a jury." Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Powers, 56 Tex.L.Rev. 47, 51 (1977). Thus, the historical reference may have been required to prevent the scope of an

[42]** In looking to the English common law of 1791, the critical distinction is that between "law" and "equity:"

> By common law, (the framers of the amendment) meant what the constitution denominated in the third article "law;" not merely suits, which the common law **[*906]** recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contra-distinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. Probably, there were few, if any, states in the Union, in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in order respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever **[**43]** may be the peculiar form which they may assume to settle legal rights.

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446, 7 L. Ed. 732 (1830). Accord, e.g., *Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 449, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)*; *Pernell v. Southall Realty, 416 U.S. 363, 374-75, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)*; *Curtis v. Loether, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)*; *Ross v. Bernhard, 396 U.S. 531, 533, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)*. Because the Court has applied this rule in such a way as to "preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure," *Baltimore & Carolina Line, supra, 295 U.S. at 657, 55 S. Ct. at 891*, it has been able to accommodate procedural change without being unfaithful to the historical test. See, e.g., *Colgrove v. Battin, 413 U.S. 149, 156-57, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973)* (twelve-member jury not required by *Seventh Amendment*); *Galloway v. United States, 319 U.S. 372, 390, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943)* (directed verdict permitted by *Seventh Amendment*); *Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494,* ***[**44]*** *498, 51 S. Ct. 513, 75 L. Ed. 1188 (1931)* (New trial on less than all issues in case may be ordered, even though at common law there was no practice of setting aside a verdict in part); *Ex parte Peterson, 253 U.S. 300, 309, 40 S. Ct. 543, 64 L. Ed. 919 (1920)* (court appointment of auditor to examine complex accounts between the parties in order to simplify and define issues does not violate *Seventh Amendment*, as long as ultimate determination of disputed issues is left to the jury); *Walker v. New Mexico & S.P.R.R., 165 U.S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837 (1897)* (where jury's general verdict is inconsistent with jury's answers to special interrogatories, *Seventh Amendment* is not violated by entry of judgment on the basis of the special verdict, setting the general verdict aside). Although in each of these cases the Court approved procedural incidents of jury trials different from those that had been in practice in 1791, in none was the right to a jury trial lost where that right had been enjoyed at the time of the adoption of the *Seventh Amendment*. [28]

American constitutional right from depending on changes in English practice a century after independence. See Wolfram, Supra, at 642.

Although English decisions from the 1780's and 90's are obviously the most helpful in determining which issues were tried to juries there in 1791, *Seventh Amendment* questions frequently require recourse to earlier or later cases, which "presumably would be authoritative only to the extent that they themselves accurately reflect the English state of practice in 1791." Id., at 642, n. 8. But since the constitution itself has sought to "preserve" that state of practice in the federal courts, federal cases may be presumed to reflect that position somewhat more accurately than cases from the English courts or the state courts, other things being equal. Most state constitutions also "preserve" the right to trial by jury in similar terms, but the scope of those guarantees varies widely. This is because the practices in the original 13 colonies varied and because states admitted later sometimes used a different referent. For example, in California the scope of the right is determined by reference to the English common law in 1850, when California's constitution was adopted. See F. James & G. Hazard, Civil Procedure § 8.1 at 347-348 & n. 4 (1977).

[28] In *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*, the Court held that a defendant in a private damage suit may be collaterally estopped from relitigating before a jury issues adversely determined in an earlier injunctive action brought by the SEC, where no jury was available. Whether he is thereby denied a jury determination of an issue on which he would have been entitled to one in 1791 depends on how the question is put. It is true that there would have been no estoppel in 1791 because at that time collateral estoppel was available only between parties in the prior litigation; on the other hand, it is equally the case that at common law, "a litigant was not entitled to have a jury determine issues that had been

[45]** We have noted earlier the defendants' concession that the *Seventh Amendment* applies "to all but the most lengthy and **[*907]** complex damage actions." [29] The issue, therefore, as framed by the historical test, is whether jury trials were unavailable in complex matters in 1791.

[46]** 1. The Accounting Cases

In support of their contention that "at the time that the *Seventh Amendment* was ratified, . . . litigations involving complex facts or sophisticated business transactions were tried before the Court and not a jury," the defendants cite a number of cases in which plaintiffs proceeded in equity to obtain "an accounting." In some of these cases, the jurisdiction of a court of equity was sustained, even though the matter was cognizable at law, because the complexity of the accounts between the parties rendered the remedy at law inadequate. For example, in *Kirby v. Lake Shore & M. S. R. R., 120 U.S. 130, 7 S. Ct. 430, 30 L. Ed. 569 (1887)*, the Court said:

> The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity.

Id., at 134, 7 S. Ct. at 432. And in *Fowle v. Lawrason, 30 U.S. (5 Pet.) 495, 8 L. Ed. 204 (1831)*, while holding that the case at bar was not sufficiently complex to justify equity jurisdiction, the Court stated the rule as being that "in transactions (not involving certain fiduciary relationships), **[**47]** great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction." *Id., at 503*. Accord, *H. B. Zachry Co. v. Terry, 195 F.2d 185 (5th Cir. 1952)*; *Quality Realty Co. v. Wabash Ry. Co., 50 F.2d 1051 (8th Cir. 1931)*; *Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801 (D.Kan.1928)* (discussing cases), Aff'd on other grounds, *46 F.2d 241 (10th Cir. 1931)*; Harrington v. Churchward, 29 Law J. Ch. 521 (1860); O'Connor v. Spaight, 1 Sch. & Lefr. 305, 309 (Irish Ch.1804). See *Kilbourn v. Sunderland, 130 U.S. 505, 9 S. Ct. 594, 32 L. Ed. 1005 (1889)*; *Standard Oil Co. v. Atlantic Coast Line R. Co., 13 F.2d 633 (W.D.Ky.1926)* Aff'd on other grounds, *275 U.S. 257, 48 S. Ct. 107, 72 L. Ed. 270 (1927)*. Thus, complexity was sometimes a factor in determining the mode of trial. However, because in these cases the plaintiffs could choose whether to seek relief in law or equity, jury trials Were available even if only at the plaintiff's opinion. Moreover, the merger of law and equity in the federal courts casts considerable doubt on the survival of the plaintiff's historical **[**48]** ability to choose a non-jury trial in such matters. These "accounting" cases, therefore, do not help the defendants here.

a. Complex Accounting Cases and the Concurrent Jurisdiction of Law and Equity

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previously adjudicated by a chancellor in equity." Compare *id. 99 S. Ct. 652 at 652-55* (opinion of the Court) With id. at 659-61. (Rehnquist, J., dissenting). See generally Shapiro and Coquillette, The Fetish of Jury Trials in Civil Cases: A Comment on Rachal v. Hill, 85 Harv.L.Rev. 442 (1971).

[29] In view of this concession, it is unnecessary to engage in the extensive historical analysis which would be required to determine conclusively the question of the applicability of the *Seventh Amendment* to antitrust actions. For examples of this type of analysis, see Mr. Justice Marshall's opinion for the Court in *Pernell v. Southall Realty, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)*, tracing the history of actions for the recovery of real property, and Judge Friendly's opinion for the majority in *Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961)*, tracing the history of the Court of Exchequer in order to determine whether there was a constitutional right to a jury in a suit by the government to collect taxes allegedly due.

Although in view of the defendant's position we assume without deciding that there is a constitutional right to jury trial in antitrust cases, we note that this assumption is supported by abundant evidence. The acts prohibited by the antitrust laws are similar to those banned by the Statute of Laborers, 1349, 23 Edw. Ch. 3, c. 6, and the Statute of Monopolies, 1623, 21 Jac. c. 3, both of which gave a right to penal damages in the courts of common law. In addition, antitrust actions have been held to sound in tort, classically a "legal" cause, See n. 61, Infra. Finally, treble damages are traditionally a remedy available only in the courts of law. See pp. 921-922, Infra.

Actions seeking an accounting are the descendants of the old action of "Account" or "Account-render," one of the earliest **[*908]** forms of action at common law. [30] **[**49]** The common-law action of account was never very popular perhaps because it was procedurally cumbersome [31] and of limited scope [32] and by the eighteenth century it was largely replaced by other remedies, both legal and equitable. [33]

[50]** In some cases there were no incidents of equitable jurisdiction, and the plaintiff had to proceed at law. See, e.g., *Fowle v. Lawrason, 30 U.S. (5 Pet.) 495, 8 L. Ed. 204 (1831)* (lessor's action for an accounting of rent allegedly due). When the claims underlying the demand for an accounting were equitable claims, equity jurisdiction was exclusive. 5 Moore's Federal Practice P 38.25, at 199 (2d ed. 1978). See, e.g., *Newberry v. Wilkinson, 199 F. 673, 678 (9th Cir. 1912)* (suit for accounting against administratrix of a decedent's estate); *Miller v. Weiant, 42 F. Supp. 760 (S.D.Ohio 1942)* (action to compel directors to account for corporate assets); *Williams v. Collier, 32 F. Supp. 321 (E.D.Pa.1940)* (suit by trustee in bankruptcy to void fraudulent transfer and impose constructive trust); 4 Pomeroy's Equity Jurisprudence §§ 1420, 1421 (5th ed. 1941).

Those cases in which resort to equity was based on the complication of the accounts between the parties fell into a third category the concurrent jurisdiction of law and equity. [34] 5 Moore's Federal Practice P 38.25, at 199 (2d ed. 1978). See e.g., *Kirby v. Lake Shore & M. S. R. R., 120 U.S. 130, 7 S. Ct. 430, 30 L. Ed. 569 (1887)*; *Fowle **[**51]** v. Lawrason, 30 U.S. (5 Pet.) 495, 8 L. Ed. 204 (1831)*; *H. B. Zachry Co. v. Terry, 195 F.2d 185 (5th Cir. 1952)*; *McNair v. Burt, 68 F.2d 814, 815 (5th Cir. 1934)*; *Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801 (D.Kan.1928)*; Aff'd on other grounds, *46 F.2d 241 (10th Cir. 1931)*. This overlap in the jurisdictions of law and equity gave plaintiffs in such cases the practical ability to choose the forum and thereby the mode of trial. When the plaintiff chose to bring his action at law, the defendant's ability to obtain a non-jury trial was severely limited:

> (T)he doctrine is well settled that **[**52]** when the jurisdictions of law and equity are concurrent the one which first takes actual cognizance of any particular controversy **[*909]** ordinarily thereby becomes exclusive. If,

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[30] See *Williams v. Collier, 32 F. Supp. 321 (E.D.Pa.1940)* (Kalodner, J.); Belsheim, The Old Action of Account, 45 Harv.L.Rev. 466 (1932); 5 Moore's Federal Practice P 38.25, at 198 (2d ed. 1978); 2 Story's Equity Jurisprudence §§ 580-602, at 1-17 (14th ed. 1918). Belsheim traces Account back to the early thirteenth century when, in a system of land ownership where "it was common for (feudal) lords to grant out manors to bailiffs, who were to account for the rents and profits thereof, deduction being made for the expenses incurred," the action provided redress for the lord "in case such a bailiff refused to account." Belsheim, Supra, at 467-68.

[31] In order to obtain relief, the plaintiff needed first to establish before a jury the defendant's obligation to account to him. The defendant would then be compelled by physical arrest and imprisonment, if necessary to appear before auditors appointed by the court, who would settle the accounts between the parties. Disputed issues of fact arising before the auditors would also be resolved by a jury. See *Ex parte Peterson, 253 U.S. 300, 308, 40 S. Ct. 543, 64 L. Ed. 919 (1920)*. Finally, the plaintiff could submit the auditors' final computation to the court of law to obtain a final judgment for any amount due. Belsheim, Supra note 30, at 493-499.

[32] During the earlier middle ages, account could be brought only against bailiffs, guardians in socage, receivers ad computandum, and certain few others; it was later extended to other types of receivers, to partners, to the plaintiff's executors, to the defendant's executors, and to third party beneficiaries. See id., at 475-493.

[33] Though the old action of account fell into general disuse, it had not entirely disappeared at the close of the eighteenth century. See, Belsheim, Supra note 27, at 466; 2 Story's Equity Jurisprudence § 581, at 2 & n. 1 (14th ed. 1918). According to Story, such actions were also brought "in the form of assumpsit, covenant, and debt . . . in the Courts of Common Law," or by a bill in equity. Id.

[34] The concurrent jurisdiction in matters of account also included cases involving mutual accounts, an accounting between two partners, an accounting by the principal where the agent's compensation depended upon the principal's profits, and others. See 4 Pomeroy's Equity Jurisprudence §§ 1420, 1421 (5th ed. 1941). For a survey of other matters within the concurrent jurisdiction, See 1 id. §§ 139, 140, at 191-194.

> therefore, the subject-matter of primary right or interest, although legal, is one of a class which may come within the concurrent jurisdiction of equity, and an action at law has already been commenced, a court of equity will not, unless some definite and sufficient ground of equitable interference exists, entertain a suit over the same subject-matter. . . . ***HN8***[] The grounds which permit the exercise of the equitable jurisdiction in such cases are the existence of some distinctively equitable feature of the controversy which cannot be determined by a court of law, or some fraudulent or otherwise irregular incidents of the legal proceedings sufficient to warrant their being enjoined, or the necessity of a discovery, either of which grounds would render the legal remedy inadequate. This rule results in part, in the United States, from the provisions of the national and state constitutions securing the right to a jury trial.

1 Pomeroy's Equity Jurisprudence § 179, at 251-252 (5th ed. 1941).

Because **[**53]** Story's view was that "(t)he whole machinery of Courts of Equity is better adapted to the purpose of an account. . . ." 2 Story's Equity Jurisprudence § 591, at 9 (14th ed., 1918), he was distressed by the ability of plaintiffs to bring such actions in the courts of law where they would be tried by juries:

> (N)ow the (equity) jurisdiction extends not only to cases of an equitable nature, but to many cases where the form of the account is purely legal, and the items constituting the account are founded on obligations purely legal. Upon such legal obligations however suits, although not in the form of actions of account, yet in the form of assumpsit, covenant, and debt, are still daily prosecuted in the Courts of Common Law, and legal defenses are there brought forward. But even in these cases, as the courts possess no authority to stop the ordinary progress of such suits for the purpose of subjecting the matters in dispute to the investigation of a more convenient tribunal than a jury, unless the parties agree to a voluntary arrangement for this purpose the cause often proceeds to trial in a manner wholly unsuitable to its real merits.

Id., § 581, at 2 (footnotes omitted).

[54]** Thus, defendants were not able to have such matters transferred to equity after the plaintiff had brought an action at law. For example, in *Williams v. Herring, 183 Iowa 127, 165 N.W. 342 (1917)*, the defendant sought to have an action transferred to equity on the ground that "the number of items involved" in the business between the parties was "so great that same can be properly tried and determined only by a court of chancery." Although agreeing that "the number of items . . . will be cumbersome and difficult to present to a jury," the court was of the view that they could be presented "in such a way as to reasonably be within the understanding and comprehension of a jury," and held:

> The fact that the controversy involves a large number of items of debit and credit arising out of many business transactions, and that same could be more conveniently tried to the court, is not a ground of equitable jurisdiction. The test is not whether the cause can be more conveniently or satisfactorily tried and determined by the court than a jury, but the accounts must be mutual requiring an accounting, or there must be some other ground of equitable cognizance not shown to exist in this case. **[**55]**
>
> In our opinion, plaintiff's cause of action upon both counts was properly brought at law, and he is entitled to a trial thereof by jury.

Id., 165 N.W. at 344-45. See also *Crane v. Ely, 37 N.J.Eq. 564 (1883)*.

These "complex" cases for an accounting therefore reflect only the availability of a jury or nonjury trial at the Plaintiff's option. There is nothing in any of these cases **[*910]** to indicate that the plaintiff could not have chosen to proceed at law, with a jury. [35] **[**56]** In this respect, they are no different from many other kinds of actions

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[35] The proposition that complex accounting cases were within the concurrent jurisdiction of law and equity might best be described as the majority view. At least one court has expressed the opinion that some cases might be complex enough to justify an injunction against a pending action at law. See *Crane v. Ely, 37 N.J.Eq. 564, 571 (1883)* (dictum). Other authorities imply that mere complication of accounts, in the absence of some trust or fiduciary relation, may not be enough to sustain equity jurisdiction:

presenting issues which, before the merger of law and equity, would be tried to a jury or to the court depending on the manner in which the plaintiff chose to proceed. [36]

It is held that equity has jurisdiction to award an accounting between parties where there are involved mutual accounts or accounts of such complication that it is not practicable to try the case at law before a jury. . . . This has been denied where no trust relationship is involved. . . . But, however this may be, it is settled that equity will not take jurisdiction because of the complication of accounts unless the remedy at law is clearly inadequate; and where the practice at law permits reference to auditors or referees there is seldom occasion for the exercise of the jurisdiction. . . . Under the federal practice, cases involving complicated accounts can be referred to auditors for the simplification of the issues involved, and the difficulties of trial at law of actions involving such accounts are thus in large measure obviated.

Broderick v. American General Corp., 71 F.2d 864, 867-68 (4th Cir. 1934) (citations omitted). See Sedalia v. Standard Oil Co., 66 F.2d 757, 761 (8th Cir. 1933) Cert. denied, ***290 U.S. 706, 54 S. Ct. 374, 78 L. Ed. 607 (1934)***; 2 Story's Equity Jurisprudence § 598, at 13-14 (14th ed. 1918). We may well conclude with Story that "where there is a remedy at law there is no small confusion and difficulty in the authorities . . . which . . . seem to deliver over the subject to interminable doubts." Id., § 595, at 11-12.

That the *Seventh Amendment* guaranty of jury trial extends to the plaintiffs in such cases was assumed by the Court in *Ex parte Peterson, 253 U.S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920)*. The plaintiff brought an action at law on an account including 298 items; the defendant's answer and counterclaim "set up another account containing 402 items." In the trial court, Judge Augustus Hand appointed an auditor

to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties, and make and file a report in the office of the clerk of this court, with a view to simplifying the issues for the jury, but not to finally determine any of the issues in the action, the final determination of all issues of fact to be made by the jury on the trial . . . .

Id., at 304, 40 S. Ct. at 544. The plaintiff then sought a writ of mandamus, complaining that the appointment of the auditor interfered with his *Seventh Amendment* right.

In an opinion by Justice Brandeis, the Court approved Judge Hand's appointment of an auditor, comparing it to the traditional practice of appointing such auditors to aid courts of equity "where the facts are complicated and the evidence voluminous." *Id., at 313, 40 S. Ct. at 547*.

What the District Judge was seeking when he appointed the auditor in the case at bar was just such aid. He required it himself, because without the aid to be rendered through the preliminary hearing and report, the trial judge would be unable to perform his duty of defining to the jury the issues submitted for their determination and of directing their attention to the matters actually in issue. *United States v. Reading Railroad, 123 U.S. 113, 114, 8 S. Ct. 77, 31 L. Ed. 138*. The hearing and report were also essential as shown above to enable the jury to perform their specific duty. Owing to the difference in the character of the proceedings and of the questions ordinarily involved, the occasion for seeking such aid as is afforded to a judge by special masters, auditors, or examiners arises less frequently at law than in equity.

Id., at 313-14, 40 S. Ct. at 547. Thus, the Court recognized that matters complex enough to require the aid of an auditor, though more often found in courts of equity, were cognizable at law as well. And as long as the auditor's report was no more than prima facie evidence, "(t)he limitation imposed by the (Seventh) amendment . . . that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with," was respected. *Id., at 310, 40 S. Ct. at 546*.

Provision for such appointments in complex matters to be tried to juries is now made in *Rule 53(b), Fed.R.Civ.P.* See *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)*.

[36] Issues as to which the plaintiff was able to choose the mode of trial arose in two basic patterns. They are explained by Professors James and Hazard:

B's violation of A's statutory right (e.g., to a patent or copyright) might entitle A to an injunction, to compensatory damages, and to a penalty. The right to any relief would turn on whether B violated the statute. A might get a determination of that issue without a jury in an equity suit, seeking an injunction and perhaps compensatory damages as incidental to an injunction. Or he might get such determination in an action at law for damages or for the penalty. Since equity refused to enforce a penalty and the law would not give an injunction, two suits would be required for complete relief. A had the choice which to bring first. And the first

[57] [*911]** b. The Concurrent Jurisdiction of Law and Equity After Merger

In the federal courts, the merger of law and equity was not intended to affect the scope of the jury trial right; ***HN9***[] *Rule 38(a)* requires only that the right "as declared by the *Seventh Amendment to the Constitution* or as given by a statute . . . shall be preserved to the parties inviolate." However, a problem was presented by those matters in which the plaintiff had previously

> had an option as to the mode of trial that excluded any option by defendant or any discretion by the court. . . . (T)he (post-merger) question, properly put, is between giving effect to the plaintiff's former option and giving defendant a counter-option and this involves a decision as to whether jury trial is to be preferred when either party (and not just the plaintiff) wants a jury trial.

F. James & G. Hazard, Civil Procedure § 8.7, at 374-75 (1977).

The problem as it was encountered in the federal system has been ably summarized by Judge Wisdom:

> In 1938 merger of the federal courts of law and equity caused considerable uncertainty in the determination of jury trial rights; the liberal joinder provisions and the broad, **[**58]** sometimes mandatory, counterclaim provisions of the Federal Rules mixed legal and equitable causes in a single litigation with unprecedented frequency. . . . The difficulty comes in deciding whether the legal or the equitable cause should be tried first an issue of practical importance to litigants, since the determination of either cause acts as collateral estoppel on common questions of fact in the other. The broad grant of discretion under Rule 42 for a trial judge to order separate trials would seem to imply authority to decide the order of the separate trials, but courts struggled with this problem without clear guidelines. Some decisions rested on the "basic nature" of the case taken as a whole. In many other decisions this test was not recognized and the choice was left to the discretion of the trial judge. On occasion, attempts to apply the "basic nature" test have led to inconsistent results.

Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 488-89 (5th Cir. 1961) (footnotes omitted). The problem reached the Supreme Court in *Beacon Theatres, **[*912]** Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)*, and *Dairy Queen, Inc. v. Wood, **[**59]** 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)*. Beacon Theatres Involved a legal counterclaim to an equitable claim; [37] in Dairy Queen the plaintiff sought a court

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determination of the common issue (violation vel non) would bind the parties in the second action. The plaintiff thus had the power to choose the mode of trial of the common issue, and he could so exercise it as to leave no room for judicial discretion.

If the statute did not provide for a penalty, A might be able to get complete relief in a suit in equity. But he would also have the option to sue for damages at law and for an injunction in equity separately, in whichever order he chose. So here again A could control the mode of trial of the common issue, without leaving room for judicial discretion.

In another class of cases A also had a choice, but it was a more limited one. Breach of certain kinds of contracts (e.g., to convey land) would entitle the injured party to either specific performance (with incidental damages for delay of performance, and the like) or to damages for breach (measured on the assumption that the contract would not be performed). Here A could in no case get both forms of relief he had to elect one or the other. His election would govern the mode of trial of issues (the making of the contract, performance of conditions precedent, breach, and the like), which would be presented in a claim for Either kind of relief.

F. James & G. Hazard, Civil Procedure § 8.7, at 370-72 (1977) (footnotes omitted); James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 671-73 (1963). Actions within the concurrent jurisdiction of law and equity fall into the latter pattern, except that, instead of choosing between "legal" and "equitable" remedies for the same right, the plaintiff simply chooses between the remedy provided in the law courts and the remedy "of the same general nature" made available by equity because for some reason the remedy administered at law is not "full, adequate, and complete." 1 Pomeroy's Equity Jurisprudence § 139, at 191-92 (5th ed. 1941).

[37] The complaint in Beacon Theatres sought a declaratory judgment that the plaintiff was not violating the antitrust laws, and an injunction to prevent the defendant from instituting an antitrust suit against the plaintiff. The defendant counterclaimed for treble damages, and the trial court then ordered that the plaintiff's "essentially equitable" claims be tried without a jury before the jury trial on the counterclaim, even though the issue of violation of the Sherman Act was common to both claims, and the party against whom that issue was determined in the court trial would be collaterally estopped from relitigating it before the jury. The Supreme Court granted mandamus and ordered a jury trial on all issues in defendant's claim.

trial of an action presenting both legal and equitable claims. [38] In both cases there were factual issues common to both the legal and equitable claims.

[60]** Writing for the Court in Dairy Queen, Justice Black left no room for doubt about the solution to the problem that was to be followed in the federal courts:

> After the adoption of the Federal Rules, attempts were made indirectly to undercut (the constitutional jury trial) right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in Beacon Theatres, Inc. v. Westover . . . .
>
> Our decision (in Beacon Theatres defines) the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in Beacon Theatres was that ***HN10***[] where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial **[**61]** of legal issues be lost through prior determination of equitable claims."

Id., at 472-73, 82 S. Ct. at 897. Therefore, the Court reasoned,

> the sole question which we must decide is whether the action now pending before the District Court contains legal issues.

Id., at 473, 82 S. Ct. at 897. The Court then examined the relief sought in the complaint, which had been brought by the owners of the "Dairy Queen" trademark against one of their licensees. The plaintiffs asked for injunctive relief to restrain the licensee from using the trademark or collecting any money from its sublicensees, "an accounting to determine the exact amount of money owing . . . and a judgment for that amount." Determining that the claim for a money judgment was "wholly legal in its nature however the complaint is construed," the Court held that the Defendant had a right to a jury trial of the legal claim, including the common factual issues of breach of contract and trademark infringement. *Id., at 475-80, 82 S. Ct. at 898-99*. Thus, the federal courts, preferring a jury trial at the demand of either party, have **[*913]** determined to give defendants a "counter-option." James & Hazard, Supra, **[**62]** at 377. [39]

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[38] In Dairy Queen, a franchiser alleging breach of the franchise agreement sued to restrain the franchisee from use of the franchise and trademark, and from collecting funds from subfranchisees. It also sought "an accounting to determine the exact amount of money owing . . ." *369 U.S., at 475, 82 S. Ct. at 898*. The district court struck the defendant's jury demand on the alternate theories that the action was "purely equitable" or that, if not, then the legal issues were "incidental" to the equitable ones. The Supreme Court reversed, holding that the claim for a money judgment for breach of contract is not equitable merely because it is "cast in terms of an "accounting,' rather than in terms of an action for "debt' or "damages.' " *Id., at 477-78, 82 S. Ct. at 900*. And it strongly rejected the notion that it is ever permissible to characterize legal issues as "incidental" in order to restrict the right to a jury trial.

[39] The expanded boundaries for the right to jury trial established in Beacon Theatres and Dairy Queen seem to have been regarded in those opinions as constitutionally required. Consequently, some commentators have viewed *Beacon Theatres, Dairy Queen, and Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* as representing an abandonment of the historical test in favor of a "dynamic" or "flexible" or "rational" approach to the *Seventh Amendment*. See 9 C. Wright and A. Miller, Federal Practice and Procedure § 2302, at 24 (1971); McCoid, Procedural Reform and the Right to Jury Trial; A Study of Beacon Theatres, Inc. v. Westover, 116 U.Pa.L.Rev. 1 (1967); Redish, *Seventh Amendment* Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw.U.L.Rev. 486, 526 (1975). Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv.L.Rev. 898, 900-904 & n. 28 (1979). However, the Court in later cases has referred to the Beacon Theatres/Dairy Queen holding as an "equitable doctrine." See *Katchen v. Landy, 382 U.S. 323, 339, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966)*. To the extent that Beacon Theatres And Dairy Queen have expanded the right to jury trial further than required by a strict application of the historical test, the characterization in Katchen is accurate. The *Seventh Amendment*, of course, does not prohibit such an expansion, but merely prohibits any contraction of the jury trial right to limits narrower than those permitted by

[63]** There are dicta in Dairy Queen implying that a defendant would not have the same "counter-option" in a complex accounting case. In response to the plaintiff's contention that its money claim was "purely equitable," because it was "cast in terms of an "accounting' rather than . . . "debt' or "damages'," the Court said:

> But ***HN11***[] the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in Beacon Theatres, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.
>
> In view of the powers given to District Courts by *Federal Rule of Civil Procedure 53(b)* to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably **[**64]** increased and it will indeed be a rare case in which it can be met. But be that as it may, this is certainly not such a case.

Id., at 477-78, 82 S. Ct. at 900. [40]

[65]** The matter, therefore, is in some doubt: In its holding in Dairy Queen, the Court extended the defendant's jury trial right to an issue on which, before merger, the plaintiff could have obtained the court trial it wanted; yet in dicta it suggested that the plaintiff's choice of mode of trial may yet be preserved in complex accounting cases. This question does not appear to have been resolved by any court, although federal courts in other types of cases have generally held that the federal policy favoring trial by jury, expressed in Beacon Theatres and Dairy Queen, requires that either party be able to demand a jury when the action **[*914]** presents issues so triable. James & Hazard, Supra, at 377. See, e.g., *Johns Hopkins University v. Hutton, 488 F.2d 912, 916 (4th Cir. 1973)* (defendant entitled to jury trial on factual issues in plaintiff's action for recission of contract so long as plaintiff holds claim for damages in reserve should court find that it is not entitled to recission) Cert. denied, *416 U.S. 916, 94 S. Ct. 1622, 40 L. Ed. 2d 118 (1974)*; *Minnesota Mutual Life Ins. Co. v. Brodish, 200 F. Supp. 777 (E.D.Pa.1962)* (defendant entitled to jury trial on issues common to **[**66]** plaintiff's equitable claim and defendant's legal counterclaim). Cf. *Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952)* (jury available upon demand of either party when consolidated or joined legal and equitable claims have common question of fact).

For two reasons, we need not now determine whether the plaintiff's limited right to a court trial of complex accounting cases has survived the merger of law and equity. First, if this Were an action for an accounting, the plaintiff's clearly expressed demand for a jury trial would be controlling, just as it would have been in 1791. Second, this is simply not an accounting case. "There are no accounts between the parties. The cause of action is one arising in tort, and cannot be converted into one for an account." *United States v. Bitter Root Development Co., 200 U.S. 451, 478, 26 S. Ct. 318, 327, 50 L. Ed. 550 (1906)*. See e.g., *Broderick v. American General Corp., 71 F.2d 864, 868 (4th Cir. 1934)*. None of the fiduciary or trust relationships giving rise to an obligation to account are present. See *American Air Filter Co., Inc. v. McNichol, 527 F.2d 1297, 1300 (3d Cir. 1975)*; *Sulzer v. Watson, 39 F.*

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the historical test. Moreover, the Court's more recent decisions have eliminated any doubt about the continuing validity of the historical test. See pp. 926-929, Infra.

[40] The dicta in Dairy Queen were themselves based on earlier dicta in *Kirby v. Lake Shore & M. S. R. R., 120 U.S. 130, 7 S. Ct. 430, 30 L. Ed. 569 (1887)*. In Kirby, after holding that "The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity," *id., at 134, 7 S. Ct. at 432*, the Court went on to observe,

> It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq.Jur. § 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted.

Id., at 134, 7 S. Ct. at 432.

414, 415 (C.C.D.Vt.1889). Nor do the plaintiffs **[**67]** seek an accounting in the sense of disgorgement of "profits made from the unfair use of a plaintiff's trademark or tradename." Robert Bruce, Inc. v. Sears, Roebuck & Co., 343 F. Supp. 1333, 1348 (E.D.Pa.1972).

2. Other Complex Litigation

Because this suit is not an action for an accounting, it is important to determine whether complexity permitted a resort to equity only in accounting cases, or in other kinds of litigation as well.

The availability of equity jurisdiction in cases involving complicated facts was addressed in United States v. Bitter Root Development Co., 200 U.S. 451, 26 S. Ct. 318, 50 L. Ed. 550 (1906) and Curriden v. Middleton, 232 U.S. 633, 34 S. Ct. 458, 58 L. Ed. 765 (1914). In Bitter Root, the United States sought relief in equity after millions of feet of timber were allegedly removed and sold by means of an involved conspiracy. Equity jurisdiction was invoked because, "by reason of the frauds and conspiracies . . . and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given . . . at law . . . ." 200 U.S., at 462, 26 S. Ct. at 323. But the Court ruled that there was no equity jurisdiction:

> The principal ground **[**68]** upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort feasors, and the various devices alleged to have been resorted to by the deceased, Daly, by way of organizing different corporations, in order to, as alleged, cover up his tracks, and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. It is simply a question of evidence to show who did the wrong and upon that point the fact could be ascertained as readily at law as in equity.

Id., at 472-73, 26 S. Ct. at 324-25. And in Curriden v. Middleton, the Court reaffirmed this holding, saying, **HN12**[] "(M)ere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction." 232 U.S. at 636, 34 S. Ct. at 458.

Moreover, there is evidence that the English recognized the difficulty of large and complex matters for ordinary juries, and found a solution not in equity, but in the **[*915]** "special **[**69]** jury." The early procedures for trial by special jury were unregulated. See Thayer, The Jury and Its Development, 5 Harv.L.Rev. 295, 301 (1892). But in 1730, it was provided by statute that "on the motion of any plaintiff or plaintiffs, defendant or defendants in any action, cause, or suit whatsoever, depending or to be brought and carried on in the . . . courts of king's bench, common pleas and exchequer, or in any of them, . . . said courts are hereby respectively authorized and required, upon motion as aforesaid, in any of the cases before-mentioned, to order and appoint a jury to be struck . . . in such manner as special juries have been, and are usually struck in such courts. . . ." 3 Geo. 2, c. 25, § 15 (1730). The act also provided that the party applying for a special jury was to pay the fees incurred thereby, id., § 16, and that qualification to serve on a special jury was determined on the basis of income. Id., § 18. Some years later, the procedure was altered so that the party applying for the special jury was to pay not only the extra sheriff's fee, but all additional expenses due to the use of a special jury. These amounts were not taxable as costs to the losing party **[**70]** unless the judge certified that "the same was a cause proper to be tried by a special jury." 24 Geo. 2, c. 18 (1751). [41]

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[41] Later statutes further modifying the procedures for special juries include 6 Geo. 4, c. 50, §§ 30-35 (1825), and 3 & 4 Will. 4, c. 42, § 35 (1833). For a discussion of special juries in nineteenth-century England, See 18 Halsbury's Laws of England, Juries §§ 634-640, at 259-63 (1st ed. 1911).

By 1958, the use of special juries in England was limited to "cases as entered in the commercial list in the Queen's Bench Division of the High Court at the Royal Courts of Justice." 23 Halsbury's Laws of England, Juries P 4 (3d ed. 1958). Special juries were abolished altogether by the Courts Act, 1971, § 40. See 23 Halsbury's Laws of England, Juries P 4 (1978 cum.supp.).

According to Blackstone, "Special juries were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though **[**71]** not upon such apparent cause as to warrant an exception to him." 3 W. Blackstone, Commentaries *357. [42] The continuing relevance of complexity as a cause for impaneling special juries appears in reported opinions discussing certifications requested pursuant to the 1751 Act. Compare London Bank of Scotland v. Marshall, 4 Foster & Finlason's Nisi Prius Reports 1046 (1865) (certifying the case as proper for a special jury "because the plea, which if proved would have raised a difficult question of law, would in its proof raise difficult questions of fact,") With Humber Iron Co. v. Jones, 4 Fos. & Fin. 1047 (1865) (The judge "declined to certify for a special jury, as it was the ordinary evidence under the general issue."); Cf. Linscott v. Jepp, 8 T.L.R. 130 (Q.B.1891) (In refusing to overturn the decision of a trial judge in a slander case not to allow a special jury, Lord Coleridge said, "There is . . . no difficulty in the trial of such a case so as to require a special jury."); Price v. Williams, 5 Dowl. 160 (Exch.1836) (special jury could be called to determine damages on writ of inquiry).

[72]** The defendants' argument that equity was generally available whenever a case presented matters too difficult for a jury relies heavily on two English decisions: Wedderburn v. Pickering, 13 Ch.D. 767 (1879), and Clench v. Tomley, 21 Eng.Rep. 13 (Ch.1603). [43]

In Wedderburn, an action concerning a dispute as to the location of the boundary **[*916]** between the parties' properties, the court found that the matter "cannot be conveniently tried before a jury" and denied the defendant's request for a jury, relying not on any common-law tradition but on Order XXXVI, rules 3 & 26, Rules of Court, 1875. [44] These rules were promulgated as part of the merger of law and equity in the English Courts effected by the Judicature Act, 1873, 36 & 37 Vict. c. 66, as amended by the Judicature Act, 1875, 38 & 39 Vict. c. **[**73]** 77.

[74]** Rule 3 provided that either party could obtain trial by jury of Any action, both those formerly "legal" and those formerly "equitable." Rule 26 was a limitation on Rule 3, and allowed the court discretion to order a trial without a jury in cases which "previously to the passing of the Act could, without any consent of parties, be tried without a jury." This rule "was framed expressly to meet cases which would under the old system (before merger) have been tried in the Chancery Division, And which might be considered, by reason of involving a mixture of law and fact, or from great complexity, or otherwise, not capable of being tried before a jury." Clarke v. Cookson, 2 Ch.D. 746 (1876) (emphasis added). As we would expect in view of this statement of Rule 26 and its purpose, the

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[42] For a more extended discussion of special juries, see Thayer, The Jury and Its Development, 5 Harv.L.Rev. 295, 300-302 (1892). According to Thayer, "there seems always to have existed the power of selecting those especially qualified for a given service . . . . What we call the "special jury" . . . was a natural result of the principle that those were to be summoned who could best tell the veritatem rei. . . . For the handling of these greater and more complicated causes, there was picked out a better class of jurymen . . . ." Id., at 300-301.

[43] The defendants appear to adopt the presentation of this argument found in *In re U. S. Financial Securities Litigation, 75 F.R.D. 702, 708-709 (S.D.Cal.1977)* Appeal pending # 77-8213 (9th Cir. 8/29/77).

[44] The relevant rules provide:

2. Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and jury, or before an official or special referee, with or without assessors.

3. Subject to the provisions of the following Rules, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2; and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as the Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried.

26. The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury.

Order XXXVI, Rules 2, 3, 26, Rules of Court, 1875. The 1873 Judicature Act had significantly limited the availability of trial by jury, but the 1875 Act and Rules generally restored the jury trial right to its pre-1873 limits. See Judicature Act, 1875, § 22; Sugg v. Silber, 1 Q.B.D. 362, 366 (1876) (opinion of Pollock, B.).

decisions applying it involved matters which were clearly "equitable" regardless of their complexity. See, e.g., Powell v. Williams, 12 Ch.D. 234 (1879) (suit to enjoin nuisance); Swindell v. Birmingham Syndicate, 3 Ch.D. 127 (1876) (action for specific performance, counterclaim for recission). And in Wedderburn itself, the defendant would have had no right to a jury trial before merger because, as the plaintiff's **[**75]** counsel argued, the action might have been tried at common law, "or the Plaintiff might have come to the Court of Chancery for an injunction." 13 Ch.D., at 770.

Thus, the 1875 rules and the cases applying them do not support the proposition that complexity can make a "legal" issue into an "equitable" one. Indeed, this very question was raised in Sugg v. Silber, 1 Q.B.D. 362 (1876), a patent infringement case which, according to Chief Justice Cockburn, could "be adequately dealt with only by assessors who have the requisite scientific knowledge." Nevertheless, the court concurred in his conclusion that the Judicature Acts and the Rules did not allow a judge "to take away from a defendant the right which he previously had of trying his case before a jury." We conclude that the English post-merger cases demonstrate only that the English used the relative difficulty of trying complex cases before juries as a limitation on the Extension of jury trials to formerly equitable matters. The defendants' reliance on them is therefore misplaced.

The report of the Clench case is set forth in full:

> Possession bound by decree, and the party prohibited to sue at common law. Inter Tomley and Clench, **[**76]** it appeared by testimony of ancient witnesses **[*917]** speaking of sixty years before, and account books and other writings, that Francis Vaughan, from whom Tomley claimed, was mulier (legitimate); and Anthony, from whom Clench claimeth, was a bastard; and the possession had gone with Tomley fifty years. In this case the Lord Egerton not only decreed the possession with Tomley, but ordered also that Clench should not have any trial at the common law for his right till he had shewed better matter in the Chancery, being a thing so long past; it rested not properly in notice De pais, but to be discerned by books and deeds, of which the Court was better able to judge then (sic) a jury of ploughmen, notwithstanding that exceptions were alleged against those ancient writings; and that for the copyhold land, the verdict went with Clench upon evidence given three days before Sergeant Williams that Anthony was mulier (31st May, 1 Jacob. 1603).

Clench v. Tomley, 21 Eng.Rep. 13 (1603). This case seems to be the sole support offered for the defendants' contention that "at early common law, at a time when jurors were often illiterate and uneducated, matters involving complex writings **[**77]** were determined by the court." See *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 67 (S.D.N.Y.1978)*. One court has relied upon Clench for the broader proposition that "since long before the American Revolution, the common law recognized that the sheer complexity of a case, in particular a case which involved many complicated documents, was sufficient grounds to deny a jury trial . . .." *In re U. S. Financial Securities Litigation, 75 F.R.D. 702, 708-09 (S.D.Cal.1977)* Appeal pending, # 77-8213 (9th Cir. 8/29/77).

Initially, we note that a single report of such a venerable case should be approached with caution, because such reports were frequently inaccurate and were "only of those parts of the opinion deemed by the particular reporter to be useful to the lawyer." *Dawson v. Contractors Transport Corp., 151 U.S.App.D.C. 401, 411, 467 F.2d 727, 737 (1972)* (Fahy, J., dissenting) Citing M. Price & H. Bitner, Effective Legal Research 283 (1953). In any event, we think that the state of development of the jury system in 1603 the historical context of that case demonstrates that defendants' reliance on it is misplaced.

The practice of submitting documentary evidence to juries was, **[**78]** at the time, already long-established. According to one scholar, "Our earliest records show the practice of exhibiting charters and other writings to the jury." Thayer, The Jury and Its Development (II), 5 Harv.L.Rev. 295, 307 (1892). Thayer traces the development of the showing of documents to juries from about 1200 until the fifteenth century "to bring (it) down . . . to the modern form." See id., at 307-311. Thus, if Clench is not to be dismissed as an aberration, it must be explained on some grounds other than the inaccurate supposition that matters involving documentary evidence were kept from juries.

These grounds might be found in the fact that the jury was then still expected to bring its own knowledge of the disputed issues to court. The presentation to the jury of the testimony of witnesses, in fact, came centuries after the presentation of documentary evidence, developing during the fourteenth and fifteenth centuries. See *id., at 310,* *357-363*. The transformation of the jury from a body which came to court knowing the truth of the matter to one which came untainted by prior knowledge, to find the truth from the evidence presented, seems to have occurred largely between the **[**79]** middle of the seventeenth and the end of the eighteenth centuries. See *id., at 380-87*; 3 W. Blackstone, Commentaries *374-75. In Bushell's Case, Vaughan 135, 124 Eng.Rep. 1006 (C.P. en banc, 1670), habeas corpus was granted to jurors who had been imprisoned for returning a verdict contrary to the evidence and the direction of the court. The opinion of Chief Justice Vaughan in Bushell's case, Supra, demonstrates the continuing importance, long after Clench v. Tomley, of the jurors' personal knowledge of the matters in dispute.

> (A) court, Vaughan says, does not charge a jury with matter of law in the abstract, **[*918]** but only upon the law as growing out of some supposition of fact. This matter of fact is for the jury; it is not for the judge, "having heard the evidence given in court (for he knows no other)," to order the jury to find the fact one way rather than the other; for if he could, "the jury is but a troublesome delay, great charge, and of no use." The judge cannot know all the evidence which the jury goes upon; they have much other than what is given in court. They are from the vicinage, because the law supposes them to be able to decide the case though no evidence **[**80]** at all were given in court on either side. They may, from their private knowledge of which the judge knows nothing, have ground to discredit all that is given in evidence in court. They may proceed upon a view. "A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning." It is absurd that a judge should fine a jury for going against their evidence, when he knows but part of it, "for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in Granby and Short's Case."

Thayer, supra, at 382-83 (footnotes omitted). It may well have been that the sixty-year old facts of the Clench case "rested not properly in notice De pais " (of the country) because they were matters of which jurors would have had no personal knowledge; since the matter had to be decided solely on the basis of evidence produced in court documents and "the testimony of ancient witnesses" Lord Egerton could easily have felt that a jury would have been, in Vaughan's words, "but a troublesome delay, great charge, and of no use. [45]

[81]** Even if Clench demonstrated an unequivocal rejection of jury trials in complex matters, however, it would still be of limited relevance to the matter before us. The historical test, after all, defines the *Seventh Amendment* right with reference to the practice in 1791 not 1603. Because of the continuing development of the jury system and the constantly shifting boundaries of the jurisdictions of law and equity during those two centuries, any decision as old as Clench provides little evidence of what the practices were 188 years later. See Thayer, Supra, at 380-87; James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 658 (1963). Moreover, of course, what evidence we do have from the eighteenth century indicates that complex matters were heard in the common law courts, albeit by "special" juries.

We therefore conclude that, as a matter of actual historical practice, matters cognizable at law were tried to juries in the courts of common law, regardless of complexity. Though there was an exception to this general rule, that exception was limited to matters of "account," and further limited by the plaintiff's ability to choose a jury or non-jury trial in such matters.

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[45] We suggest the above reading of Clench largely for the purpose of showing that defendants' reading is not necessarily the only or the best one. We do not claim ours to be definitive; nevertheless, given the fact that juries had long considered documentary evidence, any "recognition" in Clench that equity would enjoin jury trials of matters involving complex documents would have been out of step with the prior and subsequent developments in the common law.

Other grounds for the Clench decision can easily be hypothesized. In view of the significance of documentary evidence, Lord Egerton may have kept the matter in equity because only in equity could discovery be compelled. And there is certainly a hint of the doctrine of laches in the order enjoining trial of a 50-year-old claim "till he had shewed better matter . . ., being a thing so long past." Cf. *Gee v. CBS, Inc., 471 F. Supp. 600 (E.D.Pa.1979)* (50 year old claim for breach of fiduciary duty barred by statute of limitations).

Finally, it is possible that a complete reading of Clench would have to take account of the temptations to excess at a time when the famous struggle between law and equity was approaching its climax. See F. James & G. Hazard, Civil Procedure § 1.5, at 15-17 (1977).

3. The **[**82]** Rationale of the Complex Accounting Cases

The defendants also suggest that the complex accounting cases demonstrate an **[*919]** "implicit . . . belief that if a jury could not understand the matter being presented, there was not the requisite "plain, adequate and complete remedy at law'." We find the actual historical practice in complex cases sufficiently clear that no recourse to "implicit beliefs" is necessary. However, dicta in a few of these cases show enough mistrust of juries that some inquiry is warranted into the rationale (if any) implicit in the availability of equity jurisdiction in complex accounting matters. [46]

[83]** As an initial matter, it is clear that the difficulty of an accounting for juries cold not have had anything to do with the original extension of equity jurisdiction into matters of account, since in the common-law action of account the actual "accounting" was never performed by the jury. The jury's verdict was that the defendant was obliged to account, and the account was then taken by court-appointed auditors. Similarly, when equity took cognizance of such matters, the chancellor appointed a master to undertake the accounting. See 2 Story's Equity Jurisprudence §§ 587, 590 at 5, 6, 8 (14th ed. 1918); note 31, Supra.

Some later courts have, indeed, justified the recourse to equity in such cases on the ground of their difficulty for juries, or at least used that difficulty to determine whether equity jurisdiction was properly invoked. See James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 663 & n. 48 (1963). However, according to Blackstone, the existence of the concurrent jurisdiction of equity in matters of account is to be explained by the power of courts of equity to compel the production of books and records: "But, for want of this discovery at law, the courts **[**84]** of equity have acquired a concurrent jurisdiction with every court in all matters of account." 3 W. Blackstone, Commentaries *437. [47] And Story's opinion that "the whole machinery of Courts of Equity is better adapted to the purpose of an account" was expressed without any special mention of juries. [48] Moreover, since **[*920]** trial to the

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[46] See p. 902 & n. 40, Supra ; *Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801 (D.Kan.1928)*, and sources cited therein. Perhaps the most extreme example is provided by *Bennett v. United Lumber & Supply Co., 110 Conn. 536, 148 A. 369 (1930)*:

The action upon the second count was in reality an action for an accounting involving many charges and credits between the parties aggregating upwards of $ 50,000. The trial was a protracted one; the account a difficult one to unravel. The printed evidence consists of 366 pages of the record while there were introduced in evidence 64 exhibits. No action for an accounting, or one of this character, should be tried to the jury. It imposes upon a jury an impossible task to expect them to carry in memory the details of a case of this character. It is unfair to a litigant to have his case determined by a tribunal which cannot fulfill that duty with accuracy or justice, however intelligent and desirous of doing their full duty the tribunal may be.

Id. Surprisingly enough, the court in Bennett then proceeded to reinstate the jury's verdict, reversing the judgment n. o. v. won by the defendant in the trial court.

Dicta such as those in Bennett must be read with extreme caution, not only because they are dicta, but also because "the courts of the nineteenth and early twentieth century simply did not share (the unequivocal commitment to the virtue of jury trials shown in Beacon Theatres. There was instead) a more or less distinctly conscious judicial aversion to jury trial, especially in the federal courts and the court systems of the Northeastern states." F. James & G. Hazard, Civil Procedure § 8.5, at 364 (1977) (footnotes omitted). The Bennett dictum must be read with even greater caution, coming as it does from a state system which, at the time of the adoption of the federal constitution, "had a procedure all its own, going beyond anything in English practice, by which all issues of fact or law could be decided by the court," Henderson, The Background of the *Seventh Amendment*, 80 Harv.L.Rev. 289, 317 (1966), and in which such procedures apparently survived well into the twentieth century. See *Ex parte Peterson, 253 U.S. 300, 308-09* & n. 3, *40 S. Ct. 543, 64 L. Ed. 919 (1920)*; *Sulzer v. Watson, 39 F. 414 (C.C.D.Vt.1889)* (in action of "book-account" in Connecticut, trial is by court-appointed auditor rather than by jury; Connecticut procedure could not be used in federal court because of *Seventh Amendment*).

[47] Blackstone's Commentaries were first published in 1765 and may, therefore, be especially valuable as a guide to the theory and practice of late eighteenth-century England.

[48] Story was responding to Blackstone's view that discovery was the sole ground for equity jurisdiction in matters of account.

According to Story, discovery

court or a jury was just one element of the choice between law and equity in a system where the procedures of one or the other had to be taken as a package, it is difficult to assess with any confidence the importance of that one element in any particular change in the respective jurisdictions.

[85]** The difficulties attending such speculation have been well described by Professor James:

> At no time in history was the line dividing equity from law altogether or even largely the product of a rational choice between issues which were better suited to court or to jury trial. There is little to suggest that the chancellor's initial choice of a procedure borrowed from canon law reflected a considered rejection of jury trial. Rather, the choice between law and equity frequently was made upon considerations of other factors. For when equity procedure took shape it differed from the procedure at law in several important respects. Evidence in equity was produced largely by sworn pleadings and written depositions taken upon written interrogatories, rather than by testimony taken orally and subject to oral cross-examination, all in the presence of the trier of fact. At law the parties to an action were neither competent nor compellable to testify, whereas in equity each party could offer his own sworn statements and also "probe the conscience" of his adversary by propounding written interrogatories, which had to be answered under oath. The chancellor used specific remedies which were **[**86]** not available to the law courts, and the chancellor could handle multiple parties and the possibility of multiple suits in a way that the law courts had not developed. The procedure of each tribunal had to be taken as a package, and each procedure had substantial limitations which the other did not share. In equity the procedure was epistolary, included the statements of both parties, might provide for specific relief and handle multiple parties and suits, and involved no jury. At law the procedure involved oral testimony and cross-examination at a jury trial, relief In rem, and the unavailability of the testimony of either party.
>
> From the above it may be seen that even where the allocation of issues between the jurisdictions was based on rational considerations, it would often be dictated by some factor other than jury trial. When the chancellor was faced with a prickly question of credibility of witnesses, his rational desire for the benefits of demeanor evidence could be satisfied only by sending the issue to the law court with its jury. Where an accounting between business associates was sought, if the inquiry was to have the benefit of the testimony of the parties (the two witnesses **[**87]** who could shed the most sometimes the only light on the matter), it would have to be conducted in equity, where the chancellor would decide questions of fact without a jury. The same thing was true where specific performance of a contract was appropriate rather than damages for its breach, or when unnecessary multiplicity of suits was to be prevented. To put it colloquially, jury trial (or court trial) was often merely the tail of the dog under a system where you had to take the whole dog.

[*921] James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 661-62 (1963) (footnotes omitted; emphasis added). Sometimes, of course, the choice between law and equity had nothing to do with any of the procedural advantages of either system, reflecting instead the political struggle between the King and Parliament. See id., at 663; F. James & G. Hazard, Civil Procedure § 8.2, at 358 & n. 32 (1977).

The proposition that these cases demonstrate some sort of policy or belief that complex matters should not be decided by juries is further weakened by the apparent fact that the "complexity exception" to the "jury trial rule" was limited to matters of account. See pp. 914-918, **[**88]** Supra. This limitation has been explained by some by distinguishing between complication in determining liability and complication in determining damages. See *Tights,*

. . ., although a strong yet is not the sole ground of (concurrent) jurisdiction (in matters of account). The whole machinery of Courts of Equity is better adapted to the purpose of an account in general, and in many cases independent of the searching power of discovery, and supposing a Court of Law to possess it, it would be impossible for the latter to do entire justice between the parties; for equitable rights and claims not cognizable at law are often involved in the contest. Lord Redesdale has justly said that in a complicated account a Court of Law would be incompetent to examine it at Nisi Prius with all the necessary accuracy. This is the principle on which Courts of Equity constantly act by taking cognizance of matters which though cognizable at law are yet so involved with a complex account that it cannot be properly take at law; and until the result of the account is known, the justice of the case cannot appear.

2 Story's Equity Jurisprudence § 591, at 9 (14th ed. 1918). (footnote omitted).

Inc. v. Stanley, 441 F.2d 336, 340-41 (4th Cir.) Cert. denied, *404 U.S. 852, 92 S. Ct. 90, 30 L. Ed. 2d 91 (1971)*; *Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224, 228 (N.D.Ill.1977)*. [49] This explanation is attractive in that it harmonizes two groups of cases by enunciating a rational principle for distinguishing between them. However, it would imply that complex remedial issues in cases other than accounting cases have been (or can be) withdrawn from juries for that reason something of which there is no evidence. Moreover, the assumption that some rational principle is embedded in a practice which may be no more than an anachronistic remnant of legal history is hardly deserving of uncritical acceptance.

[89]** We therefore see no basis for finding in the complex accounting cases a rationale, policy, or "implicit belief" that complex and difficult questions of fact, whether of liability or of damages, must be decided by judges rather than juries.

4. Treble Damages and Juries

Earlier in this opinion, we noted that the complex accounting cases were within the concurrent jurisdiction of equity, I. e., they were cognizable at law but could, for some reason, also be brought in equity. See pp. 907-911, Supra. There were many other instances in which, for reasons other than complexity, rights and remedies normally "legal" could be determined in equity. For example, compensatory damages could be awarded in equity as "incidental" in suits seeking specific performance for breach of a contract to convey land, or actions for injunctions against copyright infringement. See F. James & G. Hazard, Civil Procedure § 8.7, at 370-372 (1977). And the "general understanding" prior to merger was that ***HN13***[] "equity could properly resolve corporate claims of any kind (including normally "legal' claims) without a jury when properly pleaded in derivative suits complying with the equity rules." *Ross v. Bernhard, 396* ***[**90]*** *U.S. 531, 536-37, 90 S. Ct. 733, 737, 24 L. Ed. 2d 729 (1970)*.

But there were certain kinds of claims which were exclusively legal and could never be the subject of an action in equity. *Scott v. Neely, 140 U.S. 106, 109-111, 117, 11 S. Ct. 712, 716, 35 L. Ed. 358 (1891)* (court of equity has no jurisdiction in a suit where "a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief.") See *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-72, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)*. ***HN14***[] Claims for treble damages the relief sought by the plaintiffs in this suit have traditionally been among those "properly cognizable only at law:"

> The right to recover penal damages still remains a right enforceable only in a common-law action. Courts of equity do not award as incidental relief damages penal in character without express statutory (authorization), as has frequently been held in copyright and patent cases.

Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 427-28 (2d Cir.) Cert. denied, *277 U.S. 594, 48 S. Ct. 530, 72 L. Ed. 1005 (1928)*. See *Fleitmann v. Welsbach* ***[*922]*** *Street Lighting Co., 240 U.S. 27, 36 S. Ct. 233, 60 L.* ***[**91]*** *Ed. 505 (1916)*; 5 Moore's Federal Practice PP 38.19(2) & 38.37(2), at 171, 308-308.3 (2d ed. 1978). Thus, even if the exercise of equity jurisdiction over complex legal claims were not limited to matters of account, it would still not extend to this case because of the exclusively legal nature of the relief sought. [50]

[92]** D. The Historical Test and Complexity After Ross v. Bernhard

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[49] It is noteworthy that in the case before us the alleged complexity is in the determination of liability, not damages.

[50] The defendants' claim of an absolute right to a non-jury trial in this litigation must be based upon the unarticulated premise that matters deemed too complex for juries were within the Exclusive jurisdiction of equity, much as derivative actions were cognizable only in equity. But, had defendants been able to establish this premise, the exclusively legal nature of treble damages would create a potential conflict of rights in every complex antitrust case not unlike the conflict that left the plaintiff in the Fleitmann case without a remedy. See n. 19, Supra. However, the refusal of the law courts to entertain derivative suits was a mere "procedural impediment" to the trial by jury of legal claims presented in such suits, a problem eliminated by merger. See *Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)*. The conflict of rights which the defendants here seek to create would admit of no solution unless one of the rights is preferred, or all parties agree on the mode of trial.

1. Ross and Recent Decisions Striking Jury Demands

In *Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)*, the Court continued the expansion of the right to jury trial begun in Beacon Theatres and Dairy Queen. The issue decided in Ross was the one that left the plaintiff in Fleitmann without a remedy the presentation of a "legal" claim in a shareholders derivative action, previously cognizable only in equity. [51] The Court held that the merger of law and equity had removed the procedural barriers to the trial of such claims by jury; derivative actions were thereafter to be viewed as having a "dual nature." The Court held that the purely equitable question of the right of the shareholders to proceed on behalf of the corporation was to be determined by the court, and that the corporation's underlying claims could then be tried by the appropriate method by the court if "equitable," and by a jury if "legal." In order to reach this result, the Court drew from Beacon Theatres and Dairy Queen the lesson that

[93]**

> where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims. The *Seventh Amendment* question depends on the nature of the issue to be tried rather than the character of the overall action.

396 U.S., at 537-38, 90 S. Ct. at 738. [52] It then added the following footnote:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and Third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult **[**94]** to apply. See James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963).

Id. at 538, n. 10, 90 S. Ct. at 738 (dictum) (emphasis added). Since Ross, several courts have struck jury demands on the authority of this dictum, which has been described by one commentator as "a suggestion of infidelity to the (historical) test." **[*923]** Wolfram, The Constitutional History of the *Seventh Amendment*, 57 Minn.L.Rev. 639, 643 (1973).

The first was *Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974)*, an interpleader action instituted by the purchaser of a building to resolve conflicting claims to the amount it owed on the notes issued in payment for the building. The building had been purchased from a corporation (IHPT) which then used the notes to redeem the shares held by McCoy, a principal stockholder. "The United States maintained that the redemption of McCoy's stock with the notes was a fraudulent conveyance as to it as a tax lien creditor. McCoy contended that the transfer was a legal redemption of the stock by a solvent corporation." *Id., at 304*. A four-day jury trial [53] followed the district judge's denial of the Government's motion to strike McCoy's jury demand, **[**95]** and, after the jury determined

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[51] The plaintiffs in Ross were shareholders in a closed-end investment company, which they claimed had paid excessive brokerage fees because of improper control by its broker. The plaintiffs alleged breach of the contract between the investment company and its broker; they accused the directors of breach of fiduciary duty, conversion of corporate assets, bad faith, gross negligence, and misconduct. The suit sought to require that the defendants, including the brokerage house, "account for and pay to the Corporation . . . their profits and gains and its losses." *396 U.S. at 531-32, 90 S. Ct. at 734*.

HN15[] -

[52] Because there were no factual questions common to both issues in Ross, the principles of Beacon Theatres were not offended by resolving the equitable issue first.

[53] Letter from Ronald Lee Gilman, Esquire to Judge Edward R. Becker (March 2, 1979), filed of record. Mr. Gilman, who represented McCoy, was kind enough to furnish this information at our request.

that the conveyance was not fraudulent, the court granted judgment n. o. v. for the Government. The court of appeals viewed the *Seventh Amendment* question as a "threshold issue . . . because it bears directly upon the district court's rulings subsequent to the verdict." Id. [54]

[96]** In order to determine whether the issues presented were "legal" or "equitable," the court looked to the Ross footnote as a three-part test, finding as to the first part that "questions involving fraud cannot be classified from custom as solely legal or solely equitable and, as a result, the nature of the remedy sought becomes considerably more important . . .. If a fraudulent conveyance action is brought to set aside a transfer, such a remedy is cognizable solely in equity." *507 F.2d at 305*. After noting that the case was "hybrid" because both legal and equitable remedies were theoretically available, the court decided that "equitable relief was necessary for enforcement of the Government's claim." *Id., at 306*.

Finally, the court considered the practical abilities of juries:

> At trial the fraudulent conveyance issue depended upon the solvency or insolvency of IHPT at the time of or immediately after the transfer. The determination of this question involved conflicting issues of fact concerning accounting procedures used to list the assets and liabilities of the corporation. In its opinion, the district court acknowledged that "the issues between the parties were both complex and **[**97]** likely to be confusing in light of the underlying facts and circumstances. . . ." We agree with this observation and consequently find as to the third factor that a jury is not especially well-qualified to dispose of such issues and that a non-jury trial of the issues is both more efficient and more likely to produce a just result.

It then concluded that "there is no constitutional right to a jury trial in an interpleader action when the creditor is proceeding against the fund and seeking to annul the conveyance to the transferee." Id.

The court's view that non-jury trials in such cases are "more efficient and more likely to produce a just result," though contributing to the court's holding, does not appear to have been a major ground for it. The court seemed instead to rely largely on the need for equitable relief; [55] certainly its **[*924]** opinion cannot be read as holding that complexity alone is sufficient to make "equitable" an otherwise "legal" issue. Similarly, in *SEC v. Associated Minerals, Inc., 75 F.R.D. 724, 725-26 (E.D.Mich.1977)*, the court struck a jury demand after finding that the claims presented and remedies sought were equitable, adding that "to the extent **[**98]** that a jury's ability to properly decide an action may be relevant . . . the issues of fraud and noncompliance with the registration provisions of the securities laws . . . are indeed complex and for this reason are not especially suited by resolution for a jury." However, several other courts have struck jury demands on the Sole ground of size and complexity in cases that would traditionally have been viewed as purely "legal."

The first of these decisions was *In re Boise Cascade Securities Litigation, 420 F. Supp. 99 (W.D.Wash.1976)*, a securities fraud litigation growing out of two corporate acquisitions in which the plaintiffs had received Boise Cascade stock **[**99]** shortly before write-downs of corporate assets caused the stock to lose more than 80% Of its value. Although recognizing that there was no apparent authority for the third part of the Ross footnote, the court found it to be "of constitutional dimensions. It must be seen as a limitation to or interpretation of the *Seventh Amendment*." *Id. at 105*. After a review of the complex issues involved in the case convinced the court that "it would

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[54] Had McCoy been entitled to a jury trial, the court of appeals could have affirmed the judgment n. o. v. only if there was insufficient evidence to support the jury's verdict. See *Upton v. Western Ins. Co., 492 F.2d 148 (6th Cir. 1974)*; *DeGarmo v. City of Alcoa, 332 F.2d 403 (6th Cir. 1964)*. Since the court of appeals determined that McCoy was not entitled to a jury, the trial court's findings of fact on the fraudulent conveyance issue were reviewed under the "clearly erroneous" standard applicable after a bench trial.

[55] The court may also have been influenced by the fact that interpleader, like the derivative action, had been a remedial device belonging to equity alone, although it interpreted Ross as requiring that in interpleader suits, as in derivative actions, the legal or equitable nature of the underlying issues was to determine the *Seventh Amendment* question.

be more capable of fairly deciding the facts" than a jury, the plaintiffs' jury demands were struck to preserve both "the appearance and fact of fairness." Id. [56]

[100]** The following year, jury demands were struck by the court Sua sponte in *In re U. S. Financial Securities Litigation, 75 F.R.D. 702 (S.D.Cal.1977)* Appeal pending, # 77-8213 (9th Cir. Aug. 29, 1977). The litigation comprised eighteen separate actions, consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation. Five plaintiff classes had been certified; they asserted various securities law claims against "20 or so individual defendants and . . . 80-odd corporate or partnership defendants." *Id., at 706*. The court's review of the scope of pretrial discovery and the probable extent of the trial reveals a litigation whose magnitude is comparable in many ways to that of the case now before us. See *id., at 706-708, 711-714*. After reviewing many of the cases discussed above, including the accounting cases, *Id., at 708-11*, the court distilled the following:

> general guidelines . . . for deciding whether a particular case is so complex that equity jurisdiction will attach and permit the case to be tried without a jury.
>
> First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury resolution. Although such problems **[**101]** often arise only during the damages portion of a trial, they sometimes are present during the liability portion as well. Also, given the comments in Dairy Queen regarding special masters, only a case in which such a special master could not assist the jury meaningfully may be subject to removal from the province of the jury because of complex accounts.
> Second, the jury members must be capable of understanding and of dealing rationally with the issues of the case.
> And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for the jurors to function effectively throughout the trial.

[*925] *Id. at 711*. Because the court found that all three of its guidelines militated against a jury trial, it determined to try the cases without a jury. The only factors considered were size and complexity; the court did not discuss the otherwise legal or equitable nature of the claims made and the remedies sought.

The next decision striking a jury on the authority of Ross was *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y.1978)*, a class action asserting antitrust claims on behalf of the composers and lyricists who have written **[**102]** for television and motion pictures. As in the U. S. Financial litigation, the question of a jury's ability to handle the case was raised by the court Sua sponte.

The court in Bernstein regarded the Ross footnote as announcing "a three-fold test to determine the "legal nature of an issue'." It recognized that "(t)he third prong of this test is devoid of cited authority and has been regarded by some as a departure, perhaps unintentional, from former law," but thoughtfully related the practical abilities of juries to the "remedy sought," since "the adequacy of the legal remedy necessarily involves the adequacy of the jury and its competency to find the facts," and concluded after review of many of the cases discussed above that consideration of the practical abilities of juries "(f)ar from being an innovation . . . is actually the restatement of . . . traditional equity powers." *Id., at 66-67*. [57]

[103]** In applying the Ross test, the Bernstein court determined that the pre-merger custom in antitrust cases was to require jury trials, and that the demands for declaratory relief and treble damages were "clearly not

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[56] The court's analysis of the third Ross factor emphasized the centrality of "an impartial and capable fact finder" to the fairness which, under the *due process clauses of the Fifth* and *Fourteenth Amendments*, measures "the legitimacy of government action. . . ." *420 F. Supp., at 104*. The court then considered the need to excuse employed persons from the jury because of an estimated trial time of four to six months, the possibility that evidence of settlement of other litigation against the defendant would prejudice the jury, and the advantages enjoyed by the court as fact finder, including experience in other commercial cases, familiarity with the case from the pretrial proceedings, the ability to review daily transcripts, etc. *Id., at 103, 104-05*.

[57] The cases considered by the court in reaching this conclusion included the Clench and Wedderburn cases discussed above at 49-55, and several of the complex accounting cases discussed above at 33-40.

equitable," [58] but that the estimated trial time of more than four months would make it impossible to empanel a representative jury. Moreover, the court found that "the sheer size of the litigation and the complexity of the relationships among the parties render it As a whole beyond the ability and competence of any jury to understand and decide with rationality." *Id., at 66-67, 70*. Thus, the order striking the plaintiffs' jury demand was based entirely on the "third prong" of the Ross "test."

[104]** The most recent decision striking a jury demand on the authority of Ross v. *Bernhard is ILC Peripherals Leasing Corp. v. I. B. M. Corp., 458 F. Supp. 423, 445-449 (N.D.Cal.1978)*, a treble damage antitrust case. Evaluating the case in the terms of the Ross dictum, the court found that both the premerger custom and the remedy sought were traditionally legal, but that "the third factor of the equation, the practical abilities and limitations of jurors, . . . causes the court to conclude that the issues in this case must be considered to be equitable." *Id. at 445*. [59]

[105]** **[*926]** Many other courts have also indicated that *Seventh Amendment* questions are to be determined by applying the three factors identified in the Ross dictum. See, e.g., *Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977)* ("the three-pronged classical test"), Aff'd on other grounds, *434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978)*; *Minnis v. UAW, 531 F.2d 850, 852-53 (8th Cir. 1975)*; *Farmer-Peoples Bank v. United States, 477 F.2d 752 (6th Cir. 1973)*; *Dawson v. Contractors Transport Corp., 151 U.S.App.D.C. 401, 405, 467 F.2d 727, 731 (1972)*; *Id., 151 U.S.App.D.C. at 410, 414, 467 F.2d at 736, 740* (Fahy, J., dissenting); *Fellows v. Medford Corp., 431 F. Supp. 199, 201-02 (D.Or.1977)*; *Polstorff v. Fletcher, 430 F. Supp. 592, 593-94 (N.D.Ala.1977)*; *General Tire & Rubber Co. v. Watson-Bowman Associates, 74 F.R.D. 139, 140-142 (D.Del.1977)*; *Jones v. Orenstein, 73 F.R.D. 604, 606 (S.D.N.Y.1977)*; *Marshall v. Electric Hose & Rubber Co., 413 F. Supp. 663, 667 (D.Del.1976)*; *Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794, 796-97 (W.D.Wis.1975)*; *Cleverly v. Western Electric Co., 69 F.R.D. 348, 350-52 (W.D.Mo.1975)*; *Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1124-25 (E.D.Mich.1974)*; **[**106]** *VanErmen v. Schmidt, 374 F. Supp. 1070, 1074-75 (W.D.Wis.1974)*; *Chilton v. National Cash Register Co., 370 F. Supp. 660, 662-65 (S.D.Ohio 1974)*; *Richards v. Smoltich, 359 F. Supp. 9 (N.D.Ill.1973)*. Cf. *Rogers v. Loether, 467 F.2d 1110, 1118 (7th Cir. 1972)* (alternative ground for holding), Aff'd on other grounds sub nom *Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)*.

Not all the lower federal courts have used Ross as the definitive *Seventh Amendment* test the Second and Fourth Circuits, for example, have questioned the scope and validity of the Ross footnote. See *Barber v. Kimbrell's, Inc.,*

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[58] The court rejected the defendants' suggestion that the damages be characterized as equitable restitution. The plaintiffs also sought injunctive relief, but it is of course well settled that the joinder of legal and equitable claims does not waive the right to a jury on the legal claims, including any common issues. See *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)*.

[59] In ILC Judge Conti had denied a pretrial motion to strike the jury demand on the ground of complexity. The trial took 96 days but ended in a mistrial, declared when the jury was deadlocked after 19 days of deliberations. Judge Conti then directed a verdict for the defendants, and struck the jury demand in the event that a remand necessitated a second trial.

In finding that the case was beyond the abilities of jurors, Judge Conti relied heavily on his own observations during trial:

The jurors were conscientious and diligent, but their past experience had not prepared them to decide a case involving technical and financial questions of the highest order.

Throughout the trial, the court felt that the jury was having trouble grasping the concepts that were being discussed by the expert witnesses, most of whom had doctorate degrees in their specialities. This perception was confirmed when the court questioned the jurors during the course of their deliberations and after they were discharged. When asked by the court whether a case of this type should be tried to a jury, the foreman of the jury said, "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that." (Tr. 19,548). Several of the other jurors indicated that they thought the major stumbling block was the requirement that the verdict be unanimous. When they were questioned after the trial, most of the jurors indicated that they thought a complex antitrust case like this one should be tried to the court.

458 F. Supp., at 447-48.

577 F.2d 216, 225 & n. 25 (4th Cir. 1978); United States v. J. B. Williams Company, Inc., 498 F.2d 414, 428-29 (2d Cir. 1974). But see id., at 452-53 (Oakes, J., dissenting). And in a later Seventh Amendment decision, the Second Circuit ignored the Ross footnote entirely. See SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90 (2d Cir. 1978). But in no decision of which we are aware has a court reached the conclusion that we reach here that the Ross footnote may not be read as requiring or permitting the consideration of "the practical abilities and limitations of **[**107]** juries" in determining whether the constitutional right to trial by jury extends to matters committed by Congress or the common law to federal district courts.

We have reached this conclusion with great respect for, and mindful of the authority of, the many courts that have reached the opposite result. Our conclusion is based on three considerations: ***HN16***[] (1) the available evidence shows that the Supreme Court never intended that the Ross footnote be a "test" for Seventh Amendment questions; (2) the proposed "test" is unworkable; and (3) application of the Ross "test" in the manner proposed would be fundamentally inconsistent with the policies underlying the role of the jury in civil actions in the United States. Our reasoning will be set out in the balance of this opinion; because of the extensive authority to the contrary, we do so at somewhat greater length than is customary.

2. Construing Ross

a. Jury Trial Decisions in the Supreme Court Since Ross

It would be at least unusual for the Supreme Court to announce a new rule of constitutional magnitude in dicta, in a footnote, and unsupported by any explanation or citation of authority. [60] **[**109]** The use of such **[*927]** means to modify **[**108]** Sub silentio a rule of constitutional interpretation that has been consistently followed for decades, if not centuries, would be even more unusual. As one commentator has written, "(T)he footnote is so cursory, conclusory and devoid of cited authority or reasoned analysis that it is difficult to believe it could have been intended to reject such established historical practice or Supreme Court precedent." Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw.U.L.Rev. 486, 526 (1975). Thus, "absent a much clearer statement by the Supreme Court," Skehan v. Board of Trustees, 590 F.2d 470, 490 (3d Cir. 1978), to the effect that Ross authorized a departure from the historical test, we would most likely consider ourselves bound by the prior decisions of the Court approving the historical test. [61] But we need not decide on that basis, because the Ross dictum is not the most recent entry on the Court's Seventh Amendment slate. We think it very significant that, despite many opportunities to do so, the Court has never proclaimed or apparently recognized that the Ross footnote prescribed a test for the Seventh Amendment.

The Ross case itself is the first and best example of this. In Ross, the argument that the case was too complex for determination by a jury had been raised at every level. The district court found that the issues in the case were not too complicated for a jury, while the court of appeals expressed its doubts that juries were competent to try derivative suits "because of the exceedingly complex nature of many of these actions," but considered it irrelevant because "the Seventh Amendment does not ask that we assess the suitability of a given type of litigation for jury trial." See Ross v. Bernhard, 275 F. Supp. 569, 570 (S.D.N.Y.1967), Rev'd on other grounds, 403 F.2d 909, 915 (2d Cir. 1968), Rev'd on other grounds, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). Opposing the petition for certiorari, the respondents **[**110]** contended that the case was unsuitable for a jury because "a precise and obviously difficult measurement of claimed disadvantage" to the corporation would be required for "each of many thousands of transactions." Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 6-7. The respondents argued that statements in Kirby and Dairy Queen described a general exception to the Seventh

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[60] Even the famous dictum in United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) did not go nearly as far as some have suggested for the Ross footnote. See Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 2748 n. 28, 57 L. Ed. 2d 750 (1978).

[61] In Skehan, the court of appeals was discussing the question whether Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) had been overruled Sub silentio by Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Amendment, and that Ross fell within it. See id.; Brief for Respondents, at 17-19. [62] The petitioners in Ross did not dispute the respondents' position that some cases were too complex for juries, but argued instead that their case was not the "rare case" referred to in Dairy Queen. See Brief for Petitioners at 18; Reply Brief for Petitioners at 10-12.

Thus, the arguments made by the defendants here were squarely presented to the Court in Ross, and the cryptic mention in footnote 10 of "the practical abilities and limitations of juries" may possibly be explained by reference **[**111]** to these arguments. Yet, when the Court considered the claims asserted on behalf of the corporation in Ross, it determined that the claims were "at least in part . . . legal" without any evaluation or even mention of the ability of a jury to understand the issues:

> The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence.

Ross v. Bernhard, 396 U.S. 531, 542, 90 S. Ct. 733, 740, 24 L. Ed. 2d 729 (1970). The omission **[*928]** of any discussion of the jury's ability to deal with the complex issues presented in Ross implies strongly that the Court did not deem it relevant to the Seventh Amendment issue there.

The next case in which the Court could have applied the Ross "test" was Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974), in which a unanimous Court decided that the **[**112]** Seventh Amendment required jury trials of actions brought under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612. It did not analyze the problem in the terms of the Ross footnote, but instead stated the rule to be that "(t)he Seventh Amendment . . . requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Id., at 194, 94 S. Ct. at 1008. The Court then found that trial by jury must be available because the action was analogous to common-law torts, [63] Id., at 195, 94 S. Ct. 1005, and because the "relief sought here actual and punitive damages is the traditional form of relief offered in the courts of law," Id., at 196, 94 S. Ct. at 1009.

[113]** The Supreme Court's omission of the Ross "test" from its discussion of the constitutional issue stands in marked contrast to the opinion of the court of appeals in that case. Expressing uncertainty about the "full implications" of Ross, the court of appeals had first determined that traditional Seventh Amendment analysis required trial by jury, and then independently considered the second and third criteria identified in the Ross footnote, determining that they, too, were consistent with a jury trial. See Rogers v. Loether, 467 F.2d 1110, 1116-18 (7th Cir. 1972), Aff'd on other grounds sub nom. Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974). Thus, the Supreme Court's exclusive reliance on traditional Seventh Amendment analysis in Curtis represents at least a Sub silentio rejection of the Ross footnote as the appropriate test. Cf. Barber v. Kimbrell's, Inc., 577 F.2d 216, 225 n. 25 (4th Cir. 1978) (questioning continued validity of Ross test in light of its omission from Curtis).

Later the same term, the Court decided in Pernell v. Southall Realty, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974), that the Seventh Amendment mandated trial by jury of **[**114]** actions under the District of Columbia's summary procedure for evictions. Again, the Court's decision was based on the historical test alone, without any reference at all to the Ross dictum. Id., at 370-81, 94 S. Ct. 1723. [64] **[**115]** Moreover, in rejecting the analysis of

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[62] See pp. 907, 913-914 & n. 40, Supra.

[63] Antitrust actions have similarly been held to sound in tort. See, e.g., Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n. 4 (5th Cir. 1976); Tondas v. Amateur Hockey Ass'n., 438 F. Supp. 310, 315 (W.D.N.Y.1977); Albert Levine Associates v. Bertoni & Cotti, S.p.A., 314 F. Supp. 169, 171 (S.D.N.Y.1970); Fagan v. Sunbeam Lighting Co., 303 F. Supp. 356 (S.D.Ill.1969).

[64] One commentator draws the opposite inference from the failure of the Curtis and Pernell decisions to mention the Ross footnote, thinking it "unlikely . . . that the Court would overturn so significant a decision without some comment." Note, The Right

the D. C. Court of Appeals as "fundamentally at odds with The test we have formulated for resolving Seventh Amendment questions," id., at 374, 94 S. Ct. at 1729 (emphasis added), the Court described that "test" by quoting from the distinction between law and equity drawn in Parsons v. Bedford, [65] concluding that the Seventh Amendment "requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." Id., at 374-75, 94 S. Ct. at 1729.

This view of the Seventh Amendment was reaffirmed by the Court in Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 449, **[*929]** 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977) and Lorillard v. Pons, 434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). [66] Moreover, in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979), the Court has once again decided a Seventh Amendment issue by applying a historical test, without any mention of the abilities of jurors or the Ross dicta. [67] Thus, instead of using the Ross dicta as a test for Seventh Amendment questions, the Court's opinions during this decade have consistently reaffirmed the continuing validity of the historical test.

[116]** b. Explanations of the Ross Footnote

Because the Court's mention of the "practical abilities and limitations of juries" in Ross was without any citation of authority and unrelated to anything else in the opinion of the Court, there has been no small measure of speculation about its source. In Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y.1978), the court explained the "third prong" of the Ross test by relating it to the traditional availability of equity when the remedy at law is inadequate, since

> where the "remedy sought" necessarily involves determination of complexities that "only a court of equity can satisfactorily unravel," the "practical abilities and limitations of juries" are also necessarily involved and must be considered in evaluating the right to a jury trial. The adequacy of the legal remedy necessarily involves the jury and its competency to find the facts.

Id. at 66. And in In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 104 (W.D.Wash.1976), the court related the third part of the Ross dictum to concepts of fundamental fairness and due process. Scholars, too, have joined the debate. Compare Wolfram, Supra note 25, at 644-45 (a **[**117]** "fleeting expression . . . of infidelity to the centrality of the traditional historical test . . . (which) would suggest, for the first time, . . . an explicitly functional approach. . . .") With Note, Congressional Provision for Nonjury Trial Under the Seventh Amendment, 83 Yale L.J. 401, 411-12 (1973) (finding a "long and distinguished" lineage for the third part of the Ross test in the traditional resort to equity because of "procedural inadequacies" such as "rules against multifarious actions . . . or limited provisions for discovery. . . . One such failing (jury trial) has not been mitigated by merger.").

Our own research discloses two very limited circumstances in which functional aspects of jury trials have been considered by the Supreme Court in Seventh Amendment contexts and to which, therefore, the Ross dictum might refer, but neither supports the position of the defendants. One of these is the traditional availability of equity jurisdiction in complex accounting cases which was discussed in dicta in Kirby and Dairy Queen in terms of the

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to a Jury Trial in Complex Civil Litigation, 92 Harv.L.Rev. 898, 902 n. 28. But this argument Assumes that the Ross footnote announced a significant constitutional doctrine, and is also based on the questionable premise that the Court had abandoned the historical test in favor of a "dynamic" interpretation of the Seventh Amendment. See note 39, Supra.

[65] See pp. 905-906, Supra.

[66] Although in Pons the Court described the parameters of the Seventh Amendment in terms of "legal relief . . . and legal rights," the holding of the Court was based on statutory grounds.

[67] Because the "legal" or "equitable" nature of a claim was not an issue in Parklane, the Court's failure to use the Ross "test" does not of itself vitiate the claim that the Ross footnote is the appropriate test for such issues. However, both the majority and dissenting opinions in Parklane clearly subscribed to the historical test. Compare Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 652-55, 58 L. Ed. 2d 552 (1979), With id., at 337-350, 99 S. Ct. at 655-61 (Rehnquist, J., dissenting).

difficulty of such matters for juries, See pp. 913-914 & n. 40, Supra, even though the available evidence suggests that this consideration **[**118]** had little or no relation to the existence of that part of equity jurisdiction. See pp. 918-921, Supra. As we have already noted, this argument was so fully presented to the Court in Ross that the mention of the limitations of juries in the footnote may be a reference to it, but could hardly be an endorsement. *Supra, at 927-928*.

The second circumstance, and the only one in which functional considerations have actually contributed to a Holding that there is no jury trial right in certain cases, involves actions committed by Congress to **[*930]** special adjudicatory bodies as part of a statutory scheme. The rationale of *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937)* and *Katchen v. Landy, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966)* was explained by the Court in *Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)*:

> Jones & Laughlin . . . stands for the proposition that the *Seventh Amendment* is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication[n8] and would substantially interfere with the NLRB's role in the statutory **[**119]** scheme. *Katchen v. Landy, 382 U.S. 323, (86 S. Ct. 467, 15 L. Ed. 2d 391*), . . . is to like effect. There the Court upheld, over a *Seventh Amendment* challenge, the Bankruptcy Act's grant of summary jurisdiction to the bankruptcy court over the trustee's action to compel a claimant to surrender a voidable preference; the Court recognized that a bankruptcy court has been traditionally viewed as a court of equity, and that jury trials would "dismember" the statutory scheme of the Bankruptcy Act. *Id., at 339, 86 S. Ct., at 478*. See also *Guthrie National Bank v. Guthrie, 173 U.S. 528, 19 S. Ct. 513, 43 L. Ed. 796 (1899)*. These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the *Seventh Amendment*. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.
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> [n8] "(T)he concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." L. Jaffe, Judicial Control of Administrative Action 90 (1965).

[120]** *Id., at 194-95, 94 S. Ct. at 1008*. See *Atlas Roofing Co. Inc. v. OSHRC, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)*; *Pernell v. Southall Realty, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)*.

Significantly, Justice White, the author of the Ross opinion, had written for the Court in Katchen v. Landy just a few years earlier. It is therefore likely that the "practical abilities and limitations of juries" language of Ross refers to the established exception to the *Seventh Amendment* in administrative proceedings and specialized courts of equity. As Justice White has more recently written for the Court in another decision based on this principle: "History and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved. . . . The *Seventh Amendment* prevents Congress from depriving a litigant of a jury trial in a "legal" action Before a tribunal customarily utilizing a jury as its fact-finding arm . . . ." *Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 460-61* & n. 16, *97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)* (emphasis added). This exception to the *Seventh **[**121]** Amendment* is obviously inapplicable in any action in a United States District Court.

Whether the Ross footnote referred to one or the other (or both) of these two possible limitations to the *Seventh Amendment*, it clearly did not purport to expand either exception beyond its narrow limits into a general "test" for the right to jury trial. These interpretations would provide a meaning for the footnote that does not reduce it to mere surplusage, but are consistent with the Court's continued adherence to the historical test. See *supra, at 926-929*. We think it clear, therefore, that the Court has never intended that the Ross footnote change the historical test. This judgment is buttressed by the problems that would attend any attempt to articulate standards governing the Ross "test," and by our perception of the policies underlying the *Seventh Amendment*. It is to these problems and policies that we now turn.

[*931] 3. Problems Inherent in the Ross "Test"

We believe that the Ross footnote is also unsuitable for use as a test for *Seventh Amendment* issues because there is no satisfactory method for the consistent application of such a test.

a. The Case-by-Case Approach

In each of **[**122]** the decisions in which the right to jury trial has been denied on the sole ground of the size and complexity of the case, the test was applied on an Ad hoc basis. The courts did not decide that all antitrust cases or class actions were beyond the ken of juries, but only that the particular actions before them were. See *ILC Peripherals Leasing Corporation v. IBM, 458 F. Supp. 423, 448-49 (N.D.Cal.1978)*; *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y.1978)*; *In re U. S. Financial Securities Litigation, 75 F.R.D. 702, 712-14 (S.D.Cal.1977)*; *In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 104-05 (W.D.Wash.1976)*. [68] **[**123]** Although none of these decisions considered the possibility of applying Ross on a "generic" basis, a case-by-case approach would seem to be required by the nature of the Ross "test." [69]

[124]** However, a case-by-case approach would be a major departure from the settled method of *Seventh Amendment* analysis used by the Supreme Court in its own decisions, both before and after Ross. In these decisions, the Court has either indicated or clearly assumed that they apply to all cases or claims of the same class. See, e.g., *Pernell v. Southall Realty, 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)* (jury required in actions to recover real property in courts of general jurisdiction); *Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* (jury trial guaranteed in all damage suits under *42 U.S.C. § 3612*); *Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* (damage actions against corporate directors for negligence and breach of contract); *Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962)* (actions on debts allegedly due under a contract or for damages for trademark infringement); *Whitehead v. Shattuck, 138 U.S. 146, 11 S. Ct. 276, 34 L. Ed. 873 (1891)* (suits to quiet title to real estate). [70]

[125]** Second, the standard of complexity is an extraordinarily difficult one to apply, even on a case-by-case basis. The problems of speculation about the abilities of a hypothetical jury and the complexities of the issues in the case would be compounded by the need to speculate about the degree to which partial settlements or summary judgments **[*932]** may simplify matters before a trial actually begins or even in the midst of a trial. [71] And, because

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[68] The decision in the Hyde Properties case would seem to apply not only to the action then before the court, but to all such actions. However, as we have noted, the alleged difficulty of such matters for juries did not seem to be important to the holding of the court. See ***supra, at 923***.

[69] In *Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D.Ill.1977)*, the court read Ross as "clearly (directing) federal courts to inquire into the competence of juries to handle different kinds of issues," *Id., at 226*, but considered and rejected the case-by-case approach:

The inquiry is a generic one, directed toward classifying a group of claims. Thus, the historical portion of the Ross test evaluates the entire line of judicial precedents to determine the traditional characterization of a particular claim. Once the court finds that the nature of an issue is basically legal, the right to a jury trial exists for that entire class of claims. The portion of the Ross test which weighs the practical abilities and limitations of juries contemplates a general analysis of the problems typically presented by those claims, not a specific case-by-case analysis of the complexity of the litigation. Otherwise, the courts would be forced to apply an unmanageable standard of complexity in every case before them.

Id., at 227-28. While we agree with Judge Marshall that the case-by-case approach is unmanageable, it is difficult for us to see how the proposed "generic" inquiry is any less so. On what basis would the court find the relevant facts and decide that patent or tax or antitrust or securities issues are, as a class, too difficult for juries? Clearly, issues within each of these classes (or almost any other that might be named) range from the very simple to the very complex. The judgment that some generic class of issues is "too complex" for decision by jury is the type of judgment better made in the political or legislative process.

[70] Actions seeking an accounting, maintainable in equity if sufficiently complicated, would seem to have been an exception to this general rule. See ***supra, at 923-924***.

there is nothing in Ross to say How complex a case must be before a jury demand may be struck, it would likely be a long time before a consistent pattern of decision emerged. [72] **[**127]** A related problem is the absence of any guide to the relationship among the three factors identified in the Ross footnote. [73] We agree **[*933]** with Judge

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[71] In an attempt to avoid such speculation, a court may indicate, as the court did in *In re U. S. Financial Securities Litigation, 75 F.R.D. 702, 714 (S.D.Cal.1977)* that the jury demand will be reinstated if subsequent developments sufficiently simplify the case. This would give the party seeking trial by jury an incentive to settle part of the case in order to obtain a jury trial of the remainder. At the same time, the party opposing trial by jury is given a countervailing and similarly strong incentive Not to settle even when he otherwise would, since by settling some of the claims he jeopardizes his new-found "right" to a non-jury trial of the remainder.

[72] The line-drawing problems awaiting any attempt to apply the Ross test in a principled and consistent manner are obvious. Compare, e.g., *In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 105* (court would be "more capable of fairly deciding the facts"); *SEC v. Associated Minerals, Inc., 75 F.R.D. 724, 726 (E.D.Mich.1977)* ("issues . . . are indeed complex and for this reason are not especially suited for resolution by a jury"); With *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y.1978)* (matter is "beyond the ability and competence of any jury to understand and decide with rationality").

[73] See Note, Ross v. Bernhard: The Uncertain Future of the *Seventh Amendment*, 81 Yale L.J. 112, 128-29 (1971). Decisions in which the Supreme Court has explicitly prescribed multi-pronged "tests" provide examples of the kinds of rules that there might be, and a contrast to the absence, in Ross, of any such rule defining the role of each "prong" in the test.

In *Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973)*, the Court enumerated the three factors relevant in determining whether a government program violates the *establishment clause*: "To pass muster under the *Establishment Clause* the law in question first must reflect a clearly secular legislative purpose . . ., second, must have a primary effect that neither advances nor inhibits religion . . ., and, third, must avoid excessive government entanglement with religion . . . ." *Id., at 773, 93 S. Ct. at 2965*. Accord, e.g., *Meek v. Pittenger, 421 U.S. 349, 358, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975)*; *Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)*. Although this test does not set "the precise limits to the necessary constitutional inquiry," *Meek, supra, 421 U.S. at 358-59, 95 S. Ct. 1753*, See *id., at 373-74, 95 S. Ct. 1753* (Brennan, J., concurring and dissenting), the language used by the Court makes clear that a law or government program which fails Any of these three "prongs" is invalid.

A different type of rule was used in *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*. There the Court held that the question of deprivation of the *Sixth Amendment* right to a speedy trial was to be determined by balancing four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id., at 530, 92 S. Ct. at 2192*. Because the test prescribed is a "balancing" test, "none of the four factors identified above (is) either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id., at 533, 92 S. Ct. at 2193*.

A third type of test prescribes one or more factors which are normally dispositive, and one or more others to be used only if the first level of the test yields no result. Examples of this type are rules permitting the presiding officer in a legislative body to vote only to break a tie and rules in athletic leagues for determining which team is "champion" when the won-lost records produce a tie for first place. Some tests of this sort prescribe a factor or set of factors (themselves to be ordered by some rule) which are sufficient but not necessary for membership in a given category. Examples are the rules for Per se antitrust violations and the SEC's "safe harbor" rules. There are doubtless other types of rules as well, and endless variations and combinations of the types described here.

The courts in the Boise Cascade, U. S. Financial, Bernstein, and ILC cases struck the jury demands on the strength of the third factor listed in the Ross dictum, without regard to the other two. Although this approach could be consistent with any of the three types of tests just described, it probably indicates an assumption that the test was like the test in Nyquist that the "equitable" nature of Any of the factors was sufficient to mandate a non-jury trial. But such an assumption is without support in Ross itself, and seems to fly in the face of Fleitmann, which held that a defendant may not be deprived of his right to a jury determination of treble damage claims in spite of the "equitable" nature of derivative actions.

At least one court seems to regard the Ross dictum as prescribing a kind of balancing test. See *Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224, 227 (N.D.Ill.1977)* ("The three Ross criteria are guides for determining whether a claim typically has a sufficient quantum of legal elements so that it must be tried to a jury."). But a balancing approach to these *Seventh Amendment* questions is also without warrant in Ross or in other cases and, at least as an approach to an entire case, has been rejected by the modern cases.

Marshall that "(t)he likely result (of a case-by-case application of Ross) would be a dilution of the right to a jury trial," *Radial Lip Machine, Inc., supra, 76 F.R.D. at 228*, and with Wolfram's observation that the Ross footnote raises "the spectre of federal judges using a disturbingly broad discretion in their determination of whether a jury ought to be interposed in particular cases." Wolfram, supra, **[**126]** 57 Minn.L.Rev. at 644.

[128]** Third, recognition of the possible validity of motions to strike jury demands on the grounds of complexity would impose yet one more burden on courts managing "big" cases. There would doubtless be motions to dispense with juries in most or all of these cases, and the motion could serve as a dilatory tactic, with potential interlocutory appeals adding to the delay. [74]

[129]** b. The Whole-case Approach

While the relationship between size and complexity has led courts to apply the Ross "test" to each case as a whole, See *ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 448 (N.D.Cal.1978)*; *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y.1978)*; *In re U. S. Financial Securities Litigation, 75 F.R.D. 702, 714 (S.D.Cal.1977)*; *In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 103-05 (W.D.Wash.1976)*, [75] **[**130]** Ross itself in the very sentence explained by footnote ten emphasizes that "(t)he *Seventh Amendment* question depends on The nature of the issue to be tried rather than the character of the overall action." *396 U.S. at 538, 90 S. Ct. at 738* (emphasis added). The "nature of the issue" test, as it developed in Beacon Theatres, Dairy Queen, and Ross, was a response to the jury trial problems created by the merger of law and equity, [76] and represents an expression of the "federal policy favoring jury trials . . . of historic and continuing strength." *Simler v. Conner, 372 U.S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963)*. It now comprises at least two similar but distinct propositions.

First, the jury trial right may not be sacrificed merely because a "legal" issue comes into Court wearing the "equitable" procedural clothing of a class action, a derivative **[*934]** action, or an interpleader, even though jury trials were not available in such actions before a merger. *Ross v. Bernhard, 396 U.S. at 540-42* & n. 15, *90 S. Ct. 733, 24 L. Ed. 2d 729* .

Second, because the federal rules permit and require the joinder of legal and equitable claims in a single civil action, the right to jury trial on the legal claims may not be compromised by characterizing the case as "basically equitable," by characterizing the legal claims as "incidental" to the equitable ones, or by trying factual issues

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The relation of the third Ross factor to the other two (and of the first two to each other) may, of course, be determined by reference to history. But to do so is to jettison any claim that the Ross footnote authorizes a departure from the historical test. And, as we have already determined, the history of jury practice and of *Seventh Amendment* adjudication provide no support for the deprivation of the jury trial right in all cases deemed "too difficult" for juries.

[74] Cf. *Community Broadcasting of Boston v. FCC, 178 U.S.App.D.C. 256, 261, 546 F.2d 1022, 1027 (1976)* ("A rule allowing interlocutory appeals (from orders denying motions to disqualify counsel on ethical grounds) would provide litigants with yet another device by which to delay final determination on the merits, and would lead the court to divert its attention from the central issues in the case."); *Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979)*. In spite of the potential for abuse, interlocutory review may be desirable because of the importance of jury trial and the likelihood that erroneous decisions to strike juries would necessitate retrials. We note that the courts in the Boise Cascade, U. S. Financial, and Bernstein cases certified their orders for interlocutory review pursuant to *28 U.S.C. § 1292(b)*. Should a trial court decline such certification in an effort to move the case along, "the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S. Ct. 948, 957, 3 L. Ed. 2d 988 (1959)*.

[75] In *Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974)*, the jury demand was struck after trial, and only as to certain issues deemed equitable by the court of appeals; the jury's verdict on a breach of contract issue was not challenged. The court recognized the need to deal separately with the legal and equitable issues presented in a single case. *Id., at 303, n. 1*. Because the jury demand in Hyde was struck after trial and because the trial lasted only four days the court was not as concerned with the size of the litigation and the length of trial as were the courts in ILC, Bernstein, U. S. Financial, and Boise Cascade.

[76] See pp. 911-913, Supra.

common to both legal and equitable claims to the court. *Beacon Theatres, supra, 359 U.S. at 507-511, 79 S. Ct. 948*; *Dairy Queen, supra, 369 U.S. at 471-473, 82 S. Ct. 894*; *Ross, supra, 396 U.S. at 537-38, 90 S. Ct. 733*. [77] Thus,

[131]**

> complex lawsuits with multiple claims and parties must be broken down into their constituent parts. If any legal cause is apparent, the right to a jury trial exists. The presence of a maze of other equitable claims in the litigation cannot obliterate defendants' right to a jury.

Radial Lip Machine, Inc. v. International Carbide Corp., 76 F.R.D. 224, 228 (N.D.Ill.1977). The use of the Ross footnote as a test would therefore place on the party seeking a non-jury trial the burden of showing that Each otherwise legal claim or issue in the case was too complex for a jury, with the right to jury trial, including the preclusive effect of the jury's findings on any common issues of fact, preserved for all issues as to which that burden is not met. The defendants here have made no attempt to meet such a burden.

4. Public Policy and the *Seventh Amendment*: The Role of the American Jury

The argument that the administration of justice would be improved by the elimination of juries in some or all civil litigation is hardly new, although it seems to have gained additional impetus in recent years. [78] However, this argument is based on a number of premises that should not be accepted **[**132]** without critical examination.

a. The Competence of the Jury as Finder of Fact

First, those who would dispense with juries in complex cases overlook the fact that the alternative to a lay jury is a lay judge. [79] We agree with Judge Patrick Higginbotham, who has written: "Apart from the occasional situation in which a judge possesses unique training . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion." P. Higginbotham, Continuing **[*935]** the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex.L.Rev. 47, 53 (1977). [80] Trial lawyers and judges and we are no exception **[**133]** often ponder the question whether judges are superior to juries in arriving at the truth in complex or technical cases. After eight and a half years on the bench, we remain convinced that judges are not. Our view is that a jury, applying its collective wisdom, judgment and common sense to the facts of a case (in

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[77] The Court in Beacon Theatres did indicate that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, . . . the right to a jury trial of legal issues (might) be lost through prior determination of equitable claims." *359 U.S. at 510-11, 79 S. Ct. at 957*. Such circumstances have since arisen, if at all, only in *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* (defendant in private damage suit may be estopped from relitigating before jury issues adversely determined in prior SEC injunctive action, where no jury was available), and *Katchen v. Landy, 382 U.S. 323, 86 S. Ct. 467, 15 L. Ed. 2d 391 (1966)* (Bankruptcy Court in summary proceeding may order creditor to surrender voidable preference before considering creditor's claim, even though if the creditor had filed no claim, preference could be recovered by trustee only in an action where the creditor would have a right to jury trial).

[78] See, e.g., Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv.L.Rev. 898 (1979); Note, Congressional Provision for Nonjury Trial under the *Seventh Amendment*, 83 Yale L.J. 401 (1973); Comment, The Right to an Incompetent Jury: Protracted Commercial Litigation and the *Seventh Amendment*, 10 Conn.L.Rev. 775 (1978).

[79] Matters requiring decision by an expert factfinder may, within certain limits, be committed by Congress to an administrative agency or specialized court. See, e.g., *Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 461* & n. 16, *97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)*; *Pernell v. Southall Realty Co., 416 U.S. 363, 383, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)*. But in a United States District Court, experts are available only as witnesses or special masters. See *Rule 53, Fed.R.Civ.P.*; *Rule 706, Fed.R.Ev.*

[80] Judge Higginbotham also demonstrates that the abandonment of the civil jury in England, widely believed to be a recognition of its inefficiency, actually resulted from manpower shortages during the two World Wars, and the inertial failure to do anything to resume the use of juries once the manpower shortages had ended. 56 Tex.L.Rev. at 50-52.

the light of proper instructions on the law) is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case; at least it is not less so.

[134]** The foreperson of Judge Conti's jury in the ILC case, See n. 59, Supra, responded to the court's questioning with the view that "a jury that's both a computer technician, a lawyer, (and) an economist" would be qualified to try that case. But no judge is all of these, and one is more likely to find a computer technician or an economist on a jury than on the bench. Complex and technical cases, no less than other cases, require judgments on the credibility of witnesses and inferences to be drawn from facts. These are the tasks at which jurors, interacting with other jurors in the crucible of trial, particularly excel.

We also note our dissent from the proposition that a jury trial in a complex matter must necessarily yield an irrational verdict because of the cumbersomeness of presenting an enormous mass of evidence to a lay jury. A strong argument can be made that the presence of a jury actually disciplines and improves the fact-finding process by imposing on both court and counsel the obligation to streamline, clarify, and teach. Judge Patrick Higginbotham puts it well:

> Both the "technical" case and the "big" case arguments overlook an enormously valuable contribution made by **[**135]** the presence of a jury. The process of distilling complex material into a comprehensible form operates less effectively in bench trials than in jury trials. Although the rules of evidence purport to discipline an advocate's presentation, they are generally only loosely followed in bench trials, on the assumption that the trial judge will consider only admissible evidence. I have found that as counsel drop their evidentiary antennae they also tend to lose their sensitivity to questions of relevance; correspondingly, the marshaling of proof so essential to clarity suffers. Trial to a jury imposes a fierce discipline on the advocates. The virtue of forcing counsel to organize a complex mass of information into a form understandable by the uninitiated is that counsel ultimately must understand the issues and evidence in the case well enough to teach. If counsel cannot comprehensibly present their case to lay persons, is it likely that counsel do, in fact, understand the case? One need only view how trials of complicated matters are conducted by able counsel to appreciate the powerful contribution that the presence of a jury makes to clarity of argumentation. The jury's presence not only **[**136]** encourages the clear presentation of facts during a trial, but the process of drafting the charge also contributes to the clarification of the controlling legal issues. When properly designed and freed of obscure "legalese," the charge enhances understanding by the court and counsel, as well as by the jury.

Higginbotham, Supra, at 54.

While not essential to our decision in view of our *Seventh Amendment* analysis, it is appropriate, we believe, to relate the foregoing general discussion to the trial of this case.

At the heart of both the plaintiffs' claims and the defendants' counterclaims are allegations of conspiracy and predatory intent. These allegations, if legally sufficient, will call for just the kind of judgments of fact that are traditionally within a jury's competence and for which a jury's unique abilities **[*936]** are especially valued.[81] **[**137]** Moreover, we believe that with proper and frequent judicial guidance (we contemplate a preliminary charge and periodic interim charges on the law) as well as thoughtful organization of evidentiary presentation by counsel, the jury will be able to understand and deal intelligently with all the facts and issues.[82]

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[81] We do not intend by this reference to intimate a view on the issues raised by defendants' motion for summary judgment in which it is alleged that the predatory intent question must now be decided in favor of defendants as a matter of law on the developed record.

[82] The need for improved techniques in managing jury trials of complex antitrust litigation has recently received attention from a Presidential Commission, and we note with interest their suggestions:

Even if the role of juries in some antitrust cases is limited, juries will continue to try many antitrust cases, including some that cannot be considered simple, and a number of innovative techniques can help juries understand those cases better. It has proved useful for courts to instruct the jury on the relevant legal issues at the beginning of trial as well as at the end. It may also be useful for courts to refresh juries on the factual and legal relationships of the different parts of the trial, such as evidence and argument on the "relevant" market. Counsel may assist the jury's early understanding of the case by giving more comprehensive

[138]** The foregoing observations demonstrate why we reject as plainly lacking in merit the defendants' suggestion that the extraordinary complexity of this matter would make a trial by jury fundamentally unfair, thereby denying them the due process of law guaranteed by the *Fifth Amendment*, [83] and the related argument that, in

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and focused opening statements. If the case is to be submitted on interrogatories, a preliminary set of interrogatories may be given to the jury at the start of the trial. These procedures collectively should facilitate the jury's understanding and assessment of the evidence presented.

The parties might provide the jurors with a binder containing important exhibits. During trial, the expanded use of visual aids may contribute to ready comprehension. Jurors may be permitted to take notes during trial and the exhibits, trial transcript (if ready), and jury instructions can be made available in the jury room during deliberations. Counsel should also evaluate the utility of preparing summaries of the evidence for the jury's use.

Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures 107 (1979) (footnote omitted).

[83] This due process argument was the basis for the decision in *In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 104 (W.D.Wash.1976)*, in which the court specifically related the Ross footnote's mention of "the practical abilities and limitations of juries" to considerations of fairness and due process.

As part of their "due process" argument, the defendants contend that the anticipated length of the trial makes it impossible to obtain a fair trial by jury: Because business people and professionals would have to be excused for cause pursuant to *28 U.S.C. § 1866(c)*, "the jury that is impaneled . . . will not be representative of the community . . . and will not have on it persons best able to cope with the issues." See *ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 448 (N.D.Cal.1978)*; *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 69-70 (S.D.N.Y.1978)*; *In re Boise Cascade Securities Litigation, 420 F. Supp. 99, 104 (W.D.Wash.1976)*; Comment, The Right to an Incompetent Jury: Protracted Commercial Litigation and the *Seventh Amendment*, 10 Conn.L.Rev. 775 (1978). The student Comment presents a statistical analysis of the jury selection process in *SCM Corp. v. Xerox Corp., 463 F. Supp. 983 (D.Conn.1978)*, showing that excuses for cause and peremptory challenges eliminated disproportionate numbers of prospective jurors who were employed in technical or managerial fields, who were male, or who had attended college.

It may well be that factors of "undue hardship or extreme inconvenience," *28 U.S.C. § 1866(c)*, will persuade the court to excuse many business executives and professionals, but this certainly does not mean that the defendants will be forced to submit their case to a jury selected from society's incompetents and misfits.

Moreover, the factors justifying excuse from jury service will have to be reassessed in light of the Jury System Improvements Act of 1978, P.L. 95-572, 92 Stat. 2453 (1978). Congress recognized that economic hardship to jurors threatened the statutory policy of providing to all litigants the right to juries "selected at random from a fair cross-section of the community in that judicial district," and sought in the 1978 Act to correct that problem. H.R.Rep.No.95-1652, 95th Cong., 2d Sess. (1978), U.S.Code Cong. & Admin.News 1978, pp. 5477, 5479. The Act increases jurors' compensation to $ 30 per day for the first thirty days of service and $ 35 per day thereafter, and also increases travel allowances. The Act also protects employees from intimidation, coercion, or discharge as a result of their jury service, and guarantees the resumption of their employment rights without loss of seniority, as if they had been on furlough or leave of absence. Finally, the Act defines the terms "undue hardship or extreme inconvenience" as they are used in *28 U.S.C. § 1866(c)* to mean:

. . . great distance, either in miles or travel-time, from the place of holding court, grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror; and in addition, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider, as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service; . . .

28 U.S.C. § 1869(j). Thus, the Act necessarily limits the number of prospective jurors who might be excused from service in this case because of economic hardship to themselves or their families. We therefore expect that the pool from which the jury is drawn will include a fair number of people of considerable sophistication and intelligence, drawn from the ranks of the employed as well as from those men and women who have chosen not to have a "job" or who are retired or unemployed.

[*937] complex litigation, a right to trial by jury would carry with it the "right to an irrational verdict." Juries like judges may sometimes render irrational verdicts, but in such an event the court serves as a check on the power of the jury. It is well settled that the court may direct a verdict without infringing the constitutional right to trial by jury. See *Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943)*. The standard for directed verdicts in this circuit has been expressed as follows:

[139]**

> (W)e must examine the record in a light most favorable to the (party against whom the verdict is to be directed), and review the specific evidence in the record and all inferences reasonably capable of being drawn therefrom. We must determine whether, as a matter of law, the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief. *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; *Lebrecht v. Bethlehem Steel Corp., 402 F.2d 585* (2 Cir. 1968); *Schad v. Twentieth Century-Fox Film Corp., 136 F.2d 991* (3 Cir. 1943); *Rawleigh, Moses & Co. v. Kornberg, 210 F.2d 176* (8 Cir. 1954); *Denneny v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969)*. "If the evidence is of such character that reasonable men, in the impartial exercise of their judgment may reach different conclusions, the case should be submitted to the jury." *Silverii v. Kramer, 314 F.2d 407, 409 (3d Cir. 1963)*. See *Rogers v. Exxon Research & Engineering Co., 404 F. Supp. 324, 335-36 (D.N.J.1975)*. Since a directed verdict motion deprives a party of jury fact-determination, it should be granted sparingly and circumspectly. **[**140]** "Nevertheless the federal courts do not **[*938]** follow the rule that a scintilla of evidence is enough. The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." 9 Wright & Miller, Federal Practice and Procedure, § 2524, at 542-43 (1971) (footnotes omitted).

Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir. 1978).

Since issues are presented to the jury only when "reasonable" men and women "in the impartial exercise of their judgment may reach different conclusions," when a jury "may properly find a verdict" for either party, there is little or no no room for an "irrational" verdict. And if the court erroneously sends issues to a jury which thereafter decides them "irrationally," further safeguards are available in the power of either the trial court or the court of appeals to grant judgment notwithstanding the verdict. See *Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967)*; *Rule 50(b), Fed.R.Civ.P.*

Moreover, it is clear that the right to trial by jury does not include the right to have any particular number of economics professors or bankers on the jury. The Supreme Court has described the requirements of due process and the *Sixth Amendment* in criminal trials:

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay v. New York, 332 U.S. 261, 284, 67 S. Ct. 1613, 1625, 91 L. Ed. 2043 (1947)*; Apodaca v. Oregon, 406 U.S. (404, *92 S. Ct. 1628, 32 L. Ed. 2d 184*), at 413, *92 S. Ct. at 1634* (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 702, 42 L. Ed. 2d 690 (1975). Whatever due process may require in the civil context, it cannot be more than is required in criminal trials by the *Sixth Amendment's* guarantee of "an impartial jury"; certainly here there is no threat of systematic exclusion of distinctive groups in the community. The legislative policy declared in *28 U.S.C. § 1861* goes no further, though its requirements could not in any event overcome the clear command of the *Seventh Amendment*. See Comment, Supra, 10 Conn.L.Rev. at 783 n. 27.

Finally, even if defendants' "cross-section" contentions had some merit, we think it would be premature to act on them at this time, rather than after the voir dire has reduced the element of speculation. See note 16, Supra.

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b. Other Functions of the Jury

The foregoing discussion has addressed the relative **[**141]** skill of judges and juries at making accurate findings of fact. What is at issue here is more; it is the very nature or character of justice provided by our judicial system. In this respect, the *Seventh Amendment* reflects societal values deeply rooted in our notions of democracy values which require that factual decisions affecting the life, liberty, and property of litigants should, at least at their option, be made by a cross section of the community, I. e., a jury of their peers. Thus, even if judges were "better" than juries at finding facts accurately in complex litigation, no decision to exclude juries from participation in these cases should be made without weighing the other important values promoted by the use of juries.

One unique virtue of the jury is its "black-box" function; it gives results without reasons. [84] In contrast, the court in a bench trial must "find the facts specially." [85] The "black-box" jury allows our courts to deliver individualized justice to do "equity" without sacrificing our expressed devotion to the uniform rule of law. See Higginbotham, Supra, at 56-57; Wigmore, A Program for the Trial of a Jury Trial, 12 Judicature 166, 170 (1929). Thus, when **[**142]** "justice" requires, juries can reach results at variance with the law. Because these decisions are not explained, they remain exceptions; the same results from opinion-writing judges would be precedents. [86]

[143]** The materials constituting the *Seventh Amendment's* "legislative history" demonstrate that this part of the jury's "practical abilities" [87] was of great importance to the antifederalists who are largely responsible for the constitutionalization of the civil jury:

> **[*939]** There is, moreover, a generalized but weighty premise that underlies every one of the antifederalist arguments in favor of constitutional protection of the right of jury trial in civil cases. It is unquestionable, but nonetheless sometimes overlooked, that the general intention of antifederalist agitation for mandatory jury trial was to achieve results from jury-tried cases that would not be forthcoming from trials conducted by judges **[**144]** alone. Clearly the antifederalists were not arguing for jury trial on the ground that it was a more efficient form of trial or in some procedural way inherently superior to trial by the court. It is common today to oppose the institution of the civil jury and its preservation in the *Seventh Amendment* on the asserted ground that trials in which juries sit are long, expensive, prone to unseemly forensics, and sometimes productive of decisions that are probably at odds with the substantive rules that the judge instructs the jury to apply. But the antifederalists were not arguing for the institution of civil jury trial in the belief that jury trials were short, inexpensive, decorous and productive of the same decisions that judges sitting without juries would produce. The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers with procedural devices; they were, for the

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84 Professor Calabresi therefore calls the jury an "aresponsible agency." See G. Calabresi & P. Bobbitt, Tragic Choices 57-79 (1977).

85 *Rule 52(a), Fed.R.Civ.P.* This rule requires the court to state its findings as to both ultimate and subsidiary facts, *O'Neill v. United States, 411 F.2d 139, 146 (3d Cir. 1969)*, and to do so with sufficient "detail and exactness" to facilitate appellate review. *EEOC v. United Virginia Bank, 555 F.2d 403, 406 (4th Cir. 1977)*; *Roberts v. Ross, 344 F.2d 747, 751 (3d Cir. 1965)*. See note 18, Supra.

86 Mr. Justice Black, the author of the Court's opinions in Beacon Theatres and Dairy Queen, has been reported as suggesting, in conversation, "that the jury system was accorded its prominence and protection in the Constitution because its aresponsibility allowed it to disregard legal rules when the rules produced results contrary to community standards, and its representativeness insured that it would do just that." Calabresi & Bobbitt, Supra note 84, at 208 n. 12.

87 Our rejection of the notion that the Ross footnote prescribes the test for *Seventh Amendment* questions, ***Supra at 926-930***, eliminates the need to parse each word and comma in it. Those who are so moved, however, might well consider the "practical abilities" of juries and not only their "limitations."

> day, libertarians who avowed that important areas of protection for litigants in general, **[**145]** and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases.

Wolfram, The Constitutional History of the *Seventh Amendment*, 57 Minn.L.Rev. 639, 671-72 (1973) (footnotes omitted). [88] **[**146]** According to Wolfram, this is particularly evident **[*940]** in the antifederalists' concern with the protection of debtor-defendants, [89] **[**147]** the frustration of unpopular or unwise law through jury nullification, [90] and the protection of **[*941]** individuals in litigation with the federal government. See id., at 667-708.

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[88] Two of Wolfram's observations on the ratification debates are of interest here. First, the antifederalists' arguments showing the importance of the jury's ability to produce results that sometimes were at variance with the law were usually very indirect. Wolfram explains this as made necessary by the politics and the "instincts of public morality" of the time. 57 Minn.L.Rev., at 703-05.

Second, there were some "scattered references" during and after the debates to the utility of jury trials in particular types of cases, "(b)ut none of these seem to have contemplated that these issues of utility could be evolved into a standard for determining the extent of the right to jury trial." *Id., at 718, 719*. For some of these scattered references, See *id., at 671 n. 86, 719*.

A contemporaneous expression of the view that complex matters were properly tried in equity, without juries, may be found in The Federalist No. 83 (A. Hamilton):

My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction, and that the causes which belong to the former would be improperly committed to juries. The great and primary use of a court of equity is to give relief in Extraordinary cases, which are Exceptions * to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a Special determination; while a separation of the one from the other has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.

* It is true that the principles by which that relief is governed are now reduced to a regular system; but it is not the less true that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules. PUBLIUS

Id., at 549-550 (Mod. Library ed.) (emphasis in original). This argument is proposed by Hamilton in defense of the omission from the constitution of a right to jury trial in civil actions. Certainly the widespread opposition to the constitution expressed because of this omission, and the adoption of the *Seventh Amendment* in response thereto, represent a resounding rejection of Hamilton's conclusions; whether his premises were also rejected is not clear.

[89] The concern for debtors was due in part to the provision in the 1783 treaty of peace with Great Britain "that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Wolfram, Supra note 25, at 673-679 & n. 92. During the preconstitutional period, creditors from Britain or another of the states had to sue in the courts of the debtor's state "where, under the protection of favorable local laws, the debtor might receive a sympathetic hearing before a jury composed of his friends and relatives." *Id., at 676*. Several provisions in the new constitution, including those for federal diversity and alienage jurisdiction, were intended to provide some measure of relief for creditors. *Id., at 677-78* & n. 95.

Wolfram canvasses the ratification debates in each state, and concludes that "concern for local debtors faced with the threat of suit in a federal court, without a jury, was one of the chief motivations for opposition to the Constitution." *Id., at 678*. A good example is the remark with which Patrick Henry concluded a speech in the Virginia ratification convention: "If previous amendments are not obtained, the trial by jury is gone. British debtors will be ruined by being dragged to the federal court, and the liberty and happiness of our citizens gone, never again to be recovered." *Id., at 691*.

[90] The power of a jury to disregard the court's instructions in accordance with the equities of the individual case or with what they thought the law should be had been rather dramatically demonstrated to colonial America in the celebrated libel trial of John

[148]** "Black-box" juries are also important in borderline cases calling for decisions and distinctions that might otherwise seem arbitrary. Mr. Justice Holmes described this function as follows:

> When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist. . . . As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations. . . . And so, as we get near the dividing point, we call in the jury.

Holmes, Law in Science and Science in Law, 12 Harv.L.Rev. 443, 457 (1899). Cf. *Duncan v. Louisiana, 391 U.S. 145, 161, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)* ("This (line-drawing) process, although essential, cannot be wholly satisfactory, **[**149]** for it requires attaching different consequences to events which, when they lie near the

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Peter Zenger in 1735. At the time, truth was no defense in a criminal libel case, and the jury was to determine only whether the defendant had published the allegedly libelous material; the presiding judge charged the jury that "whether the words . . . make a libel . . . is a matter of law . . . which you may leave to the Court." Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 100 (Katz ed. 1963). But Andrew Hamilton, perhaps the original "Philadelphia lawyer," had argued eloquently to the jury that truth should be a defense to libel, and that a jury "are by law at liberty . . . to find both the law and the fact . . .;" the jury returned a general verdict of not guilty. *Id., at 12-13, 23, 91-93, 101*. Somewhat ironically, one of the "libels" for which Zenger was tried was "that it seems trials by juries are taken away when a governor pleases." *Id., at 64*.

Although the Zenger trial was a criminal one, it seems to have contributed to "a widespread popular conviction at the time of the adoption of the *seventh amendment* that a jury in a civil case (had) the right to "decide the law'." Compare Wolfram, Supra, at 669 n. 84 With Henderson, The Background of the *Seventh Amendment*, 80 Harv.L.Rev. 289, 289-291, 327-335 (1966).

The evidence from the ratification debates that the possibility of jury nullification was important to the antifederalists consists mainly of expressions "that trial by jury is a safeguard against an oppressive exercise of the power of taxation." Wolfram, Supra, at 705-709. The words are Alexander Hamilton's in The Federalist No. 83, used to describe an antifederalist argument which he goes on to rebut by pointing out, Inter alia, that in most states summary procedures of distress and sale were available to collect taxes without a jury trial. *Id., at 705 n. 183*. But cf. *Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961)* (In 1791 in England, taxes could be collected in action of debt, which carried right to jury trial). And Hamilton himself argues that the possibility of disregard of the law makes prize cases especially unsuitable for determination by juries:

Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable.

Hamilton, The Federalist No. 83, at 548-49 (Mod. Lib. ed.).

A clear statement of the power of nullification may be found in Chief Justice John Jay's charge to the jury in *Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 1 L. Ed. 483 (1794)*, a jury trial in the Court's original jurisdiction arising on a feigned issue in an equity case, and tried to a "special jury":

It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court: for as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still, both objects are lawfully within your power of decision.

Id., at 4 (footnotes omitted).

line, actually differ very little."). Holmes points out later in the same article that the question of negligence Vel non was originally a question of law for the court:

> But about the middle of the last century, when the rule of conduct was complicated with practical details the court began to leave some of these questions to the jury. Nevertheless, Mr. Starkie, a man of intellect, who was not imposed upon by phrases, very nearly saw the ground upon which it was done, and puts it on the purely practical distinction that when the circumstances are too special and complicated for a general rule to be laid down the jury may be called in.

Id., at 459. There is thus a common-law tradition of calling in juries to decide certain questions only when there is enough complexity to require one. To impose a new rule taking very complex cases away from juries would imply a conception of the jury as a kind of Goldilocks, to be used only when the amount of complexity is "just right." [91]

[150]** In all cases where our system needs a "black-box" decider, the use of a representative jury seeks to insure that the decisions will reflect contemporary community values in courts otherwise dominated by judges with life tenure. See id., at 460. Also, by enhancing the public's sense of participation, **[*942]** the use of representative juries contributes significantly to the legitimacy of our courts and of our entire system of government. See Higginbotham, Supra, at 52, 59-60; Kaufman, A Fair Jury The Essence of Justice, 51 Judicature 88, 91 (1967).

The jury also provides a needed check on judicial power. Although the allocation of the fact-finding role to the jury serves most obviously to limit the authority of the trial judge, the second clause of the *Seventh Amendment* [92] demonstrates the importance of the limit on appellate invasion of the province of the jury as well. Because judicial fact-finding is more closely reviewed than jury fact-finding, the elimination of juries from complex or protracted litigation would increase the power of both trial and appellate judges. See Higginbotham, Supra, at 57. [93] There is no reason to believe that any of the jury's functions are less **[**151]** important in complex and protracted litigation than in smaller and simpler cases. Indeed, as "big" cases proliferate and consume an increasing share of our judicial resources, the survival of the peculiar quality of justice traditionally delivered by juries in our courts of law may depend on the continued availability of juries in such cases.

IV. Conclusion

This opinion has addressed a number of questions in order to determine whether the *Seventh Amendment* right to trial by jury applies even in a case so massive and so complex that serious questions **[**152]** of jury competence may be raised.

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[91] Holmes himself seems to have had a rather Hamiltonian view of juries; he looked forward to the day when the "democratic verdict of the jury" might eventually be replaced by "the commercial and rational test of the judgment of a man trained to decide." Id., at 445. And his view, expressed with only a touch of sarcasm, was that

. . . every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street.

Id., at 457. An example of the classic Holmes-Knowlton debate on the relative merits of simple or per se liability rules which can be applied by courts "as a matter of law" against those of more complex rules which require a jury, is *Lorenzo v. Wirth, 170 Mass. 596, 49 N.E. 1010 (1898)* (Holmes, J.); *Id., 49 N.E. at 1011* (Knowlton, J., dissenting). For discussions of this choice, See Calabresi & Bobbitt, Supra note 84, at 206 n. 5; G. Calabresi, Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class, in 3 Emerging Perspectives and Issues in the "Access-to-Justice" Movement, (Cappelletti ed. 1978). Cf. Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemp. Prob. 476, 477-78 (1936).

[92] " . . . And no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[93] Indeed, in view of the jury's role as a check on judicial power, it "might be thought to be particularly inappropriate . . . for the federal courts to claim a broad and loosely structured power to determine whether this civilian check on their own functioning should be interposed." Wolfram, Supra at 644.

Because the historical test for the *Seventh Amendment* defines the parameters of the constitutional right to a jury trial by reference to English practice in 1791, we have explored the traditional boundaries of the jurisdictions of courts of law and courts of equity. Our survey demonstrated that some cases normally belonging to the courts of common law could, if sufficiently complex, be brought in equity. But this was possible only in actions seeking an "accounting," and only at the plaintiff's option. Because this is not an "accounting" case, and because here the plaintiffs actively seek a jury trial, the historical test requires that a jury be available. This conclusion is buttressed by other considerations as well. There is little evidence that the plaintiff's historical ability to bring complex accounting matters to a court of equity was attributable to considerations of jury competence and, in any event, it may not have survived the merger of law and equity. Moreover, the remedy of treble damages sought in the case before us is one which was traditionally available Only on the verdict of a jury in a court of common law.

We next examined the Supreme **[**153]** Court's recent decisions in order to determine whether questions of jury competence had been elevated to constitutional stature by the mention in Ross v. Bernhard of "the practical abilities and limitations of juries." We determined that to so read the Ross dictum would be inconsistent with the intentions of the Supreme Court, with settled principles of jurisprudence, and with the very policies expressed in the *Seventh Amendment* itself. We have concluded, therefore, that the complexity of the case before us is not a constitutionally permissible reason for striking the plaintiffs' jury demands.

The defendants' motion is denied. An appropriate order follows.

Reiter v. Sonotone Corp.

Supreme Court of the United States

April 25, 1979, Argued ; June 11, 1979, Decided

No. 78-690

Reporter

442 U.S. 330 *; 99 S. Ct. 2326 **; 60 L. Ed. 2d 931 ***; 1979 U.S. LEXIS 108 ****; 1979-1 Trade Cas. (CCH) P62,688; 27 Fed. R. Serv. 2d (Callaghan) 653

REITER v. SONOTONE CORP. ET AL.

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

Disposition: *579 F.2d 1077*, reversed and remanded.

Core Terms

consumers, retail, Clayton Act, district court, enterprise, damages, commercial interest, legislative history, antitrust violation, antitrust, terms, court of appeals, federal court, class action, anticompetitive, treble-damages, settlements, purchaser

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

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

The Clayton Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Antitrust & Trade Law > Clayton Act > General Overview

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

The word "property" has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage "property" comprehends anything of material value owned or possessed. Money, of course, is a form of property.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

In construing a statute the court is obliged to give effect, if possible, to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

Congress' use of the word "or" in § 4 of the Clayton Act, *15 U.S.C.S. § 15*, makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business."

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

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Private Actions, Remedies**

A consumer whose money has been diminished by reason of an antitrust violation has been injured in his "property" within the meaning of § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN7[] **Clayton Act, Claims**

Monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Private Actions, Standing**

Consumers of retail goods and services have standing to sue under § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

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

Governments > Legislation > Interpretation

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

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

HN9[] **US Department of Justice Actions, Civil Actions**

The court must take a statute as it finds it.

Lawyers' Edition Display

Decision

Consumers paying higher price for goods because of ***antitrust law*** violations, held to sustain injury to "property" and to be entitled to sue for treble damages under Clayton Act (*15 USCS 15*).

Summary

On behalf of herself and all other persons in the United States who purchased hearing aids manufactured by five corporations, a woman brought a class action in the United States District Court for the District of Minnesota, seeking treble damages under 4 of the Clayton Act (*15 USCS 15*)--which authorizes such treble damage actions by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"--on the ground that because of the corporations' violation of federal antitrust laws, including vertical and horizontal price fixing, she and all other members of the class she represented were forced to pay illegally fixed higher prices for hearing aids and related services they purchased from the corporations' retail dealers. The corporations moved for dismissal of the complaint or summary judgment, arguing, among other things, that a retail purchaser of goods for personal use lacks standing to sue for treble damages under 4 of the Act because such a consumer has not been injured in his "business or property" within the meaning of the Act. The District Court held that under 4 a retail purchaser is injured in "property" if the purchaser can show that antitrust violations caused an increase in the price paid for the article purchased, but determining that the defendants had raised a controlling question of law as to which there was substantial ground for difference of opinion, the District Court stayed futher proceedings in the case and certified the question of consumer treble damage suits to the *United States Court of Appeals for the Eighth Circuit (435 F Supp 933)*. The Court of Appeals reversed, ruling that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" for purposes of 4 (*579 F2d 1077*).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Burger, Ch. J., expressing the unanimous view of the eight participating members of the Court, it was held that consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations, thus having their money diminished, sustain an injury in their "property" within the meaning of 4 of the Clayton Act, and thus may bring an action under 4 to recover treble damages.

Rehnquist, J. concurring, expressed the view that although the intrepretation of 4 of the Act as authorizing consumer suits might add a substantial volume of litigation to the strained dockets of the federal courts, and might be used to exact unfair settlements from retail businesses, any such problems were for Congress and not for the courts.

Brennan, J., did not participate.

Headnotes

MONOPOLIES §67 > treble damages -- consumer suits -- injury to "business or property" -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

Consumers who, as a result of violations of federal antitrust laws, pay a higher price for goods purchased for personal use, thus having their money diminished, sustain an injury in their "property" within the meaning of 4 of the Clayton Act (*15 USCS 15*) and may bring an action to recover treble damages under 4, which authorizes treble damage actions by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

STATUTES §163 > federal law -- construction -- language -- > Headnote:
LEdHN[2][] [2]

In every case involving the construction of a federal statute, the starting point must be the language employed in the statute by Congress.

MONEY §1 > nature -- > Headnote:
LEdHN[3][] [3]

Money is a form of property.

STATUTES §110 > construction -- giving effect to all language -- > Headnote:
LEdHN[4][] [4]

In construing a federal statute a court is obliged to give effect, if possible, to every word Congress used.

STATUTES §179 > construction -- use of disjunctive -- > Headnote:
LEdHN[5][] [5]

Under canons of construction, terms connected by a disjunctive ordinarily should be given separate meanings, unless the context dictates otherwise.

STATUTES §154 > Clayton Act -- interpretation -- belief of Congress after enactment -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

The fact that Congress, as evidenced by the text and legislative history of a federal statute enacted subsequent to the enactment of 4 of the Clayton Act (*15 USCS 15*), believed that consumers have a cause of action to recover treble damages for violations of federal antitrust laws under 4 of the Clayton Act will not be viewed as a controlling consideration by the United States Supreme Court in determining whether consumers who pay a higher price for goods purchased for personal use as a result of federal antitrust violations sustain an injury in their "business or property" within the meaning of 4 so as to be entitled to bring treble damage actions.

COURTS §105 > interpretation of statute -- adverse effects -- considerations for legislature -- > Headnote:
LEdHN[7][] [7]

For purposes of the United States Supreme Court's determining whether consumers who pay a higher price for goods purchased for personal use as a result of federal antitrust violations sustain an injury in their "business or property" within the meaning of 4 of the Clayton Act (*15 USCS 15*), so as to be entitled to bring an action for treble damages under 4, the argument that the cost of defending consumer actions brought as class actions will have a potentially ruinous effect on small businesses and will ultimately be paid by consumers relates to policy considerations more properly addressed to Congress than to the court, and such considerations cannot govern the court's interpretation of the language of 4.

Syllabus

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by respondents, alleging that, because of antitrust violations committed by respondents, she and the class she seeks to represent have been forced to pay illegally fixed higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages were sought under § 4 of the Clayton Act, which provides that "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring suit and recover treble damages. Respondents moved to dismiss the damages claim on the ground **[****2]** that petitioner had not been injured in her "business or property" within the meaning of § 4. The District Court held that under § 4 a retail purchaser is injured in "property" if it can be shown that antitrust violations caused an increase in the price paid for the article purchased; however, it certified the question to the Court of Appeals. The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4, and that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures.

Held: Consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of § 4. Pp. 337-345.

(a) Statutory construction must begin with the language employed by Congress. The word "property" has a naturally broad and inclusive meaning comprehending, in common usage, anything of material value owned or possessed. Congress' use of the disjunctive "or" in the phrase "business or property" indicates "business" **[****3]** was not intended to modify "property," nor was "property" intended to modify "business." Giving the word "property" the independent significance to which it is entitled in this context does not destroy the restrictive significance of the phrase "business or property" as a whole. Pp. 337-339.

(b) Monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. *Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390*. Thus, the fact that petitioner was deprived of only money is no reason to conclude that she did not sustain a "property" injury. Pp. 339-340.

(c) Nor does petitioner's status as a "consumer" who purchased goods at retail for personal use change the nature of the injury she suffered or the intrinsic meaning of "property" in § 4. Pp. 340-342.

(d) The legislative history reflects that the treble-damages remedy was designed to protect consumers, and that no one questioned the right of consumers to sue under § 4. Thus, to the extent that § 4's legislative history is relevant, it also supports the conclusion that a consumer deprived of money by reason of anticompetitive conduct is injured in "property" within the **[****4]** meaning of § 4. Pp. 342-344.

(e) The fact that allowing class actions such as this may add a significant burden to the federal courts' already overcrowded dockets is an important but not a controlling consideration, since Congress created the § 4 treble-damages remedy precisely for the purpose of encouraging *private* challenges to antitrust violations. P. 344.

(f) Respondents' arguments that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers, are policy considerations more properly addressed to Congress than to this Court; in any event they cannot govern the reading of the plain language of § 4. Pp. 344-345.

Counsel: John E. Thomas argued the cause and filed a brief for petitioner.

Julian R. Wilheim and Elliot S. Kaplan argued the cause for respondents. With them on the brief were Fred L. Woodworth, Joseph C. Basta, and Deborah J. Palmer.

Assistant Attorney General Shenefield argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General McCree, Deputy Solicitor General Easterbrook, Stephen M. Shapiro, Barry **[****5]** Grossman, and Bruce E. Fein. Warren Spannaus, Attorney General of Minnesota, argued the cause for the States of Alabama et al. as amici curiae urging reversal. With him on the brief were Richard B. Allyn, Solicitor General of Minnesota, Alan H. Maclin, Stephen P. Kilgruff, and Thomas Kenyon, Special Assistant Attorneys General; and John Ashcroft, Attorney General of Missouri, Walter O. Theiss, Assistant Attorney General, and Rogert Bern; joined by other officials for their respective States as follows: Charles A. Graddick, Attorney General, for Alabama; Avrum M. Gross, Attorney General, and Mark E. Ashburn, Assistant Attorney General, for Alaska; Robert K. Corbin, Attorney General, and Kenneth R. Reed for Arizona; Steve Clark, Attorney General, and Royce O. Griffin, Jr., Deputy Attorney General, for Arkansas; George Deukmejian, Attorney General, Warren J. Abbott, Assistant Attorney General, and Linda L. Tedeschi, Deputy Attorney General, for California; J. D. MacFarlane, Attorney General, B. Lawrence Theis, First Assistant Attorney General, and William E. Walters, Assistant Attorney General, for Colorado; Carl R. Ajello, Attorney General, Gerard J. Dowling and Larry H. Evans, Assistant **[****6]** Attorneys General, for Connecticut; Richard S. Gebelein, Attorney General, and William E. Kirk III, Assistant Attorney General, for Delaware; Jim Smith, Attorney General, Charles R. Ranson, Special Assistant Attorney General, and Douglas C. Kearney, Assistant Attorney General, for Florida; Wayne Minami, Attorney General, and Thomas T. Wood, Deputy Attorney General, for Hawaii; David H. Leroy, Attorney General, and Mike Brassey, Deputy Attorney General, for Idaho; William J. Scott, Attorney General, for Illinois; Theodore L. Sendak, Attorney General, for Indiana; Thomas J. Miller, Attorney General, and Gary H. Swanson, Assistant Attorney General, for Iowa; Robert T. Stephan, Attorney General, and Wayne E. Hundley, Deputy Attorney General, for Kansas; Robert F. Stephens, Attorney General, and James M. Ringo, Assistant Attorney General, for Kentucky; William J. Guste, Jr., Attorney General, and John R. Flowers, Jr., Assistant Attorney General, for Louisiana; Richard S. Cohen, Attorney General, and Cheryl Harrington, Assistant Attorney General, for Maine; Stephen H. Sachs, Attorney General, and Charles O. Monk II, Assistant Attorney General, for Maryland; Francis X. Bellotti, Attorney **[****7]** General, Paula W. Gold, Assistant Attorney General, and Steven J. Greenfogel for Massachusetts; Frank J. Kelley, Attorney General, and Edwin M. Bladen, Assistant Attorney General, for Michigan; A. F. Summer, Attorney General, and Marshall G. Bennett, Assistant Attorney General, for Mississippi; Mike T. Greely, Attorney General, and Jerome J. Cate, Assistant Attorney General, for Montana; Paul L. Douglas, Attorney General, and Robert F. Bartle and Paul E. Hofmeister, Assistant Attorneys General, for Nebraska; Richard H. Bryan, Attorney

General, for Nevada; Thomas D. Rath, Attorney General, for New Hampshire; John J. Degnan, Attorney General, and Alfred J. Luciani for New Jersey; Jeff Bingham, Attorney General, and James J. Wechsler, Assistant Attorney General, for New Mexico; Robert Abrams, Attorney General, and John M. Desiderio, Assistant Attorney General, for New York; Rufus L. Edmisten, Attorney General, Howard A. Kramer, Deputy Attorney General, and David S. Crump, Special Deputy Attorney General, for North Carolina; Allen I. Olson, Attorney General, and Dale V. Sandstrom and Terry L. Adkins, Assistant Attorneys General, for North Dakota; William J. Brown, Attorney General, and **[****8]** Eugene F. McShane and Richard M. Firestone, Assistant Attorneys General, for Ohio; Jan Eric Cartwright, Attorney General, and Manville J. Buford, Assistant Attorney General, for Oklahoma; James A. Redden, Attorney General, and James Kirkham Johns for Oregon; Edward G. Biester, Jr., Attorney General, and Norman J. Watkins and John L. Shearburn, Deputy Attorneys General, for Pennsylvania; Dennis J. Roberts II, Attorney General, and Patrick J. Quinlan, Special Assistant Attorney General, for Rhode Island; Daniel R. McLeod, Attorney General, for South Carolina; Mark V. Meierhenry, Attorney General, and James E. McMahon, Assistant Attorney General, for South Dakota; William M. Leech, Jr., Attorney General, and William J. Haynes, Jr., Deputy Attorney General, for Tennessee; Mark White, Attorney General, for Texas; Robert B. Hansen, Attorney General, and Andrew W. Buffmire, Assistant Attorney General, for Utah; M. Jerome Diamond, Attorney General, and Jay I. Ashman, Assistant Attorney General, for Vermont; Marshall Coleman, Attorney General, and Joseph W. Kaestner, Assistant Attorney General, for Virginia; Slade Gorton, Attorney General, Thomas L. Boeder, Senior Assistant Attorney General, **[****9]** and Earle J. Hereford, Jr., Assistant Attorney General, for Washington; Chauncey H. Browning, Jr., Attorney General, and Charles G. Brown, Deputy Attorney General, for West Virginia; Bronson C. La Follette, Attorney General, and Michael L. Zaleski, Assistant Attorney General, for Wisconsin; and John D. Troughton, Attorney General, Peter J. Mulvaney, Deputy Attorney General, and James W. Gusea, Assistant Attorney General, for Wyoming. [*]

Judges: BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the decision of the case. REHNQUIST, J., filed a concurring opinion, post, p. 345.

Opinion by: BURGER

Opinion

[*334] **[***934]** **[**2328]** MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

LEdHN[1A][] [1A]We granted certiorari to decide whether consumers who pay **[****10]** a **[***935]** higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "business or property" within the meaning of § 4 of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 15*.

[*335] **[**2329]** I

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by five corporations, respondents here. Her complaint alleges that respondents have committed a variety of antitrust violations, including vertical and horizontal price fixing. [1] Because of these violations, the complaint alleges, petitioner and the class of persons she seeks to represent have been forced to pay illegally fixed

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[*] David Berger, H. Laddie Montague, Jr., Merrill G. Davidoff, Stanley J. Friedman, Frederick P. Furth, Thomas R. Fahrner, Aaron M. Fine, and Josef D. Cooper filed a brief for the plaintiffs in Kennedy Smith v. Toyota Motor Sales U.S.A. et al. as amici curiae urging reversal.

[1] Specifically, Reiter alleges that respondents violated *§§ 1* and *2* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. §§ 1* and *2*, and *§ 3* of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 14*. She claims respondents restricted the territories, customers, and brands of hearing aids offered by their retail dealers, used the customer lists of their retail dealers for their own purposes, prohibited unauthorized retailers from dealing in or repairing their hearing aids, and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids.

higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages and injunctive relief are sought under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, *15 U. S. C. §§ 15* and *26*.

[**11]** Respondents moved for dismissal of the complaint or summary judgment in the District Court. Among other things, respondents argued that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for treble damages under § 4 of the Clayton Act because she had not been injured in her "business or property" within the meaning of the Act.

The District Court held that under § 4 a retail purchaser is injured in "property" if the purchaser can show that antitrust violations caused an increase in the price paid for the article purchased. The District Court relied on *Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906)*, and the legislative history of the Clayton Act set forth in *Brunswick Corp*. v. *Pueblo Bowl-O-Mat, Inc., 429 U.S. 477,* ***[*336]*** *486 n. 10 (1977)*, indicating that Congress intended to give a § 4 remedy to consumers. *435 F.Supp. 933, 935-938 (Minn. 1977)*.

The District Court determined, however, that the respondents had raised a "controlling question of law as to which there is substantial ground for difference of opinion," *id., at 938*, and accordingly **[****12]** certified the question for interlocutory review under *28 U. S. C. § 1292 (b)*. It then stayed further proceedings in the case and declined to express any opinion on the merits of the other issues raised by respondents' motions or on the certifiability of the class.

The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4. *579 F.2d 1077 (CA8 1978)*. Noting the absence of any holdings on this precise issue by this Court or other courts of **[***936]** appeals, the court reasoned that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures. It relied on the legislative history and this Court's statement in *Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972)*, that "business or property" referred to "commercial interests or enterprises." A contrary holding, the Court of Appeals observed, would add a substantial volume of litigation to the already strained dockets of the federal courts and could be used to exact unfair **[****13]** settlements from retail businesses. Small and medium-sized retailers would be especially hard hit by "gigantic consumer class actions," and granting standing to retail consumers might actually have an anticompetitive impact as a consequence. Accordingly, the Court of Appeals thought "it sensible as a matter of policy and compelled as a matter of law that consumers alleging no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act." *579 F.2d, at 1087*.

[*337] **[**2330]** We granted certiorari, *439 U.S. 1065 (1979)*. [2] **[****14]** We reverse. [3]

II

LEdHN[1B][] [1B] ***LEdHN[2]***[] [2]As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress. ***HN1***[] Section 4 of the Clayton Act, 38 Stat. 731, provides:

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[2] Differing views on this issue have been expressed by various courts. See, *e. g.,* ***Reiter v. Sonotone Corp., 579 F.2d 1077 (CA8 1978)*** (case below); *Bravman v. Bassett Furniture Industries, 552 F.2d 90, 98-99*, and n. 23 (CA3), cert. denied, ***434 U.S. 823 (1977)***; *Cleary v. Chalk, 159 U. S. App. D. C. 415, 419 n. 17, 488 F.2d 1315, 1319 n. 17 (1973)*, cert. denied, ***416 U.S. 938 (1974)***; *Theophil v. Sheller-Globe Corp., 446 F.Supp. 131 (EDNY 1978)*; *Gutierrez v. E. & J. Gallo Winery Co., 425 F.Supp. 1221 (ND Cal. 1977)*, appeal docketed, No. 77-1725 (CA9).

[3] The Court of Appeals expressly noted that Reiter's claim for injunctive relief under § 16 of the Clayton Act was not before it on interlocutory appeal. ***579 F.2d, at 1087 n. 19***. The court therefore expressed no view as to Reiter's standing to raise this claim. It also expressly refused to decide whether Reiter's claim for treble damages under § 4 was barred by the direct-purchaser rule of *Illinois Brick Co*. v. *Illinois, 431 U.S. 720 (1977)*. ***579 F.2d, at 1079 n. 3***. Accordingly, these issues are not before us.

"Any person who shall be injured in his business *or property* by reason of *anything* forbidden **[****15]** in the antitrust laws may sue therefor in any district court of the United States . . . 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* (emphasis added).

On its face, § 4 contains little in the way of restrictive language. In *Pfizer Inc*. v. *Government of India, 434 U.S. 308 (1978)*, we remarked:

"***HN2***[] 'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices **[*338]** by whomever they may be perpetrated.' *Mandeville Island Farms, Inc*. v. *American Crystal Sugar Co., 334 U.S. 219, 236*; cf. *Perma Life Mufflers, Inc*. v. *International Parts Corp., 392 U.S. 134, 138-139*. **[***937]** And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition. **[****16]** " *Id., at 312*.

LEdHN[3][] [3]Similarly here, ***HN3***[] the word "property" has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage "property" comprehends anything of material value owned or possessed. See, *e. g*., Webster's Third New International Dictionary 1818 (1961). Money, of course, is a form of property.

Respondents protest that, if the reference to "property" in § 4 means "money," the term "business" then becomes superfluous, for every injury in one's business necessarily involves a pecuniary injury. They argue that if Congress wished to permit one who lost only money to bring suit under § 4, it would not have used the restrictive phrase "business or property"; rather, it would have employed more generic language akin to that of § 16, for example, which provides for injunctive relief against any "threatened loss or damage." *15 U. S. C. § 26*. Congress plainly intended to exclude *some* category of injury in choosing the phrase "business or property" **[****17]** for § 4. Only a "commercial interest" gloss, they argue, both gives the phrase the restrictive significance intended for it and at the same time gives independent significance to the word "business" and the word "property." The argument of respondents is straightforward: the phrase "business or property" means "business activity or property related to one's business." Brief for Respondents 11 n. 7.

[2331]** ***LEdHN[4]***[] [4]***LEdHN[5]***[] [5]That strained construction would have us ignore the disjunctive "or" and rob the term "property" of its independent **[*339]** and ordinary significance; moreover, it would convert the noun "business" into an adjective. ***HN4***[] In construing a statute we are obliged to give effect, if possible, to every word Congress used. *United States v. Menasche, 348 U.S. 528, 538-539 (1955)*. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates **[****18]** otherwise; here it does not. See *FCC v. Pacifica Foundation, 438 U.S. 726, 739-740 (1978)*.***HN5***[] Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business."

LEdHN[1C][] [1C]When a commercial enterprise suffers a loss of money it suffers an injury in both its "business" and its "property." But neither term is rendered redundant by recognizing that a consumer not engaged in a "business" enterprise, but rather acquiring goods or services for personal use, is injured in "property" when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of. The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered. *E. g., Hamman v. United States, 267 F.Supp. 420, 432 (Mont. 1967)*.Congress must have intended to exclude some class of injuries by the phrase "business or property." But it **[****19]** taxes the ordinary meaning of common

[*938]** terms to argue, as respondents do, that a consumer's monetary injury arising directly out of a retail purchase is not comprehended by the natural and usual meaning of the phrase "business or property." We simply give the word "property" the independent significance to which it is entitled in this context. ***HN6***[] A consumer whose money has been diminished by reason of an antitrust violation has been injured "in his . . . property" within the meaning of § 4.

Indeed, this Court indicated as much in *Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1960)*. There the city alleged that the anticompetitive conduct of the defendants **[*340]** had caused the city to pay more for water pipes purchased for use in the city's water system. The defendants answered that the pecuniary injury resulting from the alleged overcharges did not injure the city in its "business or property" within the meaning of § 4. This Court, without relying on the fact that the city was engaged in a business enterprise, stated:

"The city was **[****20]** . . . injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *203 U.S., at 396*.

The holding of *Chattanooga Foundry* could well have been grounded on the undisputed fact that the city was engaged in the commercial enterprise of supplying water for a charge and, therefore, engaged in a business. It was not uncommon for both municipalities and private companies to own and operate competing waterworks at the turn of the century. In operating a municipal public utility, the city was in a real sense engaged in the "business of furnishing water" when it purchased the pipe to carry water from the city's reservoirs to its customers. *Ibid*.

Yet, the Court's holding in *Chattanooga Foundry* was deliberately grounded on the premise that the city had been injured in its "property" -- independent of any injury it had sustained in its "business of furnishing water" -- because the defendants' antitrust violation caused it to pay a higher price for the pipe than it otherwise would have paid. **[****21]** *Ibid. Chattanooga Foundry* therefore establishes that ***HN7***[] monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. Thus, the fact that petitioner Reiter was deprived of only money, albeit a modest **[**2332]** amount, is no reason to conclude that she did not sustain a "property" injury.

Nor does her status as a "consumer" change the nature of **[*341]** the injury she suffered or the intrinsic meaning of "property" in § 4. ***HN8***[] That consumers of retail goods and services have standing to sue under § 4 is implicit in our decision in *Goldfarb v. Virginia State Bar, 421 U.S. 773, 780, 782 (1975)*. There we held that a bar association was subject to a treble-damages suit brought under § 4 by persons who sought legal services in connection with the purchase of a residence. Furthermore, we have often referred to "consumers" as parties entitled to seek damages under § 4 without intimating that consumers **[***939]** of goods and services purchased **[****22]** for personal rather than commercial use were in any way foreclosed by the statutory language from asserting an injury in their "property." *E. g., Pfizer Inc*. v. *Government of India, 434 U.S., at 313-315*; *Brunswick Corp*. v. *Pueblo Bowl-O-Mat, Inc., 429 U.S., at 486 n. 10*; *Hanover Shoe, Inc*. v. *United Shoe Machinery Corp., 392 U.S. 481, 494 (1968)*; *Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)*.

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), is not to the contrary. There we held that injury to a state's total economy, for which the state sought redress in its *parens patriae* capacity, was not cognizable under § 4. It is true we noted that the words "business or property" refer to "commercial interests or enterprises," and reasoned that Hawaii could not recover on its claim for damage done to its "general economy" because such injury did not harm Hawaii's "commercial interests." *405 U.S., at 264*.

However, the language of an opinion is not always to be parsed as though we were dealing with language of a statute. Use of **[****23]** the phrase "commercial interests or enterprises," read in context, in no sense suggests that only injuries to a business entity are within the ambit of § 4. Respondents ignore the Court's careful use of the disjunctive and the naturally broad meaning of the term "interests" in *Hawaii v. Standard Oil Co., supra.* The phrase "commercial interests" was used there as a generic reference to the interests of the **[*342]** State of Hawaii as a party to a commercial transaction. This is apparent from *Hawaii*'s explicit reaffirmance of the rule of *Chattanooga Foundry* and statement that, where injury to a state "occurs in its capacity as a consumer in the marketplace" through a "payment of money wrongfully induced," treble damages are recoverable by a state under the Clayton Act. *Hawaii v. Standard Oil Co., supra, at 263 n. 14*. A central premise of our holding in *Hawaii* was concern over duplicative recoveries. We noted that a "large and ultimately indeterminable part of the injury to the 'general economy'" for which the State sued was "no more than a reflection of injuries to the 'business or property' of consumers" for which, on a **[****24]** proper showing, they could recover in their own right. *405 U.S., at 263-264*.

Consumers in the United States purchase at retail more than $ 1.2 trillion in goods and services annually. 1978 Economic Report of the President 257 (Table B-1). It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market. Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her "property" under § 4.

Nothing in the legislative history of § 4 conflicts with our holding today. **[***940]** Many courts and commentators have observed that the respective legislative histories of § 4 of the Clayton Act and § 7 of the **[**2333]** Sherman Act, its predecessor, shed no light on Congress' original understanding of the terms "business or property." [4] **[****26]** Nowhere in the legislative record **[*343]** is specific reference **[****25]** made to the intended scope of those terms. Respondents engage in speculation in arguing that the substitution of the terms "business or property" for the broader language originally proposed by Senator Sherman [5] was clearly intended to exclude pecuniary injuries suffered by those who purchase goods and services at retail for personal use. None of the subsequent floor debates reflect any such intent. On the contrary, they suggest that Congress designed the Sherman Act as a "consumer welfare prescription." R. Bork, The Antitrust Paradox 66 (1978). Certainly the leading proponents of the legislation perceived the treble-damages remedy of what is now § 4 as a means of protecting consumers from overcharges resulting from price fixing. *E. g*., 21 Cong. Rec. 2457, 2460, 2558 (1890). Because Congress in 1890 rejected a proposal to allow a group of consumers to bring a collective action as a class, some legislators questioned whether individual consumers would be willing to bring actions for relatively small amounts. See, *e. g., id*., at 1767-1768, 2569, 2612, 3147-3148, 3150. At no time, however, was the *right* of a consumer to bring an action for damages questioned. [6]

LEdHN[6A][] [6A]In *Brunswick Corp*. v. *Pueblo Bowl-O-Mat, Inc., supra*, after examining the legislative history of § 4, we described the Sherman Act as "conceived of primarily as a remedy for '[the] people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as '[opening] the door of justice **[*344]** to every man . . . and [giving] the injured party ample damages for the wrong suffered.'" *429 U.S., at 486 n. 10*. Thus, to the extent that the legislative history is relevant, **[****27]** it supports our

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[4] See, *e. g., Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972)*; *Weinberg v. Federated Department Stores, Inc., 426 F.Supp. 880, 882-883 (ND Cal. 1977)*, appeal docketed, No. 77-1547 (CA9); M. Forkosch, Antitrust and the Consumer 2-3 (1956); Comment, Closing the Door on Consumer Antitrust Standing, 54 N. Y. U. L. Rev. 237, 242-243, 249-252 (1979). See also 1 P. Areeda & D. Turner, ***Antitrust Law*** para. 106, pp. 14-16 (1978).

[5] As originally introduced, the bill that ultimately became the Sherman Act authorized "any person or corporation injured or damnified by [an unlawful] arrangement, contract, agreement, trust, or combination" to sue for damages thereby sustained. S. 1, 51st Cong., 1st Sess., *§ 2* (1889).

[6] Of course, the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of *Fed. Rule Civ. Proc. 23*.

holding that a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in "property" within the meaning of § 4. [7]

LEdHN[6B][] [6B]

Respondents **[***941]** also argue that allowing class actions **[****28]** to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. HN9[] We must take the statute as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. Indeed, nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice. Administrative Office **[**2334]** of the United States Courts Ann. Rep. 101, Table 28 (1978). To be sure, these private suits impose a heavy litigation burden on the federal courts; it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates.

LEdHN[7][] [7]Finally, **[****29]** respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by **[*345]** consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be -- and they are not without substance -- they cannot govern our reading of the plain language in § 4.

District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions. See generally Durham & Dibble, Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation, 1978 B.Y.U.L. Rev. 299. Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class-action harassment, or "windfall" settlements if the district courts exercise sound discretion and use **[****30]** the tools available.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN took no part in the decision of this case.

Concur by: REHNQUIST

Concur

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion and write separately only to point out that the concern expressed by the Court of Appeals that an interpretation of "business or property" in the manner in which the Court interprets it today would "add a substantial **[***942]** volume of litigation to the already strained dockets of the federal courts and could be used to

[7] Although in no sense a controlling consideration, we note that our holding is consistent with the assumption on which Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, 15 U. S. C. § 15c et seq. The text and legislative history of this statute make clear that in 1976 Congress believed that consumers have a cause of action under § 4, which the statute authorizes the states to assert in a *parens patriae* capacity. See, *e. g*., 15 U. S. C. §§ 15c (a)(1), 15c (a)(1)(B)(ii), 15c (b)(2); H. R. Rep. No. 94-499, pp. 6, 9 (1975). See also *Illinois Brick Co*. v. Illinois, 431 U.S., at 734 n. 14.

exact unfair settlements from retail businesses," *ante*, at 336, is by no means an unfounded one. And pronouncements from this Court exhorting district courts to be "especially alert to identify frivolous **[*346]** claims brought to extort nuisance settlements" will not be a complete solution for those courts which are actually on the firing line in this type of litigation. *Ante*, at 345. But I fully agree that we must take the statute as Congress wrote it, and I also fully agree with the Court's construction of the phrase "business **[****31]** or property." I think that the Court's observation, *ante*, at 343 n. 6, that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of *Fed. Rule Civ. Proc. 23*" is a miracle of understatement; and in the absence of any jurisdictional limit, there is considerable doubt in my mind whether this type of action is indeed ultimately of primary benefit to consumers themselves, who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services. Be that as it may, the problem, if there is one, is for Congress and not for the courts.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 360

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 15

US L Ed Digest, Restraints of Trade and Monopolies 67

L Ed Index to Annos, Damages; Restraints of Trade and Monopolies

ALR Quick Index, Double or Treble Damages

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Supreme **[****32]** Court's views on weight to be accorded to pronouncements of legislature, or members of legislature, respecting meaning or intent of previously enacted statute. *56 L Ed 2d 918*.

Authority of state to sue as parens patriae to recover treble damages under 4 of Clayton Act (*15 USCS 15*). 23 ALR Fed 878.

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LK Productions, Inc. v. American Federation of Television & Radio Artists

United States District Court for the Southern District of Texas, Houston Division

June 13, 1979

Civ. A. No. 74-H-942

Reporter
475 F. Supp. 251 *; 1979 U.S. Dist. LEXIS 11765 **; 101 L.R.R.M. 2900; 86 Lab. Cas. (CCH) P11,408; 1979-2 Trade Cas. (CCH) P62,871

LK PRODUCTIONS, INC.; HARRY LIEBERMAN, a/k/a LARRY KANE; and KANE & KOMPANY, Plaintiffs v. THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AND THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DALLAS-FORT WORTH LOCAL, Defendants

Core Terms

stars, producer, top, television, performers, unfair, Answers, anti trust law, artist, collective bargaining agreement, recording, radio, employer group, Clayton Act, Productions, markets, cases, appearing, Sherman Act, adherence, syndicate, networks, Norris-LaGuardia Act, advertisers, agrees, Defendants', conspiracy, negotiate, sponsors, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] Antitrust & Trade Law, Sherman Act

The mere fact that union conduct may violate established law does not justify a conclusion that the union conduct violated the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

The Sherman Act is not applicable unless the facts present some form of restraint upon commercial competition in the marketing of goods or services.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

HN3[] Antitrust & Trade Law, Sherman Act

Some form of restraint of commercial competition is the sine qua non to the condemnation of contracts, combinations, or conspiracies under the Sherman Act, and general restraints upon competition are condemned only when their purpose or effect is to raise or fix the market price.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Since the enactment of the declaration in § 6 of the Clayton Act that the labor of a human being is not a commodity or article of commerce nor shall such labor organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws, restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN5[] **Antitrust & Trade Law, Sherman Act**

Strikes or agreements to not work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

Counsel: [1]** Vinson & Elkins, Eleanor S. Glass and Harry Reasoner, Saccamanno, Clegg, Martin & Kipple, Charles Kipple, Houston, Tex., for plaintiffs.

Dixie, Wolf & Hall, Chris Dixie and Louise Gilmore, Houston, Tex., for defendants.

Opinion by: COWAN

Opinion

[*252] MEMORANDUM OPINION RELATING TO ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

Introduction and Outline

Defendants' Motion for Partial Summary Judgment seeks to eliminate the plaintiffs' antitrust allegations from this case. Defendants' motion seeks no relief from plaintiffs' cause of action based on alleged unfair labor practices in violation of the National Labor Relations Act. This memorandum will set out the reasons for the court's action in granting defendants' motion.

This memorandum opinion will:

I. Summarize the record (pp. 252 to 266);

II. Discuss the controlling authorities (pp. 266 to 273); and

III. Distinguish those authorities which are arguably applicable but not controlling (p. 273).

The issue here is not whether Kane has a cause of action of some type the issue is whether he is entitled to Treble damages and attorneys fees under the antitrust laws.

I.

SUMMARY OF THE RECORD

[2]** Record before the Court

The record consists of the following documentary material and testimony: Deposition of Harry Lieberman, a/k/a Larry Kane, taken on January 30, 1976 (Kane deposition); Affidavit of Eleanor S. Glass, counsel for plaintiffs, authenticating minutes **[*253]** of the meeting of the Board of Directors of AFTRA Dallas-Fort Worth Local and additional significant correspondence relating to the matters in controversy (Glass affidavit); Affidavit of Harry Lieberman, a/k/a Larry Kane (hereinafter "Kane"), filed in this court on January 12, 1979 (Kane affidavit); Affidavit of Sanford R. Wolff, National Executive Secretary of defendant AFTRA; Defendants' Supplemental Answers to Plaintiffs' Second Request for Production of Documents, filed herein on January 3, 1979; transcript of a two-day hearing conducted before Administrative Law Judge Lloyd Buchanan, on January 8 and 9, 1974 (hereinafter "NLRB transcript"); Defendants' Answers to Plaintiffs' First Set of Interrogatories, filed on March 14, 1978, along with voluminous exhibits to the answers appearing in this record in a folder labeled "Attachments No. 28" and numbered 1-A et seq. (hereinafter "Defendants Answers"); **[**3]** and a detailed First Amended Complaint setting out the alleged antitrust cause of action.

Nature of Defendants and Their Collective Bargaining Agreements

The nature of defendant AFTRA is established by Exh. 3 to Defendants Answers constituting the Articles of Agreement and Constitution of the American Federation of Television and Radio Artists (hereinafter referred to as the "AFTRA Constitution"). AFTRA is a voluntary association formed to advance and benefit ". . . all those connected with performances in the field of radio, television and phonograph recordings . . ." Among other things, its objectives are

> . . . to protect and secure the rights of the above-described persons in their professional activities;
>
> . . . to promulgate and carry into effect such policies as shall secure the united action of all members of the said professions for the common good;
>
> . . . to assist such persons in securing just and equitable contracts, agreements, working conditions, and minimum compensation in their dealings with employers, producers, networks, stations, advertising agencies, sponsors, independent packagers, transcription companies, phonograph recording companies, agents, **[**4]** managers, impresarios, and others connected directly or indirectly with radio, television, or phonograph record business;
>
> . . . to investigate the practices of such employers, producers, networks, stations, advertising agencies, sponsors, independent packagers, transcription companies, phonograph recording companies, agents, managers, impresarios, and others and to take united action to abolish unfair dealings or abuses or other conditions which are detrimental to persons engaged in the said professions;
>
> . . . to bargain collectively on behalf of its members and to deal with employers, producers, networks, stations, advertising agencies, sponsors, independent packagers, transcription companies, phonograph recording

companies, agents, managers, impresarios and others whose activities affect the members concerning grievances, standard contractual relations, minimum wages and conditions, and concerning all related and collateral abuses that may affect the welfare of the members.

Persons eligible for membership in AFTRA are:

Any person who has performed, or intends to perform, as an actor, singer, dancer, announcer, newsperson, narrator, commentator, lecturer, **[**5]** analyst, M.C., sound effects artist, graphic artist, manual artist, demonstrator, moderator, panel member, specialist, quiz person, disc jockey, sportscaster, specialty act, puppeteer, model, walk-on, extra or supernumerary in the fields of radio, television and phonograph recordings . . .

Article V of the AFTRA Constitution provides that:

No person shall become a member of the Association, or of any Local thereof, unless and until such person signs an application which shall substantially provide that such person agrees to be bound by the respective constitutions of the Association **[*254]** and the Local and by such amendments thereto as may thereafter be lawfully made, and by any bylaws, rules, regulations and orders existing or thereafter lawfully enacted pursuant to such constitutions and any amendments thereto.

Article VIII of the AFTRA Constitution provides for the establishment of local unions whose constitutions and bylaws "shall be consistent with the constitution and bylaws of the Association approved by the National Board . . ."

Article XXII of the AFTRA Constitution provides that:

The Association through its National Board may order the members **[**6]** of all Locals to refrain for a given time . . . from working for, dealing with, or having any business or professional relations with, any one or more employers, producers, networks, stations, advertising agencies, sponsors, independent packagers, transcription companies, phonograph recording companies, agents, managers, impresarios or other persons connected with the radio or phonograph record business . . .

The remaining portions of Article XXII deal with certain limitations upon the exercise of this power and prescribe definite procedures which must be followed before such an order may be issued. Article XVIII of the AFTRA Constitution provides that:

Any member who shall be guilty of an act, omission, or conduct which in the opinion of the Board is prejudicial to the welfare of the Association, or any of its Locals, or of any of its members, as such . . . may . . . be either fined, censored, suspended or expelled from membership.

Article XVIII of the AFTRA Constitution sets forth the relationship between AFTRA and its Locals, and provides in its pertinent parts:

The relation of each Local to this Association is that of an organization accepting certain rights **[**7]** vested in this Association, and agreeing in consideration of the giving of said rights, to assume the obligation set forth in this Constitution; and the acceptance of rights hereunder by the several Locals, shall not be deemed, at this time, to create any partnership or joint venture between them.

Article XXV provides that any member who has or asserts a claim against the Association, or any of its Locals, must submit his dispute to compulsory arbitration.

The nature of the Dallas-Fort Worth Local is established by Exh. 3-A to Defendants' Answers, and constitutes the Articles of Agreement, Constitution and Bylaws of the Dallas-Fort Worth Local of the American Federation of Television and Radio Artists (hereinafter "AFTRA Local Constitution"). The AFTRA Local Constitution provides that all members becoming members of the Local shall be deemed members of the national Association and subject to its jurisdiction. (See Art. 3, Sec. 3 of the AFTRA Local Constitution).

The AFTRA Local Constitution repeats many of the provisions contained in the AFTRA Constitution, including the provision that every applicant for membership ". . . shall sign an application on such form as shall be **[**8]** prescribed by the Local Board which shall substantially provide that he agrees to be bound by the respective constitutions of the Federation and of the Dallas-Fort Worth Local . . ." (see Art. V, Sec. 1)

Article XII Sec. 1 of the AFTRA Local Constitution provides that:

> Subject to the approval of the National Board, the Local, through its Local Board, may order its members to refrain for a given time or until further order of the Local Board under specified conditions or in any manner whatsoever from working for, dealing with, or having any business or professional relations with any one or more employers, agents, managers, impresarios, or other persons connected with the radio, television or phonograph record business . . .

Article XX of the AFTRA Local Constitution also provides that unless the national Board grants an exemption, ". . . the exclusive remedy of any member who has **[*255]** or asserts a claim against the Federation, any of its Locals, or other subdivisions . . ." shall be by a compulsory arbitration procedure.

Collective Bargaining Agreements Negotiated By AFTRA

The collective bargaining agreements which AFTRA and its Locals negotiate with various ". **[**9]** . . employers, producers, networks, stations, advertising agencies, sponsors, independent packagers, transcription companies, phonograph recording companies, agents, managers, impresarios and others connected directly or indirectly with radio, television, phonograph record business . . ." are established by a number of the exhibits to Defendants' Answers. The AFTRA collective bargaining agreement applicable to the television industry is in the record as Exh. 6 to Defendants Answers. The pertinent parts are:

Paragraphs 1 through 74 basically set forth detailed rules concerning wages, hours and conditions of employment.

Paragraph 75 contains detailed provisions concerning "People Covered" and provides essentially that those persons covered are "All persons who perform as talent, e.g., Masters of Ceremonies, . . ."

Paragraph 78 entitled "Waivers" is significant. This paragraph plus the agreement which AFTRA Dallas-Fort Worth Local eventually worked out with Kane in December 1971 (see discussion, p. 262, Infra) establish that nothing in the rules, procedures or customary practices of AFTRA or AFTRA locals prevent them from bargaining separately with each employer group. The second **[**10]** paragraph of Paragraph 78 provides:

> The wages and working conditions set forth herein are the minimum wages and working conditions for the employment of television artists in the categories mentioned above and no waiver of any such wages or working conditions by any artist shall be effective unless the written consent of AFTRA to such waiver is first had and obtained.

Pursuant to the authority granted by this paragraph, AFTRA Dallas-Fort Worth Local (its action later confirmed by AFTRA) agreed with Kane that during his formative period, while he was attempting to get his business on its feet, he was not required to pay union scale but was to pay only $ 50 per artist per performance and make a 6 1/2 % Contribution to the AFTRA Pension and Welfare Fund. This provision is, it seems to the court, significant in the light of Pennington, infra, in that it demonstrates that defendants were not required to and did not here attempt to impose union scale upon those employers who were financially unable to pay.

Paragraph 84 entitled "Union Shop" contains the following significant provision:

> American Federation of Television and Radio Artists agrees that it is and will continue to **[**11]** be an open union and that it will keep its membership rolls open and will admit to membership all eligible television artists engaged by the producers. American Federation of Television and Radio Artists agrees not to impose unreasonable entrance fees or dues upon its members and wherever necessary for the producers' program purposes to qualify members within 24 hours after notice from the producer.

This provision is significant in view of the concern expressed in Carroll, infra, and Allen Bradley, infra, where the courts apparently believed it wise to deny a union the power to exclude a particular group of businessmen from a relevant market. In the context of this case, the union could never prevent a "top star" from appearing on the Larry Kane Show since such person would always have a virtually absolute right to become a union member.

Paragraph 92 of the collective bargaining agreement defines the situation in which a producer may be declared an "unfair producer."

Paragraph 93 contains a commitment that AFTRA will not strike any producer who performs in accordance with the Code.

Paragraph 95 sets up a detailed arbitration procedure to resolve controversies between **[*256]** **[**12]** any producer and AFTRA or between any producer and a member of AFTRA.

Paragraph 102 of the collective bargaining agreement relates to the detailed provisions with reference to the collection of funds for the AFTRA Pension & Welfare Fund.

The collective bargaining agreement, entitled "1969-1972 National Code of Fair Practice for Network Television Broadcasting" construed in conjunction with the AFTRA Constitution and the AFTRA Local Constitution, makes it clear that the union and the signatories of the collective bargaining agreement contemplated that the "employer group" would include

> . . . employers, producers, networks, stations, advertising agencies, sponsors, independent packagers, transcription companies, phonograph recording companies, agents, managers, impresarios, and others connected directly or indirectly with the radio, television or phonograph record business . . .

The agreement contemplated that the "employee group" would include

> . . . any person who has performed or intends to perform as an actor, singer, dancer, announcer, newsperson, narrator, commentator, lecturer, analyst, Master of Ceremonies, sound effects artists, graphic artists, manual artists, demonstrator, **[**13]** moderator, panel member, specialist, quiz person, disc jockey, sportscaster, speciality act, puppeteer, model, walk-on, extra, or supernumerary, in the field of radio, television and phonograph recordings . . .

Part of the key to this case is that some persons, like Larry Kane and Dick Clark, would be both "employees" and also part of the "employer group" similar to the orchestra leaders, whose activities were in issue in American Federation of Musicians v. Carroll, infra, pg. 260. A person like Larry Kane or Dick Clark, who was both an employer and a member of the "labor group," is also, in the undersigned's analysis, to some degree analogous to the truck driver who owns his own rig in International Brotherhood of Teamsters v. Oliver, infra, pg. 266, and *California Dump Truck Owners Association v. Associated General Contractors, 562 F.2d 607 (9th Cir. 1977)*.

The nature of the "employer group" is illustrated by Exh. 7 to Defendants Answers, listing literally hundreds of employers who have agreed to comply with one or another of the various AFTRA Codes. Examination of this exhibit reveals that members of the employer group include record companies, advertising agencies, charitable **[**14]** organizations such as the Lutheran Church; well-known entertainers who are also producers such as Ray Charles; political organizations such as various branches of the Democratic Party; the various political action committees such as the Committee to Elect Joseph Early to Congress and the Committee to Elect Judge Nicholas Tsoucalas; major corporate entities such as Cook Paint & Varnish Company through their advertising manager; the Ford Motor Company, Photo-Media Department. Examination of Exh. 7 also reveals that apparently AFTRA and the AFTRA Dallas Local have never been particularly active in organizing activities in the Houston area since very few of the signatories listed in Exh. 7 appear to be Houston-based companies. This fact is at least a partial explanation of why defendants exhibited little interest in Kane during the years when he operated his show locally as an employee of Channel 13.

The Larry Kane Show and Its Demise

In 1959 Kane, an ex-disc jockey and then a student at the University of Houston began to host the "Larry Kane Show" on KTRH-TV, Channel 13, a local Houston, Texas television station. Kane continued his endeavor for a decade as an employee of Channel 13.

[15]** Kane's program was successful and popular locally.

The basic concept of Kane's program was that for one or two hours on a Saturday afternoon, he would host what was essentially a party in the Channel 13 studio at which a number of teenagers would dance **[*257]** to recorded music. In addition, during the course of the program, two or three "top stars" would appear in person, sing or otherwise perform, and then participate in an interview with Kane. Intervals for commercials were interspersed through the show.

Despite the simplicity of the concept, a fairly elaborate production staff was required to produce the show. It was necessary to have a director, an assistant director, a dance director, cameramen, makeup personnel and talent directors to schedule and care for the "top stars." Studio facilities were necessary.

Kane, while in charge of this entire operation, was himself a performer. The program typically commenced with Kane being introduced, thereafter participating in the first dance; this activity would normally be followed by a commercial break, and thereafter the first top star would be interviewed by Kane. Kane prepared for his performance by acquainting himself with **[**16]** the top star and determining what the top star wished to talk about during the interview. (See NLRB transcript, p. 227, et seq; and p. 274, et seq).

The concept of the Larry Kane Show is not unique. Similar shows have appeared in Chicago, Los Angeles, Nashville and in other markets. Sanford Wolff, National Executive Secretary and the chief executive officer of AFTRA, has testified, without contradiction, that Kane-type shows produced in Chicago, Los Angeles, Nashville and others of which he had knowledge, were produced under AFTRA collective bargaining agreements in which recording artists were paid for performing services on the programs. (NLRB transcript pp. 307-315). Probably the best known of these shows is Dick Clark's "American Bandstand" program.

While Mr. Wolff testified before the NLRB hearing (see NLRB transcript p. 315, et seq) that shows like the Larry Kane Show were customarily produced with the producer paying union scale, it is inferable from certain of Mr. Wolff's correspondence (see letter, Infra, p. 261) and from the fact that Kane was able to continue to obtain "top stars" even after he was placed on the unfair list that both AFTRA and the American Federation of **[**17]** Musicians have had considerable difficulty in persuading their own members to refrain voluntarily from working on record promotion shows like the Larry Kane Show. This inference could also arise from the fact that the AFTRA Dallas Local was obviously very reluctant to undertake the chore of persuading Kane to sign a "letter of adherence" and pay union scale to the top stars who appeared on his show.

During the decade from 1959 to 1969, while Kane was an employee of Channel 13 and acting as host of the Larry Kane Show, he devised a method of obtaining the services of the "top stars" without making a monetary payment to the top stars. As a general rule, each of the "top stars" was attempting to promote a record or his own career. Many "top stars" were willing to appear on the Kane show simply for the public exposure which they received. Generally, Channel 13 would pay only for the performer's lodging and ground transportation while in the Houston area. Kane would normally arrange for the appearance of the "top stars" through the star's agent, or through a record company with which the star had a contract.

During the actual performance, Kane exercised little detailed control over the **[**18]** manner in which the star performed. For example, Kane did not tell the star what to sing or how to sing, or prescribe his costume. Administrative Law Judge Buchanan accurately observed that Kane would not demand that Al Jolson refrain from singing on his knees. On the other hand, Kane did control totally the environment in which the star performed in the sense of controlling the teenaged dancers, the cameramen, directors, dancing coordinators, and the time allotted to the "top stars." Administrative Law Judge Buchanan, who conducted the detailed hearing described above, has found that the "top stars" had the legal status of independent contractors.

[*258] For purposes of this motion, it must be assumed that the "top stars" did in fact have the legal status of independent contractors. It is apparent, however, that they were "independent contractors" of a specialized variety. The manner in which they performed their function was certainly considerably different from the manner in which an independent contractor in the construction business performs his work. Additionally, Kane, while his corporation ultimately became an "employer" of some of the personnel putting on his show, **[**19]** was also always a performer. He actively participated in and was a vital part of the entire show.

On occasion, a star's agent or the record company with whom Kane was dealing would ask whether or not Kane paid the union scale. Kane would reply that he did not. Significantly, Kane has testified on his deposition that his basic plan throughout the entire period of his syndication was that the performers would be paid nothing. (Kane deposition pp. 66-68). Despite this plan, however, as will be shown at a later point in this narrative, Kane did ultimately agree to pay the performers. (See discussion of meeting of December 1971, Infra, p. 262).

In 1969 and 1970, Kane because restive in his relationship with Channel 13. In March of 1969, Kane formed a corporation, LK Productions, Inc., one of the plaintiffs herein, for the purpose of syndicating the Larry Kane Show. By "syndication" in this context is meant that the Kane show would be taped and an effort made to market the tapes to television stations or other possible purchasers located in other areas of the country.

Contemporaneously with Kane's formation of LK Productions, Inc., or shortly thereafter, the management of Channel 13 changed. **[**20]** The new management of Channel 13 was not enthusiastic about Kane's plans to syndicate his show and attempted to persuade him to continue to produce the show locally as he had done successfully over the last ten years. Kane was unwilling to accept this advice and continued with his plans to syndicate his show.

Eventually Kane terminated his employer/employee relationship with Channel 13 and intensified his efforts to syndicate his show. Initially he continued to produce the show at Channel 13 but became dissatisfied with the charges which Channel 13 levied upon him for the use of its facilities, and thus he moved his office close to an entity known as Mobile Color, Inc., where he was able to continue to produce his shows. At the time he moved from Channel 13, Kane also entered a business relationship with an entity known as Bing Crosby Productions, later Tele-Com (hereinafter "Crosby/Tele-Com").

Kane's arrangement with Crosby/Tele-Com was that Crosby/Tele-Com was to syndicate Kane's show nationally on a "barter" basis. A show is syndicated on a barter basis by making arrangements with networks and local television stations to use the syndicated show, without charge. The syndicator, **[**21]** however reserves the right to sell to advertisers some of the time which has been reserved during the shows.

Kane's relationship with Crosby/Tele-Com, which extended from the time Kane left Channel 13 in 1970 until Kane terminated with Crosby/Tele-Com in August of 1971, was ultimately unhappy.

Kane testifies that Crosby/Tele-Com did an excellent job of placing his show with non-paying stations in various markets, but did not succeed in selling the advertising spaces or obtaining sponsors. In this connection, some of Kane's regular advertisers during the period that he was an employee of Channel 13 were Gordon's Jewelry, Texas State Optical, and O. J. Beauty Lotion. All of these advertisers are local or regional advertisers. These advertisers remained with him when he established his relationship with Crosby/Tele-Com. The only additional substantial advertiser that Crosby/Tele-Com was ever able to obtain was Vicks, for their product Clearasil. This relationship with Vicks terminated in June 1971.

By January 1971, Crosby/Tele-Com had been successful in "placing" Kane's show on **[*259]** non-paying television stations in over 25 states. The only problem was that Crosby/Tele-Com was **[**22]** unsuccessful in selling the advertising spots, or obtaining "sponsors" for the Larry Kane Show. The television stations paid nothing for the use of the Kane show under the arrangement with Crosby/Tele-Com.

During the decade when Kane was an employee of Channel 13 and was producing the Larry Kane Show locally, none of the defendants exhibited any interest in him, possibly because the Houston area has apparently never been actively or extensively organized by defendants. That disinterest changed in 1971 when Kane's show began to be aired in Los Angeles, New York and other areas in which there were strong and active local AFTRA chapters.

A detailed understanding of events which occurred from the spring of 1971 until the fall of 1972 may be obtained from correspondence which appears in this record appended to the affidavit of Eleanor S. Glass, and also appended as exhibits to "Defendants Answers." The parties to this detailed correspondence are John Kunsak, Jr., a/k/a "Johnny K," a/k/a "Johnny," the Executive Secretary of the AFTRA Dallas-Fort Worth local; David Tytherleigh, Executive Secretary of the AFTRA Los Angeles Local; Sanford Wolff, Executive Secretary of AFTRA National;

Claude **[**23]** McCue, Executive Secretary of AFTRA Los Angeles Local; and Sharon Mayhew, an employee and representative of the Dallas-Fort Worth Local.

The record (Eleanor Glass affidavit, Exh. I-A) contains a copy of a letter from David O. Tytherleigh, Assistant Executive Secretary of the Los Angeles Local, to Sanford Wolff, the National Executive Secretary, advising that the Larry Kane Show was to be shown at Station KTLA in Los Angeles on April 24, 1971. Wolff was advised that the program was made available free on a barter deal by the distributor, Tele-Com Productions. Tytherleigh concludes his letter to Wolff by stating:

I realize how difficult it is to control these record promotion shows. . . .

It is a fair inference that the AFTRA Dallas-Fort Worth Local, in response to pressure from Wolff, began efforts to persuade Kane to pay the union scale to "top stars." In the spring or summer of 1971 Kunsak told Kane that AFTRA and its Dallas-Fort Worth Local would place his show on the unfair list and cut off the supply of entertainers if Kane did not sign a "letter of adherence." Letters of adherence are described in Paragraph 89(a) of the 1969-1972 National Code of Fair Practice for Network **[**24]** Television Broadcasting (see Exh. 6 to Defendants Answers). The signer of a letter of adherence basically acknowledges receipt of a number of AFTRA codes, and agrees to abide by and conform to the codes, which prescribe wages, hours and terms of employment. The signer of the letter of adherence also agrees to the arbitration provisions of the various codes and agrees to make contributions to the AFTRA Pension & Welfare Fund according to the AFTRA Pension & Welfare Fund's Agreement and Declaration of Trust, dated November 16, 1954.

A "letter of adherence" is visualized more accurately by examination of Exh. 6(a) to Defendants Answers; it is the type of letter agreement which AFTRA and its locals attempt to obtain from producers like Kane, in which Kane in effect acknowledges receipt of the national code and agrees to be bound by the terms and provisions of the code, except as modified in any supplemental letter agreements.

In addition to the collective bargaining agreement entitled "1969-1972 National Code of Fair Practice for Network Television Broadcasting" which obviously covers television broadcasting, AFTRA also promulgated and attempted to negotiate adherence to codes of fair **[**25]** practice for commercial radio broadcasting (see Exh. 6 to Defendants Answers) for radio recorded commercials, or television recorded commercials, and for radio transcribed commercials.

Also illustrative of a typical "letter of adherence" is Exh. 83 to Defendants Answers, entitled "Screen Actors Guild American Federation of Television and Radio Artists **[*260]** Texas Local and Regional Contract Letters of Adherence." This letter of adherence is similar to that set out in the collective bargaining agreement itself and states that the "producer/advertising agency signatory . . . " acknowledges receipt of the American Federation of Television and Radio Artists Code of Fair Practice for Transcriptions for Broadcast Purposes, and the 1969-1972 AFTRA National Code of Fair Practice for Recorded Commercials for Television Broadcasting Purposes, and agrees to comply with the terms and conditions of said documents and also sets out certain rates for appearances on commercials which are applicable in Texas, Arkansas, Oklahoma, Louisiana and New Mexico areas. See also Exh. 8(a) (10) to the Defendants Answers to illustrate a typical form of letter of adherence.

The inference could be drawn **[**26]** from the record, and in fact it may be established almost conclusively that the reluctant AFTRA Dallas-Fort Worth Local responded to pressures from the Los Angeles Local and that the Los Angeles Local succeeded in enlisting Mr. Wolff of the National Association in encouraging the AFTRA Dallas-Fort Worth Local to take action against Kane. It could also be fairly inferred that the Dallas Local was motivated by complaints from Dick Clark, who paid union scale and was the signatory to an AFTRA letter of adherence. While the record contains no detailed information concerning Clark's operation, it is undisputed in the evidence that Clark's operation was basically similar to that of Kane's. This is important because Clark, being a performer himself, was clearly not an "employer group." (See *American Federation of Musicians v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*, and International Brotherhood of Teamsters v. Oliver, infra.)

The record is unclear as to what response Kane made to Kunsak's demands, but the record does establish that in the summer of 1971, Kane himself became a member of AFTRA (NLRB transcript p. 240). Kane was still a member of AFTRA at the time of **[**27]** his testimony before Administrative Law Judge Buchanan in January of 1973.

Kane's application for membership in AFTRA is not before the court; however, the AFTRA Articles of Agreement and Constitution are before the Court (Defendants Answers Exh. 3). Article V of the AFTRA Constitution provides that "No person shall become a member of the Association, or of any Local thereof, unless and until . . . " such person executes an application agreeing to abide by the constitution, bylaws, rules, regulations and orders of AFTRA and its locals.

In August of 1971, Kane terminated his relationship with Crosby/Tele-Com. Kane has testified that the reason for this termination was that Crosby/Tele-Com had failed to make accurate and detailed accountings of the moneys due Kane and because Crosby/Tele-Com had obtained only one national advertiser, Vicks, and the relationship with Vicks had terminated the previous June. Kane determined in August 1971 that he was going to syndicate his own show and was going to make his own efforts to sell the show to various markets and to obtain advertisers. He was hindered in this connection, however, because Kane and LK Productions, Inc. did not have sufficient **[**28]** funds to enable its sales personnel to travel. Kane also determined that he was no longer going to market his show on a "barter" basis but was going to demand payment from a television station before furnishing his product.

In August of 1971, LK Productions, Inc. "went into reruns." A television show goes into reruns when it ceases producing shows regularly and begins to show again those shows which have been previously performed and taped. Kane testifies that following the severance of his ties with Crosby/Tele-Com in August 1971, he had a sequence of 18 simultaneous reruns, which caused remaining sponsors to become very concerned. (Kane deposition, p. 54).

Kane's strained financial circumstances and the nature of his conversations with AFTRA Dallas Local representatives during the summer of 1971 is further illustrated by Sharon Mayhew's letter of August 9, **[*261]** 1971 to David Tytherleigh of the Los Angeles Local. Sharon Mayhew was a representative of the Dallas Local. Mayhew's letter of August 9 reports that Kane had told Kunsak (another representative of the Dallas local) that Crosby/Tele-Com had advanced Kane $ 10,000 and was dunning him for repayment and that Kane's principal **[**29]** objection to paying scale was that he simply had no money. Mayhew reported to Tytherleigh that:

> The gist of the matter, however, is that Kane has no money to pay performers because TCP has not paid him; that TCP is dunning him for repayment of an "advance"; that performers have all agreed to do the show strictly for the promotion aspect.

(TCP is Tele-Com Productions, herein called Crosby/Tele-Com). (See Exh. 13 to Defendants Answers).

Tytherleigh's letter to Mayhew of August 12, 1971 (Exh. 13 to Defendants Answers) reveals that Tytherleigh was not impressed with Kane's financial difficulties and that he insisted that so long as Kane continued to produce shows, he should be a required signatory to the AFTRA network TV code.

During August, October and November of 1971, the Larry Kane Show was still being seen in a number of states, although Kane was not being adequately compensated because of the failure of Crosby/Tele-Com to obtain sponsors. Both AFTRA and the Los Angeles Local continued to encourage the Dallas-Fort Worth Local to take more vigorous action toward obtaining what they regarded as compliance from Kane. The record (Eleanor Glass affidavit Exh. II) contains a letter **[**30]** from Mr. Tytherleigh of the Los Angeles Local to the Dallas-Fort Worth Local, stating:

> Thank you for your letter of August 9, 1971 together with the enclosures thereto.
>
> If Larry Kane made a bad deal with TCP, AFTRA, so far as I know, is in no position to collect his money for him as a producer. Herb Neuer, being in Chicago where TCP is located, is in a better position to know if there is any lever to be used. In the meanwhile, Kane continues to produce shows and is not a signatory to the AFTRA Network TV Code, which covers syndicated shows such as his. It is my feeling that there is no alternative but to have the Dallas Local Board of Directors request the National Board to declare his company and Larry Kane as

> an individual "unfair,' and for AFTRA to so notify its members thereafter ordering them not to perform services for or on behalf of Larry Kane or LK Productions. When work is performed that is applicable to one of the national codes and when the result of such production is exhibited in other cities, it is not the prerogative of the Local where the production occurs to waive compliance with the applicable Code. At least that is what I have always understood to be **[**31]** the rule.

One possible inference from this letter is that Kane had joined AFTRA in the hope that AFTRA would aid him in his continuing controversy with Crosby/Tele-Com. Another possible inference is that the defendants were attempting to place Kane in a better financial position by assisting him in his controversy with Crosby/Tele-Com.

On October 5, 1971, Tytherleigh of the Los Angeles Local wrote another letter to the Dallas-Fort Worth Local inquiring what action was to be taken with reference to Kane and encouraging the Dallas-Fort Worth Local to take action to declare Kane "unfair." (See Eleanor Glass affidavit Exh. III).

On October 28, 1971, Claude McCue, the Executive Secretary of the Los Angeles Local, directed another letter to the Dallas Local complaining about Kane and the failure of the Dallas Local to take some action with reference to Kane. In response to this letter, a copy of which went to Sanford Wolff, National Executive Secretary, Mr. Wolff responded to the Los Angeles Local, with copies to the Dallas-Fort Worth Local, in a letter containing the following language:

> Dear Claude:
>
> By copy of this letter John Kunsak will know that I agree with your strong **[**32]** recommendations and I hope that the action **[*262]** recommended by you is taken by the Dallas Local Board on November 8th.
>
> I think that out of Johnny's letter comes one thought that should give us significant pause. I believe that we need a strong rule with regard to members working on programs that are non-signatories and concerning which fees are not paid. This afternoon I will discuss such a rule with Morty Becker and hopefully prepare something for presentation at our Board Meeting on November 9th. This will have to be a rule, put on deferred agenda and brought before all three sections of the Board. It will have to be well publicized and promulgated by all locals and I guess that a real campaign for its enforcement will have to be made in New York, Chicago, Los Angeles and Nashville. It will be the kind of rule that the musicians' union has in the past successfully promulgated and enforced even though it has caused that Union a great deal of difficulty. Our members must realize that appearances on tape programs which are then going to be syndicated is doing nothing but eating away the limited number of hours during which live performers are working on television.

[33]**

> I would like to start a campaign immediately after November 16th amongst all locals, members and franchised agents and in any instance in which an agent books one of our people with a non-signatory I am going to ask Morty to take action to revoke the franchise. I am tired of hearing this stuff about pushing records and pushing books and otherwise appearing free so as to promote some individual's career.

It is significant, it seems to the writer, that while it can be demonstrated persuasively that considerable pressure was placed upon the Dallas-Fort Worth Local, the pressure was all from other AFTRA locals, and not from "employer groups." This entire record is devoid of any indication that any "employer group" had any interest whatsoever in eliminating Kane as a competitor.

In December of 1971, AFTRA Dallas Local, finally stirred to action by the continual correspondence from AFTRA and the Los Angeles Local, invited or urged Kane to attend a meeting of the Dallas board. This meeting is documented by detailed minutes which are introduced into this record through the Eleanor Glass affidavit. These minutes, the accuracy of which is not disputed, described the portion of the **[**34]** meeting relating to Kane as follows:

LARRY KANE PRODUCTIONS

> The next guest to appear before the Board was Larry Kane of Larry Kane Productions, Inc. The reason for his appearance was to decide what to do about the pressure from both Coasts to put Mr. Kane on the unfair list for

> not paying scale. Mr. Kane explained the problems that he has had and is still having with the show, mainly due to the failure of Tele-Com to come through with the money as per the contract.
> Mr. Kane is now in the process of withdrawing his show from all current markets. Mr. Kane stated that his main problem was in not knowing the difference in syndication and network shows. He was never asked by any performer on his show for scale. All performers appear to plug something . . . a book, a record, or a movie. Mr. Kane currently has a suit against Tele-Com to get the money owed.
> The markets on which his show is now running are all on a barter basis, set up by Tele-Com. He has no money coming in from the show, and has received no money before now.
>
> His plans are to re-call all the shows and then offer them to paying markets only. All shows currently running on a barter basis will be **[**35]** off the air by January 1. After then, only the stations who will pay for the show will receive it. Mr. Kane currently has enough shows taped to last until January 1. His show is on once a week.
>
> Larry asked the Board to help him work out an arrangement whereby he could stay on the air, because he would be able **[*263]** to pay the performers after his show goes on a paying basis.
> A discussion was held on regional rates, etc. Mr. Kane was asked if he would be willing to sign a regional Letter of Adherence. He said that he would, and he would know within a month what the future of this show will be . . . whether to go ahead with it or just forget it. The Board decided to set a temporary regional rate that Mr. Kane can live with for 30 days until he can see what the future is.
> A motion was made that the Larry Kane Productions, Inc. will pay single performance $ 50.00 per performance per show; $ 100.00 for a group per show, one performance, effective January 1, 1972, for a period of 30 days, subject to ratification by National AFTRA. This approval of the Dallas/Fort Worth AFTRA Local. Motion carried unanimously.
>
> Said motion was acceptable to Mr. Kane. **[**36]** Also, it was agreed that an additional 6 1/2 % Of that fee will be paid for each performer to the AFTRA Pension and Welfare Fund.
> Mr. Kane stated that there was a chance he would have at least one major market Philadelphia and it is understood that the above rates are only for this five state region. A new agreement will be negotiated with Mr. Kane and Larry Kane Productions, Inc. every thirty days to re-evaluate the situation. The agreement from January 1 to February 1 will be negotiated on January 15, 1972.

Kane testifies that the agreement documented by the minutes of the meeting of December 13, 1971 was acceptable to him at that time. (Kane testimony before NLRB, pp. 287-8). Shortly thereafter he received a telephone call from Kunsak, the representative of the Dallas Local, who advised him that AFTRA had agreed to the plan set forth in the minutes of the meeting of December 13, 1971.

It is significant, in light of Pennington, infra, that defendant unions did not rigidly insist upon Kane paying exactly the same wages paid by other similar producers. According to the undisputed evidence, the defendants and Kane worked out an arrangement which was then acceptable to **[**37]** Kane.

One of the key facts in this pattern is that (according to the undisputed evidence) Kane later simply decided that he would not or could not comply with the agreement that he had made with the AFTRA Dallas-Fort Worth Local in December 1971. At some undetermined time between December 1971 and March 1972, Kane again discussed the situation with Kunsak, the representative of the Dallas Local, and told Kunsak that since Kane was not producing shows, it would be superfluous to discuss additional agreements or to discuss performance of the agreement made at the December 1971 meeting.

In March of 1972, events occurred which, according to Kane's view of the facts, dramatically improved Kane's prospects for creating a successful enterprise. It is undisputed that the period from the time of Kane's severance of relations with Crosby/Tele-Com until March 1972 had been a very discouraging period. Kane, apparently because of financial pressures, had stopped production of shows and was selling only reruns. Two of his sponsors who had been faithful to him over the years were disturbed by the reruns and either dropped their sponsorship or were on the verge of doing so. Kane had taken the position **[**38]** with the Dallas Local, through Mr. Kunsak, at some time between December 13, 1971 and March 2, 1972, that because of the fact that he was not producing, he could not pay even the $ 50 per performance per artist which he had agreed with the Dallas Local to pay.

In March 1972, Kane made a new agreement with Channel 2, another local television station. According to his arrangement with Channel 2, Kane was allowed to use Channel 2's production facilities. Channel 2 made no charge to Kane and LK Productions, Inc. for the use of its production facilities, but entered an agreement with Kane that Channel 2 would enjoy 10% Of LK Productions' gross revenues in return for the use of its production facilities.

[*264] In March of 1972, Kane again talked with Kunsak and advised that he was prepared to resume production of the show on March 25, 1972 and offered to pay Pension & Welfare Fund contributions. Kunsak informed Kane that paying the pension fund contributions would not be satisfactory but that he, Kunsak, would still like to work out a satisfactory overall agreement (NLRB transcript, p. 288-289). It seems to the undersigned to be established conclusively, and as a matter of law, **[**39]** that Kane was withdrawing from and refusing to perform the agreement he had previously made in December of 1971.

Kane's situation in March of 1972, and his position with reference to the agreement which he had previously made in December 1971, is set forth graphically and without substantial dispute, in Kane's letter to Kunsak of March 6, 1972, copied verbatim:

> As we agreed, I am apprising you that we plan to resume production of the Kane Show on March 25, 1972 under a special arrangement with KPRC-TV wherein our production costs are reduced substantially. If such arrangement were not available to us, there would be no way we could begin producing the show at this time.
>
> I have attached a copy of our current market list, which vividly reflects the type of bleak position in which we presently exist. The only positive steps accomplished have been reduction of production expense, dropping non-revenue producing stations, and launching an all-out attempt to try earning our way out of debt. Operating efficiently and taking a hard line on overhead, we can work out of this. All the assistance that you can offer will make a vast difference in our success or failure. It is perfectly **[**40]** obvious that, with the attached market list, we are in business by the skin of our teeth and in no position to be paying scale to performers. Even the reduced scale appears momentous at this stage. The P & W is realistically all that I feel we can handle; and I ask that you consider our present position and the task that we have undertaken. Naturally, we plan to increase this market list. We must in order to progress. However, this time, if the list increases, so must our revenue and eventually our ability to pay performers. Until such time as our revenues are meaningful, we are strictly treading water for survival. I assure you that these past few months of consecutive re-runs have done us no good, and we have a tremendous rebuilding process ahead.
>
> Since we have no information or appropriate forms in our files covering the P & W payments for performers, I will appreciate your sending some down with any pertinent information as to the exact procedure we are to follow in filing these. Whatever procedure is to be settled upon, I want to be certain that our office is well aware and equipped to handle it.
>
> Also, please advise me of my present membership status, and requirements **[**41]** for the insurance coverage. Thanks again, John, and I look forward to your reply, and hopefully to your full cooperation as we fight the setbacks and work out of this dilemma. Right down the line, we have been 100% Factual with you, and we obviously need your reciprocal assistance until we are healthier.

Kunsak wrote Sanford Wolff, the National Executive Secretary on March 14, 1972 in effect urging Wolff to accept Kane's proposition. AFTRA National was unable and unwilling to agree to Kane's new proposition, and thus eventually Kane was placed upon the unfair list in July of 1972.

The action of AFTRA and AFTRA Locals in placing Kane on the unfair list obviously did not absolutely prevent Kane from obtaining "top stars." On October 6, 1972, Kunsak wrote Claude McCue, Executive Secretary of the Los Angeles Local, that on August 5, 1972, Mike Murphy, member of the New York Local, Rick Springfield who records for Capitol Records, the Gary Lewis Group, Neil Sedow and Messrs. Boatman, Rosenthrow and Ramsey had all appeared live on the Larry Kane Show.

On various other dates in August and September, according to Kunsak's letter, **[*265]** other AFTRA members appeared on Kane's **[**42]** show. (See Exh. 24-1 to Defendants Answers).

It should be recalled that Kane normally had three performers on each of his shows. The performance of the agreement which he had made in December 1971 would thus cost Kane $ 150 per show plus 6 1/2 % Of that sum for contribution to the AFTRA Pension & Welfare Fund. While there is no direct evidence in the record concerning the cost of producing one show, it is apparent from the testimony concerning the number of personnel required to produce the show and the obvious costs of the production equipment required, that $ 150 per show was a very nominal addition to the total expense of producing a show of this nature.

This court is fully aware of the fact that in deciding a motion for summary judgment, it cannot make decisions concerning disputed facts; however, the undersigned believes that no reasonable juror could ever believe that Kane's ultimate financial failure was caused by the union's demand that he pay something in the range of $ 50 per performance to the "top stars" who appeared on his show. The undersigned is totally persuaded (and persuaded to the point where this court is willing to hold as a matter of law) that Kane's ultimate **[**43]** difficulties with the union in 1972, and his being placed on the unfair list, were the result of his unexplained refusal to perform the agreement he had made in December 1971, and not to any violation of the antitrust laws.

Kane has testified about this set of circumstances twice. He has executed and filed an affidavit setting out matters which he apparently feels are helpful to his cause. In his testimony and his affidavit, Kane does not explain or state that following his March 1972 contact with Kunsak he ever attempted again to work out any form of accommodation with the union except for the letter of March 6, 1972 which is an obvious repudiation of the agreement made in December 1971. His conduct is consistent with his testimony upon his disposition in which he testified that his basic plan and intent throughout was to avoid making any payments to the "top stars" because he did not feel that any payments were justified. (See Kane deposition, p. 65-66).

Kane contends that his ultimate lack of success in his arrangement with Channel 2 was caused by the union activities; however, Kane was able to operate during March, April, May, June and July, of 1972 with no union interference **[**44]** whatever because the union did not actually place him on its "unfair list" until July 21, 1972.

There is no evidence in the record as to how many shows were actually produced after March 28, 1972 or concerning Kane's success or lack of success in marketing those shows or the advertising spots on such shows.

On September 11, 1972 the Board of Directors of the Dallas-Fort Worth Local met and their minutes (See Exh. 14(a)-2 of Defendants Answers) contained the following notation:

> Johnny K. informed the Board that as per communication from Morty Becker, attorney for AFTRA, the following action should be taken and that he had followed the instructions. Larry Kane was notified by "registered letter' of his rights to appear on his own behalf (sic) represented by counsel to explain his actions in appearing on the Larry Kane Show following notification that the show had been placed on the "unfair' list by the National Board. Mr. Kane did not appear at this time nor did he appear later in the evening, but Carter Smith reported that he had personally observed an audio-tape (sic) recorded by Mr. Kane's appearance on at least three shows since the National Board action. Action on the matter **[**45]** was delayed to give Mr. Kane sufficient time to appear at the meeting and the business of the Board moved to another item on the agenda.

This entire history of this matter would justify an inference that after Kane made his agreement with the AFTRA representative in December 1971, he thereafter simply decided to ignore his agreement and his commitments as an AFTRA member.

[*266] The minutes of the meeting of September 11, 1972 also reflect some details concerning AFTRA Dallas Local's efforts to organize in the Houston area. These efforts were apparently meeting with only limited, if any success. After a discussion of the organizing activities in the Houston area, the minutes contain the following notation:

> Carter then mentioned that at this time Larry Kane had still not arrived to appear before the Board and that appropriate action needed to be taken. Johnny Kunsak said that we must inform Kane that he is being

> suspended and is being fined for each performance on his show since August 5. At the last meeting Annabelle Weenick had moved that he be fined the rate for his type of show $ 185 per show. Such fine will continue to accrue for all future appearances.

In 1972, **[**46]** Kane, as the charging party, filed two complaints with the National Labor Relations Board. These complaints proceeded to hearing before the Honorable Lloyd Buchanan, Administrative Law Judge on January 8 and 9, 1972.

On November 7, 1972 AFTRA Los Angeles Local gave notice to all entities who had previously been notified that Kane was on the unfair list, that AFTRA would not do anything to interfere with the employment of any AFTRA artist on the Larry Kane Show during the pendency of NLRB Cases Nos. 23-CC-463 and 23-CC-467.

In October of 1973, Judge Buchanan rendered his decision, finding that the "top stars" were independent contractors, and for that reason AFTRA and the AFTRA locals had committed an unfair labor practice. Thereafter the National Labor Relations Board obtained an injunction, to which the AFTRA entities agreed, prohibiting the retention of Kane and his companies upon the "unfair list." This injunction was entered in October of 1973.

In the spring and summer of 1972, Kane formed a joint enterprise with Leroy Golger, and they together produced a number of taped shows which they attempted to market. Their efforts to market these shows was not successful, and Kane contends **[**47]** that the lingering effects of his "unfair" listing was responsible for his inability to market these shows.

The earlier "unfair" listing did not inhibit Kane's efforts to obtain performers for the Golger shows, and it is thus difficult to perceive how an "unfair listing" which had been removed and which the defendants had been enjoined from enforcing, would have had any inhibiting effect upon the sale of these programs; nevertheless, it is conceivable that this would be a fact issue which this court cannot decide.

As this court views the facts, however, the entire Golger enterprise is essentially immaterial. The Golger enterprise occurred long after the conduct which is complained of in this case. If the union's conduct did not fall within the ambit of the ***antitrust law***, then later damages stemming from that conduct may provide the plaintiff some basis for damages under the labor laws, but cannot provide the basis for treble damages under the antitrust laws.

II.

ANALYSIS OF CONTROLLING AUTHORITIES

This case is controlled by the following authorities: *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*; *Milk Wagon Drivers' Union v. Lake Valley Farm Products, **[**48]** 311 U.S. 91, 61 S. Ct. 122, 85 L. Ed. 63 (1940)*; *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*; *Local Union 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*; *International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312 (1959)*; *American Federation of Musicians v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*; *Hunt v. Crumboch, 325 U.S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954 (1945)*; *California Dump Truck Owners Assn. v. Associated General Contractors of America, 562 F.2d 607 (9th Cir. 1977)*; Dissents by Justice Brandeis in *Duplex Printing Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1924)*; *Bedford Cut **[*267]** Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927)*.

Apex Hosiery v. Leader, supra, was an effort to recover treble damages from a union and its officers for damages incurred during a violent sitdown strike at the Apex Hosiery factory. The facts bear no resemblance to the case at bar, but Apex teaches the following relevant lessons:

> 1. ***HN1***[] The mere fact that union conduct may violate established **[**49]** law (in that case state laws against trespass and willful destruction of property) does not justify a conclusion that the union conduct violated the antitrust laws;

2. ***HN2***[] The Sherman Act is not applicable unless the facts present ". . . some form of restraint upon commercial competition in the marketing of goods or services . . ." *310 U.S. at 495, 60 S. Ct. at 993*.

3. In analyzing all of the pre-1940 cases involving the conflict between the antitrust laws and those Congressional enactments to labor policy, Justice Stone said at *310 U.S. 469, at 500, 60 S. Ct. 982 at 996, 84 L. Ed. 1311* :

> In the cases considered by this Court since the Standard Oil case of 1911 ***HN3***[] some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price.

Justice Stone's opinion goes on to point out that the anti-trust laws were not applicable to the conduct involved in Apex because it was plain that the strike did not have as its purpose restraint in competition **[**50]** in the market for Apex's goods.

Similarly in the case at bar, the union's challenged conduct did not prevent Kane from competing in any market, but merely required that if he was to compete, he must pay those sums to the performers which he had agreed to pay in his meeting in December of 1971.

In focusing upon the fact that any successful union activity to some degree acts as a restraint upon competition, Justice Stone said:

> A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." ***HN4***[] Since the enactment of the declaration in § 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce * * * nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws', it would seem plain that restraints on the sale of the employee's services to the employer, **[**51]** however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.
>
> ***HN5***[] Strikes or agreements to not work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. . . . Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor standards **[*268]** is the objective of any national labor organization. But this effect on competition has not been considered to **[**52]** be the kind of curtailment of price competition prohibited by the Sherman Act.

It is significant that no one in the current case was trying to eliminate Kane as a competitor. Persons like Dick Clark, and the union officials who responded to urgings from him, were attempting to create a situation in which if Kane competed in the markets in which they operated, Kane would be required to make some payment to the "top stars" and make contributions to the AFTRA pension fund. The only competition which this would eliminate, however, would be "price competition based on differences in labor standards . . ." Elimination of price competition based on differences in labor standards does not give rise (according to the language of Apex v. Leader) to a cause of action under the antitrust laws.

Milk Wagon Drivers Union v. Lake Valley Farm Products, supra, (like the case at bar) involved a secondary boycott and was the first Supreme Court case (with the possible exception of the New Negro Alliance (*New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S. Ct. 703, 82 L. Ed. 1012*) case) in which the Supreme Court gave effect to the Norris-LaGuardia Act. Defendant was an AF of L union **[**53]** which had for many years represented Chicago milkmen. Before the advent of the Great Depression the normal method of distributing milk in Chicago was that the various dairies which produced milk would own their own wagons, which they operated through employees, who became members of the defendant Milk Wagon Drivers Union.

During the depression, in response to the economic pressures of that era, a number of dairies attempted to devise means of underselling the established dairies, and for this purpose commenced the sale of their milk to independent contractors, called "vendors" who in turn resold the milk to retail establishments called "cut-rate stores" which then proceeded to undersell conventional dairies. This competition gravely injured the conventional dairies causing them to lay off many of the members of the defendant union.

Defendant union and its members began to picket the "cut-rate stores." The cut-rate stores then sued to enjoin the continued picketing.

Justice Black held that the trial court properly refused to enjoin the picketing because of the provisions of the Norris-LaGuardia Act and because the dispute in question properly involved a "labor dispute" within the **[**54]** meaning of the Norris-LaGuardia Act, 29 U.S.C. § 101-115.

In *Milk Wagon Drivers Union v. Lake Valley Farm Products, supra* and in *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*, Justices Black and Frankfurter explained in detail the history of the Clayton and Norris-LaGuardia Acts. In this connection, Justice Black said:

> The Norris-LaGuardia Act passed in 1932, is the culmination of a bitter political, social and economic controversy extending over half a century. Hostility to "government by injunction' had become the rallying slogan of many and varied groups. Indeed, as early as 1914 Congress had responded to a widespread public demand that the Sherman Act be amended, and had passed the Clayton Act, itself designed to limit the jurisdiction of federal courts to issue injunctions in cases involving labor disputes. But the proponents of the Norris-LaGuardia Act felt that the jurisdictional limitations of the Clayton Act had been largely nullified by judicial decision. Thus, the Senate Judiciary Committee, reporting the Norris-LaGuardia Act, said: "That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open **[**55]** to discussion. The use of the injunction in such disputes has been growing by leaps and bounds. * * * For example approximately 300 were issued in connection with the railway shopmen's strike of 1922, * * * ' And on the same subject, the House Judiciary Committee said: "These are the same character of acts which Congress in § 20 **[*269]** of the Clayton Act of October 15, 1914 (*20 U.S.C.A. § 52*) sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained therein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect.' As an example of the judicial interpretation of the Clayton Act which the Committee said was "responsible in part for this agitation for further legislation,' the Committee referred to the cases of *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196*; *American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A.L.R. 360* and *Bedford Cut **[**56]** Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A.L.R. 791*. In these cases, the jurisdiction of the courts to grant injunctions had been upheld upon allegations and findings that the Sherman Anti-Trust Act had been violated.
>
> Whether or not one agrees with the committees that the cited cases constituted an unduly restricted interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the

> construction of the Norris-LaGuardia Act. For us to hold, in the face of this legislation, that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress.

Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U.S. at 102, 61 S. Ct. at 127, 128.

It is apparent that the Supreme Court in the Milk Wagon Drivers case did not perceive that the attempted secondary boycott which the union **[**57]** was undertaking in that case violated the antitrust laws. This is true even though the secondary boycott, if successful, would have sheltered the conventional dairies from competition from the "cut-rate" dairies and the "cut-rate" stores.

The first comprehensive effort by the Supreme Court to correlate the Sherman Act, the Clayton Act and the Norris-LaGuardia Act appears in *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*.

The Hutcheson case was one in which the local chapter of the United Brotherhood of Carpenters had clearly breached its agreement with Anheuser-Busch, refused to arbitrate a jurisdictional dispute which it had agreed to arbitrate, and had attempted to mount a secondary boycott against Anheuser-Busch products. Despite this clearly reprehensible conduct, and despite the fact that the union conduct would have been clearly violative of the antitrust laws under the previous cases of *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349*, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916*, Justice Frankfurter, speaking for the majority of the Court, held that Clayton **[**58]** and Norris-LaGuardia Acts precluded the applicability of the antitrust laws to union activities.

The United Brotherhood of Carpenters and the International Association of Machinists both had collective bargaining agreements with Anheuser-Busch, and both had agreements that any jurisdictional disputes would be submitted to arbitration. The machinists were awarded certain work which the carpenters felt was legitimately theirs. The carpenters declined to submit the jurisdictional dispute to arbitration and instead struck Busch, picketed Busch, struck certain construction companies working on Busch premises to build a new brewery, and instituted or attempted to institute a secondary boycott of Busch products among its members and their friends. Justice Frankfurter carefully analyzed the Clayton and Norris-LaGuardia Acts and found that these statutes, by their terms, **[*270]** precluded the courts from holding that the union's activities violated the antitrust laws. The heart of Justice Frankfurter's reasoning, clearly applicable to the present case, appears in the following language:

> In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had **[**59]** before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.
>
> It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by § 20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by § 20 for "terminating any relation of employment,' or "ceasing to perform any work or labor,' or "recommending, advising, or persuading others by peaceful means so to do.' The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes **[**60]** within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working.' Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do.'

United States v. Hutcheson, 312 U.S. at 232, 61 S. Ct. at 466-467.

Justice Frankfurter's treatment in the Hutcheson case, of Bedford Cut Stone v. Journeymen Stone Cutters' Assn., supra, and Duplex Printing Press v. Deering, supra, is also extremely significant. Justice Frankfurter points out:

> The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. . . . The Norris-LaGuardia Act was a disapproval of Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, and **[**61]** Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section.

United States v. Hutcheson, 312 U.S. at 236, 61 S. Ct. at 468.

Duplex Printing Press Co. v. Deering and Bedford Cut Stone v. Journeymen Stone Cutters were both cases decided after the enactment of the Clayton Act in 1914 but before the enactment of the Norris-LaGuardia Act of 1932. Both involved similar facts. Both arose from situations in which unions which had been unsuccessful in obtaining their objectives by strikes, attempted to impose secondary boycotts upon employers with whom they had long-standing disputes. In both instances, the majority of the Supreme Court interpreted the Clayton Act with extreme narrowness and placed the conduct of the unions within the ambit of the anti-trust laws. In 1932, Congress, stirred by what it perceived as the Supreme Court's refusal to follow what Congress thought it had done in the Clayton Act, clarified the matter in the Norris-LaGuardia Act. Finally, in Milk Wagon Drivers and Hutcheson, the intent of Congress was **[**62]** eventually vindicated. In both Duplex Printing and Bedford Cut Stone, Justice Brandeis prepared eloquent dissents, which **[*271]** now in the light of the Norris-LaGuardia Act and Hutcheson have considerable precedential force and which make it totally clear that the conduct which the plaintiffs here seek to bring within the ambit of the antitrust laws is immunized from the antitrust laws by the congressional will as expressed in the Clayton and Norris-LaGuardia Acts.

None of the subsequent cases in any way dilute the absolute holding of the Supreme Court in Hutcheson and Milk Wagon Drivers that secondary boycott activity by unions, acting alone, does not violate the antitrust laws.

Plaintiffs here seek to avoid the clear thrust of the Hutcheson case by arguing that Dick Clark was in effect an "employer group" and thus the union's action in placing Kane on the unfair list may be regarded as a conspiracy between a union and an "employer group." The undersigned is persuaded that the record, as a matter of law, will not permit such a construction of the facts because:

1. Clark himself is a performer and an AFTRA member and not an "employer group"; and

2. The teaching **[**63]** of American Federation of Labor v. Carroll, supra, precludes such a result.

Defendants' motion for partial summary judgment could be persuasively predicated upon Justice Frankfurter's opinion in Hutcheson and Justice Brandeis' dissents (which history and the Norris-LaGuardia Act have rendered authoritative) in Bedford Cut Stone and Duplex Printing. [1.] More recent cases confirm the conclusion that the motion should be granted.

[1.] See Justice Goldberg's statement in Jewel Tea, supra, and Pennington, supra, that:

Mr. Justice Brandeis' dissent in Duplex has, however, carried the day in the courts of history as evidenced by subsequent congressional action and decisions of this Court. The Norris-LaGuardia Act, 97 Stat. 70, 29 U.S.C. § 101 (1958 ed.), was passed by congress in 1932 expressly to overrule the majority opinion of Duplex and the cases that followed it and to affirm the philosophy of the dissenters in those cases . . .

Hunt v. Crumboch, 325 U.S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954 (1945) (decided **[**64]** contemporaneously with Allen Bradley Co. v. Local Union No. 3, infra) arose from a bitter union-employer dispute between Transportation Workers Local 197 and Hunt Motor Freight. The union struck all truckers and haulers serving A& P's Philadelphia operations for the purpose of enforcing a closed shop. Violence occurred. One of the Hunt partners was indicted for murder of a union official and acquitted. At the end of the successful strike, the union had successfully organized all of the contractor haulers except Hunt. The union refused to negotiate with Hunt. A&P had entered a closed shop agreement whereby all contract haulers were required to operate with union employees. Hunt lost his contract with A&P at the union's instigation and later had a similar experience with another employer who had agreed to a closed shop agreement. The union effectively punished Hunt for his alleged murder of a union official by driving him out of business.

The majority, in an opinion by Justice Black, refused to apply the antitrust laws to the union activity because:

1. The union had acted alone and not in combination with employer groups. This fact distinguished Allen Bradley.

2. A refusal **[**65]** by a union group to sell the labor of its members is not a violation of the Sherman Act. Reliance was placed on *Apex Hosiery, supra* and *Hutcheson, supra.*

The heart of the majority reasoning is expressed in the following language:

> The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. The act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

Hunt v. Crumboch, 325 U.S. at 826, 65 S. Ct. at 1548.

[*272] *Amalgamated Meat Cutters v. Jewel Tea Co., supra*, like the case at bar, involved union efforts to persuade its members to refrain from working for a certain employer. In the case at bar, had the union efforts been successful, Kane could have competed in the Los Angeles and New York markets only by paying his "top stars" the compensation he had agreed to pay in the December 1971 meeting. In Jewel Tea, Jewel was, by the union's action, effectively prohibited from competing by selling meat in Chicago in the evening hours. Jewel was understandably **[**66]** disturbed because it had equipped 174 of its 196 stores to vend meat in pre-packaged, self-service systems which Jewel contended did not require a butcher's services. These restrictions upon uninhibited competition in Jewel Tea were permissible under the antitrust laws primarily because the restrictions were, in Justice White's language ". . . intimately related to wages, hours and working conditions."

Jewel Tea's controversy with the union arose from Jewel's desire to compete by selling meat after 6:00 p.m., and the meat cutters' desire to spend their evenings at home. The collective bargaining agreement between the Meat Cutters' Union (representing almost all Chicago butchers) and the Associated Food Retailers of Greater Chicago, a trade association of 1,000 merchants accepted a collective bargaining agreement providing that fresh meat would not be sold before 9:00 a.m. or after 6:00 p.m. in either service or self-service markets. During the 1957 contract negotiations Jewel contended that butchers were not necessary in self-service meat sections and sought a relaxation of the previously existing rule. Jewel's demand was ultimately rejected and the new collective bargaining agreement **[**67]** continued the previous restriction. Jewel, under threat of strike, finally accepted the contract but then brought suit alleging that the marketing hours restriction violated the Sherman Act and that the union and its officers had conspired with the employers who were willing to abide by the marketing hours restrictions. As evidence of the conspiracy, Jewel relied upon:

1. The acceptance by Associated Food Retailers of the market-hours restriction;
2. Union's strike threat against Jewel to compel acceptance of the restriction;
3. Refusal of the union to permit its members to work after 9:00 p.m. or before 9:00 a.m.;
4. Refusal by the union to permit any grocery firm to sell meat after 6:00 p.m. or before 9:00 a.m. even in self-service facilities;

5. An agreement by the members of Associated Food Retailers to insist upon the marketing hours restriction in all collective bargaining agreements between the unions and any store operator;

6. Associated Food Retailers' agreement with other employer groups that no firm would sell meat after 6:00 p.m. or before 9:00 a.m. and the action of the union and its officers in enforcing compliance with **[**68]** that agreement.

The Supreme Court opinion by Justice White held that the challenged agreement was exempt from Sherman Act attack because:

1. The trial court had properly found, As a matter of law, that there was no evidence of a union-employer conspiracy. This finding was obviously predicated upon the reasoning that negotiations upon a mandatory subject of bargaining and a subsequent collective bargaining agreement would not constitute a conspiracy. In this connection, Justice White said: ". . . We therefore have a situation where the unions, having obtained a marketing-hours agreement from one group of employers, have successfully sought the same terms from a single employer, Jewel, not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be in their own labor union interests." *85 S. Ct. at 1601*.

[*273] 2. The union's demands were "intimately related" to hours and conditions of employment.

In 1942 Justice Frankfurter in Hutcheson attempted to render consistent all of the then existing labor laws and the Sherman Act. Justice Goldberg persuasively and skillfully repeated **[**69]** this task in his Jewel Tea (concurring) opinion (*381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640*), which also served as his dissent in *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626*. Justice Goldberg's comprehensive, eloquent opinion, and the judicial and legislative history teach that courts should be most reluctant to engage in ". . . intervention via the antitrust route in legitimate collective bargaining." *381 U.S. at 697, 85 S. Ct. at 1608*. Justice Goldberg said:

Stripped of all the pejorative adjectives and reduced to their essential facts, both Pennington and Jewel Tea represent refusals by judges to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in legitimate collective bargaining. The history of these cases furnishes fresh evidence of the observation that in this area, necessarily involving a determination of "what public policy in regard to the industrial struggle demands,' *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479, 485, 41 S. Ct. 172, 183, 65 L. Ed. 349* (dissenting opinion of Mr. Justice Brandeis), "courts have neither the aptitude nor the criteria **[**70]** for reaching sound decisions.' Cox, Labor and the Antitrust Laws A Preliminary Analysis, 104 U.Pa.L.Rev. 252, 269-70 (1955); see Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14 (1963).

Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 .

III.

AUTHORITIES ARGUABLY APPLICABLE BUT NOT CONTROLLING

Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945) and *United States v. Brims, 272 U.S. 549, 47 S. Ct. 169, 71 L. Ed. 403* were cases in which the union had participated in employer conspiracies to fix prices or allocate markets. The consistent holding has been that unions have no exemption or immunity from antitrust liability when the union participates in and becomes a party to a conspiracy of businessmen, even though such participation may result in higher wages and better working conditions.

The evidence in the case at bar establishes lack of "employer group" participation in the defendant's conduct because:

1. Dick Clark, applying the analysis of *American Federation v. Carroll, supra*, was not an "employer group."

2. **[**71]** Even if it were assumed (and there is a complete lack of evidence to support such an assumption) that "employer groups" had complained to the defendants about Kane and that the union responded, no fact issue concerning a "conspiracy" would be created. The defendant unions did nothing to "drive" Kane out of business but on the contrary attempted to and did reach an agreement with him in December 1971 which would enable him to get his business feet on the ground by paying temporarily a wage less than "union scale." Certainly any producer of a "Kane type" show who was required by the union to pay scale to performers who could have been induced to work without monetary compensation might legitimately feel discriminated against if the union made no efforts to obtain similar commitments from Kane. A producer's action in expressing dissatisfaction and the union's response to such a rational complaint could not, in the undersigned's view, provide the basis for a finding of an illegal employer-union conspiracy to violate the antitrust laws.

Connell Construction Co. v. Plumbers and Steamfitters Local No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975) is distinguishable from the **[**72]** case at bar.

[*274] A key element in Connell was that the union did not seek to represent and did not represent Connell's employees. In the case at bar, most of the "top stars" were AFTRA members.

The union strategy in Connell could have, if successful, given the union the power to exclude subcontractors from the Dallas area. The defendants' activities here could not have excluded Kane from any area because the union attempted to work out a financial arrangement with which Kane could live. In addition, the pertinent documents obligated the union defendants to admit performers to membership, virtually immediately and upon demand.

Local No. 10 in Connell had negotiated with the Mechanical Contractors Association a contract containing a "most favored nation" clause, providing that if the union granted more favorable contract terms to any other employee, it would extend the same terms to all members of the association. This inhibited the union's ability to negotiate with individual subcontractors. The defendants here were not similarly inhibited, had committed themselves to no "most favored nations" clause and did in fact negotiate individually with Kane, working out an agreement **[**73]** satisfactory to him in December 1971.

Local No. 10's conduct was improper because it gave the union the power to exclude from the Dallas market a subcontractor whose employees enjoyed wages and working conditions equal to or superior to those of union members but who were able to bid competitively because of greater efficiency. AFTRA and AFTRA locals neither possessed nor sought power of that nature in the case at bar.

The union in Connell sought the agreement with the general contractor ". . . solely as a way of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees." *421 U.S. at 632, 95 S. Ct. at 1839*. In the case at bar, AFTRA directly represented most of the "top stars" and sought only an agreement to pay their normal scale and make contributions to AFTRA's pension fund.

The majority opinion (*421 U.S. at 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418*) condemned the union's conduct on the ground that the union strategy, if approved, would give the union ". . . an almost unlimited organizational weapon." No similar statement can be made concerning the defendants' activities in the present case. The defendants here already represented **[**74]** most of the "top stars" and Kane himself. From one point of view, defendants here were merely seeking to enforce an agreement Kane made in the December 1971 meeting.

A key factor in Connell was that the challenged agreement was "outside the context of a collective-bargaining relationship." *421 U.S. at 636, 95 S. Ct. at 1841*. The defendants here were endeavoring to enforce Kane's agreement in December to place himself within the bounds of a collective bargaining relationship.

CONCLUSION

For the reasons stated herein, defendants' motion for partial summary judgment is GRANTED, and plaintiffs' case, insofar as it purports to assert a cause of action predicated on the antitrust laws, is DISMISSED. Plaintiffs' case predicated upon alleged violations of the National Labor Relations Act, the Taft-Hartley Act and the other labor statutes will remain pending.

End of Document

[Times Mirror Co. v. Federal Trade Com.](#)

United States District Court, Central District of California.

June 13, 1979, Filed

Civil No. 78-3422-LEW.

Reporter

1979 U.S. Dist. LEXIS 11738 *; 1979-2 Trade Cas. (CCH) P62,756

The Times Mirror Co. v. Federal Trade Commission, Michael Pertschuk, Paul Rand Dixon, Elizabeth Hanford Dole, David A. Clanton, and Robert Pitofsky.

Core Terms

Clayton Act, newspaper advertising, commodity, space, advertising, tangible, judicial intervention, argues, expertise, constitutional right, proceedings, intangible, administrative remedy, required to exhaust, district court, violates, alleges, unfair

LexisNexis® Headnotes

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Failure to Exhaust

HN1[] **Reviewability, Exhaustion of Remedies**

The failure to exhaust administrative remedies precludes judicial relief, but in a particular case other factors may outweigh the preference for a preliminary agency determination. The propriety of judicial intervention is tested under a three part standard which requires the court to weight: (1) The extent of injury from pursuing an administrative remedy, (2) the degree of doubt about agency jurisdiction, and (3) the involvement of agency expertise in the question of jurisdiction.

Antitrust & Trade Law > Clayton Act > Jurisdiction

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN2[] Clayton Act, Jurisdiction

Section 2(a) of the Clayton Act prohibits discrimination in price between purchasers of commodities of like grade and quality where the effect is substantially to lessen competition or a tendency to create a monopoly. 15 U.S.C.S. § 13(a).

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

HN3[] Reviewability, Exhaustion of Remedies

Only a clear showing of irreparable injury from anticipated agency action excuses the exhaustion of administrative remedies and permits judicial intervention in the agency process.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN4[] Reviewability, Exhaustion of Remedies

Litigation expenses which are normal incidents of participation in the agency process do not constitute irreparable injury. Nor does asserted waste of government resources by the Federal Trade Commission (FTC) in allegedly frivolous litigation amount to irreparable injury when determining the propriety of judicial intervention. Obviously, Congress has empowered the FTC to decide which actions are worthy of its attention.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

HN5[] Reviewability, Exhaustion of Remedies

In certain circumstances the assertion of a constitutional right may be, by itself, enough to give a district court jurisdiction to hear an attack on an interlocutory order. The rationale underlying this exception is that resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board. This limited exception is not intended, however, to provide an automatic escape route from the exhaustion requirement. The fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping an administrative agency in its tracks.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

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

Evidence > ... > Testimony > Judicial Intervention in Trials > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN6[] **Reviewability, Exhaustion of Remedies**

The judicially-created exhaustion requirement is intended to facilitate the development of a full factual record, to encourage the exercise of administrative expertise and discretion, and to promote judicial and administrative efficiency. Doubts about an agency's subject matter jurisdiction in a proceeding are only one factor in a district court's decision whether or not to interrupt an agency adjudication.

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

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

HN7[] **US Federal Trade Commission Actions, Judicial Review**

The Federal Trade Commission's final decision is subject to review by the court of appeals. *15 U.S.C.S. § 45(c)*.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > Parties > Intervention > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN8[] **Reviewability, Exhaustion of Remedies**

An unambiguous statutory or constitutional right justifies the extraordinary remedy of judicial intervention in an agency proceeding.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Administrative Law > Judicial Review > Reviewability > Questions of Law

Administrative Law > Separation of Powers > Jurisdiction

HN9[] **Reviewability, Jurisdiction & Venue**

In the absence of a "clear jurisdictional defect," an agency should have the opportunity to make the initial determination of its own jurisdiction, subject to appellate court review.

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

Most courts and authorities that have addressed the question have concluded that newspaper advertising is not a "commodity" under *§ 2(a)* of the Clayton Act. It cannot be said, however, that the jurisdictional question is free from doubt, or that the Federal Trade Commission's jurisdictional conclusion is frivolous.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Reviewability > Questions of Law

HN11[] **Standards of Review, Deference to Agency Statutory Interpretation**

Some courts have distinguished between legal and factual questions in assessing the importance of administrative expertise. But the requirement of exhaustion of remedies often applies as well to questions of law as to questions of fact. Courts should accord deference to an agency's own construction of its authorizing statute when reviewing final agency action.

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 > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

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

HN12[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

Section 5 of the Federal Trade Commission Act empowers the Federal Trade Commission to initiate proceedings to prevent unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. *15 U.S.C.S. § 45*.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN13[] **Agency Rulemaking, Rule Application & Interpretation**

The Federal Trade Commission's power to act to prevent unfair methods of competition and unfair or deceptive acts or practices includes the power to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or spirit of the antitrust laws.

Opinion by: [*1] WATERS

Opinion

Memorandum of Decision

Background

WATERS, D. J.: In this suit, plaintiff Times Mirror Company, publisher of The Los Angeles Times, seeks injunctive and declaratory relief from an adjudicative proceeding initiated by the Federal Trade Commission. The FTC issued its twocount complaint, Commission Docket No. 9103, on July 27, 1977. Count I charges that Times Mirror's practice of offering cumulative annual volume discounts to purchasers of retail display advertising space in the Los Angeles Times violates Section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45*). Count II of the complaint charges that the practice violates *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act (*15 U.S.C. § 13(a)*).

On November 4, 1977, Times Mirror filed a motion to dismiss Count II of the complaint on the ground that newspaper advertising space is not a "commodity" within the meaning of *Section 2(a)*. The motion was granted by the administrative law judge who certified his order for interlocutory appeal to the Commission pursuant to *Section 3.23(b)* of the Commission's Rules of Practice (*16 C.F.R. § 3.23(b)*). The Commission granted review and on July 27, **[*2]** 1978, issued an order reinstating Count II of the complaint.

On September 1, 1978, Times Mirror filed this action to enjoin the Commission from pursuing any future proceedings under either count of its complaint in Docket No. 9103. The plaintiff contends that the FTC lacks subject matter jurisdiction over the proceeding under either Section 5 of the Federal Trade Commission Act or *Section 2(a)* of the Clayton Act. Moreover, Times Mirror asserts that it will suffer irreparable injury if it is forced to pursue an administrative remedy. The case is now before this court on Times Mirror's motions for a preliminary injunction and summary judgment, and the FTC's motion to dismiss.

Merits

It is clear that no final FTC decision has been rendered on the issues and proceedings involved in Docket No. 9103. Consequently, the plaintiff has not exhausted its administrative remedies and the FTC argues that judicial intervention is premature. It is certainly the general rule that HN1[] failure to exhaust administrative remedies precludes judicial relief, but in a particular case other factors may outweigh the preference for a preliminary agency determination. *Casey v. FTC 578 F. 2d 793 (9th* ***[*3]*** *Cir. 1978)*; *California ex rel. Christensen v. FTC 549 F. 2d 1321 (9th Cir. 1977)*, cert. denied, *434 U.S. 876, 98 S. Ct. 227, 54 L. Ed. 2d 156 (1977)*. The propriety of judicial intervention is tested under the three part standard adopted in *Lone Star Cement Corp. v. FTC, 339 F. 2d 505 (9th Cir. 1964)*, which requires the court to weight: (1) The extent of injury from pursuing an administrative remedy, (2) the degree of doubt about agency jurisdiction, and (3) the involvement of agency expertise in the question of jurisdiction. The two counts of the complaint in Docket No. 9103 will be tested against this standard in reverse order.

Count II

In Count II of the complaint, the FTC alleges that Times Mirror's practice of offering cumulative annual volume discounts to purchasers of retail display advertising space violates ***HN2***[] *Section 2(a)* of the Clayton Act, which prohibits discrimination in price "between purchasers of commodities of like grade and quality" where the effect is substantially to lessen competition or a tendency to create a monopoly. *15 U.S.C. § 13(a)*. Times Mirror filed its motion to dismiss this count for lack of subject matter jurisdiction on November 4, 1977, arguing **[*4]** that newspaper advertising does not fall within the scope of the term "commodities" under the Clayton Act.

The administrative law judge agreed, holding that *Section 2(a)* covers only tangibles. Of newspaper advertising space, he stated: "But here the respondent sells the service of taking the advertiser's message into a million homes, with its own circulation list and its own means of distribution. That the message is carried on a tangible piece of paper does not make the delivery of the message any less a service."

The Commission disagreed. It found that the Clayton Act was clearly intended to apply to tangibles and not to apply to intangibles, but that newspaper advertising space falls somewhere in between. Analyzing the problem in terms of the policies underlying the Clayton Act, the Commission concluded that newspaper advertising space "is sufficiently fungible in nature to be susceptible to the kind of non-discriminatory pricing which the legislative scheme seeks to encourage" and that "there is nothing inherent in the sale of newspaper advertising space that requires particularized skills or treatment for different customers." As a result, the Commission refused to follow **[*5]** two recent district court decisions, *National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81 (D.D.C. 1977)*, and *National Auto Brokers Corp. v. General Motors Corp., 1974-2 TRADE CASES P97,856*, (S.D.N.Y. 1974), in which it has been held that newspaper advertising space is not a commodity under the Clayton Act. Times Mirror argues that Lone Star justifies its suit for relief from the effect of the Commission's decision on Count II.

I. Extent of Injury

It is well established that ***HN3***[] only a clear showing of irreparable injury from anticipated agency action will excuse the exhaustion of administrative remedies and permit judicial intervention in the agency process. *Christensen, supra*; *Renegotiation Board v. Bannercroft Clothing Co., 415 U.S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974)*.

Times Mirror alleges that it will suffer five separate types of harm if it is forced to pursue this action through the administrative system: (1) the expense and inconvenience of further litigation before the Commission, (2) waste of government resources which will hurt Times Mirror as a member of the taxpaying public, (3) the possibility of private treble damage suits pending ultimate **[*6]** judicial review, (4) violation of Times Mirror's due process rights, and (5) a chilling effect upon the flow of news, editorial and commercial information to the public.***HN4***[]

Litigation expenses which are normal incidents of participation in the agency process do not constitute irreparable injury. *Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938)*; *Christensen, supra*. Nor does asserted waste of government resources by the FTC in allegedly frivolous litigation amount to irreparable injury under the Lone Star test. "Obviously, Congress has empowered the FTC to decide which actions are worthy of its attention." *Christensen, supra, at 1323 n. 2*.

The plaintiff next argues that if the FTC proceeding is allowed to result in a cease and desist order, Times Mirror might have to defend a multitude of private treble damage suits pending reversal of an adverse decision. The same argument was rejected in *Casey, supra*: "If the FTC lacks jurisdiction, however, no party would be collaterally estopped by an FTC finding." *578 F. 2d at 796 n. 5*, citing *Paramount Transportation Systems, 436 F. 2d 1064, 1066 (9th Cir. 1971)*; but see *McCulloch Interstate Gas Corp.* **[*7]** *v. Federal Power Commission, 536 F. 2d 910 (10th Cir. 1976)*.

Times Mirror's last two asserted elements of injury relate to constitutional rights it claims will be violated if the FTC is allowed to proceed in Docket No. 9103. Some courts have held that ***HN5***[] in certain circumstances the assertion of a constitutional right may be, by itself, enough to give a district court jurisdiction to hear an attack on an interlocutory order. *Downen v. Warner, 481 F. 2d 642 (9th Cir. 1973)*; *Coca-Cola Company v. FTC, 475 F. 2d 299 (5th Cir. 1973)*; *Fay v. Douds, 172 F. 2d 720 (2d Cir. 1949)*. The rationale underlying this exception is that "[resolving] a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen v. Warner, supra, at 643*.

This limited exception is not intended, however, to provide an automatic escape route from the exhaustion requirement. "The fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping [an administrative agency] in its tracks." *Bokat v. Tidewater Equipment Co., 363 F. 2d 667, 672 (5th Cir. 1966)*; **[*8]** accord, *Coca-Cola Co. v. FTC, 475 F. 2d 299, 303 (5th Cir. 1973)*; see also *Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1082 (C.D. Cal. 1976)*.

Here, Times Mirror alleges two potential violations of its constitutional rights. First, it claims that to allow the FTC to pursue its "unlawful proceeding" deprives Times Mirror of due process. This is the kind of "conclusory language of a denial of due process" that has been held not to justify judicial intervention. *Bokat, supra* . In essence, Times Mirror asserts that due process requires that it be allowed to seek judicial intervention in any agency proceeding in which it challenges the agency's jurisdiction. This argument is at direct odds with the policies underlying the exhaustion requirement. ***HN6***[] "The judicially-created exhaustion requirement is intended to facilitate the development of a full factual record, to encourage the exercise of administrative expertise and discretion, and to promote judicial and administrative efficiency." *Downen v. Warner, supra, at 643*. Doubts about an agency's subject matter jurisdiction in a proceeding are only one factor in a district court's decision whether or not to interrupt an **[*9]** agency adjudication. Times Mirror will have a full opportunity to present its contentions in the proceeding before the Commission, and ***HN7***[] the Commission's final decision is subject to review by the court of appeals. *15 U.S.C. § 45(c)*.

Times Mirror's second claim of constitutional injury is based on *first amendment* freedom of speech. The plaintiff contends that if it is forced to cut back on volume discounts, the result will be a reduction in total advertising.Less advertising will mean less space for news and editorial material with the resultant "... chilling effect on the flow of news... to the public." This attenuated argument falls far short of the ***HN8***[] "unambiguous statutory or constitutional right" that justifies the extraordinary remedy of judicial intervention in an agency proceeding. *Coca-Cola, supra, at 304*.

II. FTC Jurisdiction

The second factor of the Lone Star test requires this court to assess the degree of doubt about agency jurisdiction to proceed. ***HN9***[] In the absence of a "clear jurisdictional defect," an agency should have the opportunity to make the initial determination of its own jurisdiction, subject to appellate court review. *Christensen, supra, at 1324*. Relying **[*10]** on (1) the plain language of the Clayton Act, (2) legislative history, (3) contemporaneous interpretation by the FTC, (4) judicial decisions, and (5) statements of authorities in the field, Times Mirror contends that newspaper advertising space clearly lies outside the reach of the Clayton Act.

First, Times Mirror argues that under the wording of the Clayton Act "commodities" can only include tangible goods and merchandise. *Section 2(a)* speaks of "commodities of like grade and quality," and allows for price differentials based on "cost of manufacture, sale or delivery," "actual or imminent deterioration of perishable goods, obsolescence of seasonal goods," etc. Times Mirror quotes the statement of antitrust authority F. Rowe that "any extension of the price discrimination prohibitions beyond the area of tangibles would make nonsense of this language." Price Discrimination Under the Robinson-Patman Act 61-62 (1962).

Next, Times Mirror argues that the legislative history of both the original *Section 2* of the Clayton Act and *Section 2* as amended by the Robinson-Patman Act in 1936 reflects an intention to limit its applicability to tangible products and merchandise.

Third, Times **[*11]** Mirror points to an informal ruling of the FTC, recorded at 81 Cong. Rec. App. 2336-37 (1937) soon after the passage of the Robinson-Patman Act. In the ruling the FTC announced that it was dropping a case against periodical publishers who charged proportionally higher rates for less than full page advertisements. The FTC concluded that "the sale of advertising space in the circumstances in this case does not involve the sale of a 'commodity' within the meaning of the act." Id.

In 1953, however, the Supreme Court, in *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 610 n. 27, 73 S. Ct. 872, 881, 97 L. Ed. 2d 1277, 1290*, explicitly referred to the status of advertising space under the Clayton Act as an open question:

On oral argument here, the government explanatorily referred to an early informal Federal Trade Commission opinion to the effect that advertising space was not a "commodity" within the meaning of *§ 2* of the Clayton Act. We express no views on that statutory interpretation. Compare note 11, supra.

In footnote 11, the Court had listed cases demonstrating its broad interpretation of the "interstate commerce" requirement of the Sherman Act. The reference **[*12]** suggests that if it had ruled on the point, the Court would also have given a broad interpretation to the term "commodities."

Times Mirror points out that four years later a bill was introduced, but not enacted, in Congress to amend the Clayton and Robinson-Patman Acts "to include the sale of services by independent contractors." H.R. 8277, 85th Cong., 1st Sess., 103 Cong. Rec. 9898 (1957). The bill reflected congressional understanding that *Section 2(a)* covered "only tangible commodities and not services." H.R. Rep. No. 607, 85th Cong., 1st Sess. 66 (1957). But the Commission decision here does not conflict with this understanding. The Commission found that newspaper advertising space is neither pure tangible nor pure intangible. Since the tangible/intangible distinction provided no easy answer, the Commission looked to Clayton Act policy in deciding that newspaper advertising space is a commodity under *Section 2(a)*.

Finally, Times Mirror argues that most recent cases and commentary support their contention that newspaper advertising space is not a commodity under *Section 2(a)*. Their point is well taken. In a number of decisions involving products other than newspaper advertising **[*13]** space, but which also fall in between the tangible and intangible categories, it has been held that *Section 2(a)* of the Clayton Act is inapplicable. See, e. g., *Baum v. Investors Diversified Services, Inc., 409 F. 2d 872 (7th Cir. 1969)* (mutual fund shares); *American Bankers Club, Inc. v. American Express Co., 1977-1 TRADE CASES P70,740 (D.D.C. 1977)*(travelers checks); *Kennedy Theater Ticket Service v. Ticketron, Inc., 342 F. Supp. 922 (E.D. Pa. 1972)* (reserved seat tickets). And in *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc., 295 F. 2d 375 (7th Cir. 1961)*, cert denied, *369 U.S. 812 (1962)*, the court held the Clayton Act inapplicable to the sale of television advertising.

Also, in *ALW, Inc. v. United Air Lines, Inc., 510 F. 2d 57 (9th Cir. 1975)*, the court cited *Amana, supra*, in dictum for the proposition that "[advertising] does not fall within the traditional definition of 'commodities' within the purview of Section 3" of the Clayton Act. Finally, two recent district court cases have specifically held that newspaper advertising space is not a "commodity." *National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81 (D.D.C. 1977)*; *National Auto* ***[*14]*** *Brokers Corp. v. General Motors Corp., 1974-2 TRADE CASES 97,856 (S.D.N.Y. 1974)*.

Authorities in the field have also concluded that newspaper advertising space has been excluded from the Clayton Act. P. Areeda states that *Section 2(a)* "applies only to transactions in 'commodities' which are customarily understood to exclude services and such intangibles as newspaper or broadcast advertising." Antitrust Analysis 846 (1974), cited in *National Tire, supra, at 85*. E. Kintner argues that "[what] is being sold is in the nature of a service, the circulation of ideas to the newspaper's readers. The printed paper is merely a tangible vehicle for the conveyance of these ideas. It is only incidental to the dominant tangible nature of the transaction." A Robinson-Patman Primer 49 (1970), cited in *National Tire, supra, at 85*. J. von Kalinowski states in his treatise that newspaper and magazine advertising are intangibles not within the term "commodities."3 ***Antitrust Law*** and Trade Regulation § 24.05. Finally, co-sponsor Patman stated in his book on the subject that the act was not intended to apply to magazine or other advertising. W. Patman, The Robinson-Patman Act 75 (1938).

But the **[*15]** cases are not unanimous. In Scott Publishing Co. v. Columbia Basin Publ shers, *Inc., 180 F. Supp. 754 (W.D. Wash. 1959)*, aff'd *293 F. 2d 15 (9th Cir. 1961)*, cert. denied *368 U.S. 940 (1961)*, the district court expressed "considerable doubt" about whether newspaper advertising was a "commodity," but neither the district nor the circuit court found it necessary to decide the question. In *Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522, 527 (2nd Cir. 1956)*, the court stated that whether or not newspaper advertising is a "commodity"remained an "important and apparently unresolved question" under the Clayton Act. And in *United States v. Wichita Eagle Publishing Co., 1959 TRADE CASES 75,535 (D. Kan. 1959)*, newspaper advertising was treated as a commodity without discussion. Finally, in *National Tire, supra*, while the court concluded that newspaper advertising space is not a "commodity," it noted that "[there] is little legal authority on the issue" and that "the characterization of newspaper advertising is not clearly established." *441 F. Supp. at 85*.

Overall, it is clear that ***HN10***[] most courts and authorities that have addressed the question have concluded that newspaper advertising **[*16]** is not a "commodity" under *Section 2(a)*. It cannot be said, however, that the jurisdictional question is free from doubt, or that the Commission's jurisdictional conclusion is frivolous. *Lone Star, supra, at 511*. Since it is not clear that the FTC is operating outside the scope of its statutory authority, intervention is not warranted under this branch of the Lone Star test. Christiansen, supra, at 1324.

III. Involvement of Agency Expertise in the Question

Times Mirror has argued that there is no need for specialized administrative expertise to decide a purely legal question of statutory interpretation. ***HN11***[] Some courts have distinguished between legal and factual questions in assessing the importance of administrative expertise. See, e.g., *McKart v. United States, 395 U.S. 185, 198-99, 89 S. Ct. 1657, 1665, 23 L. Ed. 2d 194, 205-06 (1965)*. But "the requirement of exhaustion of remedies often applies as well to questions of law as to questions of fact. Courts should accord deference to an agency's own construction of its authorizing statute when reviewing final agency action." *Christensen, supra, at 1324*; accord, *Casey, supra, at 798*.

The question of FTC jurisdiction to proceed **[*17]** against Times Mirror under the Clayton Act in the present case appears to be an example of a legal issue to which the exhaustion requirement should apply. The FTC has special expertise in the area of federal ***antitrust law*** and a thoughtful jurisdictional decision by the Commission may prove helpful to a reviewing court. See *National Tire, supra, at 85*. The Commission has already issued an opinion upholding FTC jurisdiction under Count I of the complaint involved in Docket No. 9103, but further proceedings in the case could result in clarification or even reversal of that decision.

In summary, Times Mirror fails to establish a basis for judicial intervention. Both of the primary goals of the exhaustion doctrine, promotion of judicial economy and administrative efficiency, will be served by allowing the FTC to proceed with the adjudication. It is not clear that the FTC is exceeding its jurisdiction and Times Mirror has asserted no cognizable injury it will suffer if it is forced to defend itself in the FTC proceeding.

Count I

In Count I of the complaint, the FTC alleges that Times Mirror's practice violates Section 5 of the Federal Trade Commission Act. ***HN12***[] Section 5 empowers **[*18]** the FTC to initiate proceedings to prevent "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." *15 U.S.C. § 45 (1976)*. Times Mirror's argument for district court action relieving it from further FTC proceedings under Count I of the complaint is even less convincing than its argument for relief from Count II. Its claims for relief under the injury and administrative expertise branches of the Lone Star test are the same for both counts. With regard to agency jurisdiction, however, its allegations of agency overreaching in Count I are much weaker.

Times Mirror has raised no challenge to Section 5 jurisdiction in the proceeding now before the FTC. Consequently, Times Mirror is asking this court to decide against the FTC on the issue of Section 5 jurisdiction before the agency has been offered the opportunity to give even a preliminary justification for its action. Times Mirror attempts to circumvent this problem by arguing that the jurisdictional questions under Section 5 and *Section 2(a)* are identical and that the FTC decision on *Section 2(a)* is also a decision on Section 5. In fact, however, it is clear **[*19]** that ***HN13***[] the FTC's power to act to prevent unfair methods of competition and unfair or deceptive acts or practices includes the power "to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or spirit of the antitrust laws." *FTC v. Sperry and Hutchinson Co., 405 U.S. 233, 239, 92 S. Ct. 898, 903, 31 L. Ed. 2d 170, 176 (1972)*.

In response, Times Mirror argues that Section 5 jurisdiction may exist in proceedings involving conduct that has been inadvertently omitted from the Clayton Act, but not where the conduct involved has been deliberately excluded from the Act. See *Grand Union Co. v. FTC, 300 F. 2d 92 (2d Cir. 1962)*. It is unnecessary to pass on the validity of this argument since, as discussed above, it is not clear that the sale of newspaper advertising space has been deliberately excluded from the coverage of the Clayton and Robinson-Patman Acts.

With regard to Count I of the complaint, the FTC has not had the opportunity to make even a preliminary decision on its jurisdiction under Section 5 of the FTC Act, and it appears likely that its authority to act under that section is broader in the present case than its authority **[*20]** under *Section 2(a)* of the Clayton Act. Consequently, the plaintiff again fails to meet the Lone Star test for judicial intervention and must pursue its claims in the proceeding before the FTC.

The plaintiff's motions for a preliminary injunction and summary judgment are denied; the FTC's motion to dismiss is granted.

California Computer Products, Inc. v. International Business Machines Corp.

United States Court of Appeals for the Ninth Circuit

June 21, 1979

No. 77-1563

Reporter

613 F.2d 727 *; 1979 U.S. App. LEXIS 13793 **; 1979-1 Trade Cas. (CCH) P62,713; 52 A.L.R. Fed. 702

CALIFORNIA COMPUTER PRODUCTS, INC. and CENTURY DATA SYSTEMS, INC., Plaintiffs-Appellants, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant-Appellee.

Subsequent History: [1]** Rehearing Denied November 16, 1979.

Prior History: Appeal from the United States District Court for the Central District of California.

Core Terms

prices, disk, products, monopolization, antitrust, peripheral, manufacturers, directed verdict, lease, predatory, competitors, integrated, monopolist, drives, cuts, increased price, specific intent, Sherman Act, causal, monopoly power, disk drive, customers, attempt to monopolize, price reduction, relevant market, technological, violations, marginal, models, equipment manufacturer

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Industries > Sports > 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

HN1[] **Clayton Act, Claims**

The Clayton Act § 4, *15 U.S.C.S. § 15*, authorizing private antitrust suits for damages, 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. This statute confers standing to sue only upon those persons causally injured by antitrust violations.

Antitrust & Trade Law > Sherman Act > Claims

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

HN2[] **Sherman Act, Claims**

In order to prevail in an action under the Sherman Act, *15 U.S.C.S. § 2*, the plaintiff must prove not only injury causally linked to the asserted violation, but also that the injury is of the type the antitrust laws were intended to prevent. The plaintiff's burden of proving the former is satisfied by proof of some damage flowing from the antitrust violation. Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts, since the antitrust laws were enacted for the protection of competition not competitors.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Private Actions, Standing**

A plaintiff in an action under the Sherman Act, *15 U.S.C.S. § 2*, must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond plaintiff's own loss of business or the market's loss of a competitor. Moreover, it is not sufficient for an antitrust plaintiff to allege an indirect ripple effect. It is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy. Antitrust violations admittedly create many foreseeable ripples of injury to individuals, but the law has not allowed all of those merely affected by the ripples to sue for treble damages.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4[] **Trials, Judgment as Matter of Law**

As a general rule, the district court has the power to direct a verdict if the evidence permits only one reasonable conclusion as to the verdict.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Burdens of Proof > General Overview

HN5[] **Trials, Judgment as Matter of Law**

On a motion for a directed verdict, the district court must consider all the evidence both favorable and unfavorable. But in order to avoid passing on the credibility of witnesses and weighing contradictory evidence, the court must resolve all inferences in favor of the party with the burden of persuasion, because it is the jury, not the judge, which weighs the contradictory evidence and inferences, judges the credibility of witnesses, and draws the ultimate conclusion as to the facts.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6[] **Trials, Judgment as Matter of Law**

On a motion for a directed verdict, the court must view the evidence in the light most favorable to the party opposing the motion and it must examine all the evidence.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN7[] **Trials, Judgment as Matter of Law**

In order to benefit from the favorable inferences available under the motion for directed verdict standard, the party against whom the motion is made must present "substantial evidence."

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

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

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

In considering a motion for a directed verdict, the court must give the party against whom the motion is made the benefit of all reasonable evidentiary inferences. This is no less true in an antitrust case. However, if there is no substantial evidence to support the claim, the court must direct a verdict.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN9[] **Trials, Judgment as Matter of Law**

The sole issue in an appeal from a directed verdict against the party with the burden of persuasion is the sufficiency of the evidence of the appellant's claim. The correct standard is whether or not, viewing the evidence as a whole, there is substantial evidence present that could support a finding for the nonmoving party.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN10[] **Trials, Judgment as Matter of Law**

The standard for determining the propriety of a directed verdict, identical to that for determining the propriety of a judgment notwithstanding the verdict, is the same for district and appellate judges.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

A directed verdict is proper, even in an antitrust case, when there is no substantial evidence to support the claim.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Robinson-Patman Act, Claims**

There are three essential elements to a successful claim of the Sherman Act, *15 U.S.C.S. § 2* monopolization (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal "antitrust" injury.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Monopolies & Monopolization, Attempts to Monopolize**

Monopoly power is the power to control prices or to exclude competition. This definition of monopoly power has been applied principally with reference to the defendant's share of the relevant product and geographic markets.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Monopolies & Monopolization, Actual Monopolization**

The second element of a successful monopolization claim requires that the conceded monopolist have engaged in "willful" acts directed at establishing or retaining its monopoly, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

HN16[] **Monopolies & Monopolization, Actual Monopolization**

The plaintiff in a monopolization claim under the Sherman Act, *15 U.S.C.S. § 2* need not show that the conceded monopolist's acts were of a kind that would be unlawful for an ordinary enterprise. Rather, the plaintiff must show that the defendant's acts "unnecessarily excluded competition" from the relevant market. Nor is it necessary to show a specific intent to eliminate a competitor.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Monopolies & Monopolization, Actual Monopolization**

The defendant's acts in a monopolization claim are properly analyzed analogously to contracts, combinations and conspiracies under the Sherman Act, *15 U.S.C.S. § 1*. The test is whether the defendant's acts, otherwise lawful, were unreasonably restrictive of competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

Governments > Legislation > Overbreadth

HN18[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1* is limited to concerted activity and contractual restraints, while under the Sherman Act, *15 U.S.C.S. § 2* individual activity may also give rise to liability.

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

HN19[] **Sherman Act, Claims**

There are four elements to a successful claim of the Sherman Act, *15 U.S.C.S. § 2* attempt to monopolize: (a) specific intent to control prices or destroy competition with respect to a part of commerce; (b) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; (c) a dangerous probability of success; and (d) causal "antitrust" injury.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

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

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

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

HN20[] **Antitrust & Trade Law, Sherman Act**

While the completed offense of monopolization under the Sherman Act, *15 U.S.C.S. § 2* demands only a general intent to do the act a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt.

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

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

"Direct evidence" of specific intent to control prices or destroy competition is not always necessary when the attempt claim is founded upon a substantial claim of restraint of trade, that is, a Sherman Act, *15 U.S.C.S. § 1* violation. In these circumstances the requisite specific intent may be inferred. Market power is relevant to determining whether such an inference is proper; but where a *§ 1* violation "clearly" exists, proof of market power is unnecessary to support an inference of specific intent.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN22[] **Sherman Act, Claims**

Since under the rule of reason market definition is required to establish the Sherman Act, 15 U.S.C.S. § 1 violation, such evidence is necessary where specific intent is sought to be shown by inference unless a per se violation of § 1 is made out.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] Monopolies & Monopolization, Attempts to Monopolize

The third element of the Sherman Act, 15 U.S.C.S. § 2 attempt, the requirement that a defendant's demonstrated specific intent to control prices or destroy competition have a dangerous probability of success, may be satisfied either by direct proof of market power, or by inference from the proven specific intent itself. Because this element may be inferred from the existence of a specific intent in proper cases, it is not an "essential" element of an attempt claim. For the same reason, neither is proof of any particular degree of market power necessarily an "independent" element of such a claim.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN24[] Clayton Act, Claims

In addition to the first three elements necessary to establish a prima facie case of attempted monopolization, the fourth element, causal "antitrust" injury, is as necessary to confer standing to sue and to support a claim for damages under the Sherman Act, 15 U.S.C.S. § 2 attempt as it is under § 2 monopolization. The Clayton Act § 4, 15 U.S.C.S. § 15.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] Monopolies & Monopolization, Attempts to Monopolize

The Sherman Act does not draw a distinction between competition on the bases of price and of performance: the two are inseparable parts of any competitive offering. Where the opportunity exists to increase or protect market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN26[] **Judgment as Matter of Law, Directed Verdicts**

The complexity of a plaintiff's case, however, does not entitle it to avoid a directed verdict if the evidence no matter how much of it there may be is weak.

Counsel: Maxwell M. Blecher, Harold R. Collins, Jr., Daphne M. Stegman, of Blecher, Collins & Hoecker, Los Angeles, Cal., for plaintiffs-appellants.

David Boies, Ronald S. Rolfe, Stuart W. Gold, Cravath, Swaine & Moore, New York City, Ernest J. Getto, Kadison, Pfaelzer, Woodward, Quinn & Rossi, Los Angeles, Cal., David Boies, Scarsdale, N. Y., for defendant-appellee.

Judges: Before CHOY and KENNEDY, Circuit Judges, and PALMIERI, * District Judge.

Opinion by: CHOY

Opinion

[*731] California Computer Products, Inc. ("CalComp") appeals from the judgment entered on a directed verdict in favor of appellee International Business Machines Corp. ("IBM") as to all counts of its complaint charging IBM with violations of *§ 2* of the Sherman Act, *15 U.S.C. § 2*. We affirm.

I. Background and Proceedings Below

IBM is one of the largest industrial corporations in the world. It achieved technical leadership in the computer industry **[**2]** over other early entrants, such as Sperry Rand, in the mid-1950's and thereafter pioneered the development of many electronic data processing products, including the disk products involved in this litigation.

Disk products are part of a broader category of what is known as peripheral equipment, such as disks, tapes, printers, and terminals, which is connected to the central processing unit ("CPU") to enable the data processing system to perform particular functions. Included in the reference to disk products are disk drives, devices using magnetic disks similar in appearance to phonograph records to store information, and controllers, used for communication between disk drives and the CPU. Occasionally these devices are built into the CPU; alternatively, they exist as external components that may be "plugged into" the CPU. As a general purpose computer systems manufacturer, IBM sells both CPUs and peripherals, including disk products.

CalComp began manufacturing computer products in 1960, when it made plotting devices peripheral equipment that provides graphic, printed or pictorial output. CalComp claims no injury with respect to these products. With the acquisition of Century Data **[**3]** Systems in 1969, CalComp entered the disk products market, manufacturing disk drives and controllers that were "plug compatible" with IBM's and other suppliers' CPUs. CalComp's business strategy with respect to IBM-compatible disk products was straightforward: copy and, where possible, improve upon an IBM design, and undersell IBM to its own customers. By the "reverse engineering" of simply buying a device

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* The Honorable Edmund L. Palmieri, Senior United States District Judge for the Southern District of New York, sitting by designation.

from IBM, taking it apart, and building a similar one, CalComp was able to avoid IBM's expenditures for research and development and pass the savings on through lower prices.

CalComp commenced this lawsuit on October 3, 1973. The complaint alleged that IBM's introduction of new CPUs and disk products, its price cuts on existing disk products, its leasing policies, and other marketing practices prevented CalComp from effectively competing with IBM for disk product sales and thus violated *§ 1* and *§ 2* of the Sherman Act. [1] CalComp alleged and attempted to prove that these acts by IBM took place within a ten year span, from late 1963 to 1972, resulting in treble damages of $ 306 million. Following over three years of discovery and pretrial, trial to a jury began on November 15, 1976. **[**4]** At the conclusion of fifty-four days of trial covering three months, the district court granted IBM's motion for directed verdict on February 11, 1977.

The records and transcript on this appeal comprise 132 volumes. Voluminous briefs **[*732]** and supplemental briefs by the parties and Amicus briefs were permitted. We have considered all of the arguments advanced and scrutinized pertinent parts of the record, particularly in view of the nature of the appellate task on review of a directed verdict.

II. Antitrust Standing

CalComp has asserted that IBM's actions created anticompetitive effects on three classes of IBM competitors: (1) general purpose computer systems manufacturers, (2) leasing companies and (3) IBM-compatible peripheral equipment manufacturers. We believe that CalComp, an IBM-compatible peripheral equipment manufacturer, lacks antitrust standing as to the first two categories of claims.

Section 4 of the Clayton Act, *15 U.S.C. § 15*, ***HN1***[] authorizing **[**5]** private antitrust suits for damages, provides in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . .

This statute confers standing to sue only upon those persons causally injured by antitrust violations. *Kapp v. National Football League, 586 F.2d 644, 648-49 (9th Cir. 1978)*; *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-99 (9th Cir. 1977)*. Moreover, ***HN2***[] in order to prevail the plaintiff must prove not only injury causally linked to the asserted violation, but also that the injury is of the type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d at 498-99*; *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir. 1973)*, Cert. denied, *414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1975)*. The plaintiff's burden of proving the former is satisfied by proof of Some damage flowing from the antitrust violation. *Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed.* ***[**6]*** *2d 129 (1969)*. Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts, since "(t)he antitrust laws . . . were enacted for "the protection of Competition not Competitors,' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488, 97 S. Ct. at 697*, Quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. See *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir. 1978)*. Accordingly, the ***HN3***[] plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor. See *Knutson v. Daily Review, Inc., 548 F.2d 795, 803 (9th Cir. 1976)*. Moreover, it is not sufficient for an antitrust plaintiff to allege an indirect ripple effect. As this court wrote in John Lenore & Co.:

> It is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy. Antitrust violations admittedly create many foreseeable ripples of injury to individuals, but the law has not **[**7]** allowed all of those merely affected by the ripples to sue for treble damages.

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[1] CalComp has dropped its *§ 1* claim on this appeal.

550 F.2d at 499.

In the present case CalComp has alleged that IBM's actions injured general purpose computer systems manufacturers and leasing companies. But CalComp does not include itself among these two classes of IBM competitors. Nor does CalComp's evidence demonstrate a direct causal injury which would afford it standing. Rather, at best CalComp argues that injury to these two groups has had an indirect ripple effect upon it. As John Lenore & Co. indicates, such an indirect ripple effect is not sufficient to allow CalComp to sue for treble damages on its first two categories of claims.

III. CalComp's Claims as to IBM-Compatible Peripheral Equipment Manufacturers

A. Standard of Review on Appeal from Directed Verdict

HN4[] As a general rule, the district court has the power to direct a verdict if **[*733]** "the evidence permits only one reasonable conclusion as to the verdict." *Fountila v. Carter, 571 F.2d 487, 489-90 (9th Cir. 1978)*, Quoting *Kay v. Cessna Aircraft Co., 548 F.2d 1370, 1372 (9th Cir. 1977)*; See *Syufy Enterprises v. National General Theatres, 575 F.2d 233, 235 (9th Cir. 1978)*. [2] **[**8]** **HN5**[] The district court must consider all the evidence both favorable and unfavorable. But in order to avoid passing on the credibility of witnesses and weighing contradictory evidence, the court must resolve all inferences in favor of the party with the burden of persuasion, because

> (i)t is the jury, not **[**9]** the judge, which "weighs the contradictory evidence and inferences, judges the credibility of witnesses, . . . and draws the ultimate conclusion as to the facts . . . ."

Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 (9th Cir. 1978), Quoting *Cockrum v. Whitney, 479 F.2d 84, 86 (9th Cir. 1973)* and *Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520 (1944)*; See *Marquis v. Chrysler Corp., 577 F.2d 624, 639 (9th Cir. 1978)*; *Kay v. Cessna Aircraft Co., 548 F.2d at 1372*. [3]

[10]** Thus, this court in *Maheu v. Hughes Tool Co., 569 F.2d 459, 464 (9th Cir. 1977)*, upholding the denial of a directed verdict against the party with the burden of persuasion, made it clear that application of the general standard of Fountila and Kay, supra, required it to **HN6**[] view the evidence "in the light most favorable to the party opposing the motion," and that it "must examine All the evidence" (emphasis added). See also *id. at 481* (concurring and dissenting opinion); *Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 882 (9th Cir. 1977)*;

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[2] Although the district court may direct a verdict either against the party who does not bear the burden of persuasion or the party who does bear that burden, the amount of evidence required for a directed verdict differs. The party seeking a directed verdict must make a stronger showing of evidence if he bears the burden of persuasion. See *United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356 (9th Cir. 1977)*; *Juhnke v. EIG Corp., 444 F.2d 1323, 1325 (9th Cir. 1971)*; Comment, "Directing the Verdict in Favor of the Party with the Burden of Proof," 50 N.C.L.Rev. 843 (1972). Thus directed verdicts for defendants are more frequent than for plaintiffs. See C. Wright, Federal Courts 464 (3d ed. 1976).

[3] This test is a hybrid of the so-called "new trial" and "most favorable evidence" tests. Shortly after the power of the federal courts to grant directed verdicts consistently with the *seventh amendment* was established in *Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943)*, two polar tests were proposed for determining whether the evidence in a particular case is sufficient to warrant a directed verdict against the bearer of the persuasion burden. The first, the "setting aside" or "new trial" test, permitted a directed verdict against the party with the burden of persuasion if the judge, looking at All the evidence, both favorable and unfavorable, determined that he would be duty bound to set aside a verdict for that party. In the second, the "most favorable evidence" test, the court was to consider only the evidence favorable to the party with the persuasion burden, completely disregarding all unfavorable evidence, and determine whether a reasonable jury, viewing the evidence in the light most favorable to that party, could find every essential part in that party's favor. If it could not, a directed verdict for the other party would be proper. See McBaine, "Trial Practice: Directed Verdicts; Federal Rule," 31 Calif.L.Rev. 454, 460-61 (1943). The principal differences between these polar tests were that the "setting aside" test involved passing upon the credibility of witnesses and weighing contradictory evidence, while the "most favorable evidence" test did not; and the former test permitted consideration of all the evidence, while the latter did not.

Santa Clara Valley Distributing Co. v. Pabst Brewing Co., 556 F.2d 942, 944 (9th Cir. 1977); Kay v. Cessna Aircraft Co., 548 F.2d at 1372; Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1140 (9th Cir.), Cert. denied, *419 U.S. 1023, 95 S. Ct. 500, 42 L. Ed. 2d 298 (1974)*.

HN7[] In order to benefit from the favorable inferences available under this standard, the party against whom the motion is made must present "substantial evidence." As stated in Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975):

> **HN8**[] In considering a motion for a directed verdict, the court must give the party against whom the motion **[**11]** is made the benefit of all reasonable evidentiary inferences. (Cited authority omitted.) This is no less true in an antitrust case. **[*734]** However, if there is no substantial evidence to support the claim, the court must direct a verdict.

Id. at 677 (emphasis added), Quoting Cleary v. National Distillers & Chemical Corp., 505 F.2d 695, 696 (9th Cir. 1974). **HN9**[] The "sole issue" in an appeal from a directed verdict against the party with the burden of persuasion is thus the sufficiency of the evidence of the appellant's claim. Cleary v. National Distillers & Chemical Corp., 505 F.2d at 696. As stated in Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d at 1140, "the correct standard is whether or not, viewing the evidence as a whole, there is substantial evidence present that could support a finding . . . for the nonmoving party." Accord, Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 & n.2 (9th Cir. 1977) (substantial evidence is "more than a mere scintilla" and consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"), Cert. denied, *439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122* ***[**12]*** *(1978)*.

HN10[] The standard for determining the propriety of a directed verdict identical to that for determining the propriety of a judgment n. o. v., Fountila v. Carter, 571 F.2d at 489; Cockrum v. Whitney, 479 F.2d at 85 is the same for district and appellate judges. Maheu v. Hughes Tool Co., 569 F.2d at 481 (concurring and dissenting opinion).

In its Amicus brief the Department of Justice argues that:

> Because of the generally complex nature of antitrust litigation and the important role which motive and intent often play therein, the Supreme Court has generally disapproved of the use of summary procedures, such as motions for directed verdicts, in antitrust cases. Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (, 82 S. Ct. 486, 7 L. Ed. 2d 458) (1962); Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 746 (, 96 S. Ct. 1848, 48 L. Ed. 2d 338) (1976); See also Chisholm Bros. Farm Equip. Co. v. International Harvester Co., supra, 498 F.2d at 1139. Complex Section 2 cases, such as this case, involve numerous factual issues such as market definition, whether the defendant possesses monopoly power in a relevant market and whether the defendant had the purpose or intent to **[**13]** exercise that monopoly power. These issues must be resolved by the jury after receiving appropriate instructions from the court.

However, in Santa Clara Valley Distributing Co. v. Pabst Brewing Co., 556 F.2d at 944-45 n.1, this court dealt extensively and definitively with the meaning of Poller and Hospital Building Co. in the context of a directed antitrust verdict. That case, emphasizing that the Supreme Court's disapproval of "summary proceedings" dealt with "Pre trial motions" (emphasis original), concluded that "the same circumspection is not required in the case of directed verdicts." Rather, the usual standard described above applies:

> **HN11**[] a directed verdict is proper, even in an antitrust case, when "there is no substantial evidence to support the claim."

Id., quoting Rutledge v. Electric Hose & Rubber Co., 511 F.2d at 677, and Cleary v. National Distillers & Chemical Corp., 505 F.2d at 696. See Marquis v. Chrysler Corp., 577 F.2d at 639 & n.25. [4]

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[4] That directed verdicts in antitrust cases have not been "generally disapproved" is evident from the fact that Santa Clara Valley, like Syufy, Janich Brothers, Cleary and Chisholm Brothers, affirmed a directed verdict in favor of the antitrust defendant. In

[14]** B. General *§ 2* Doctrine

CalComp contends that the evidence was sufficient to show that particular conduct **[*735]** on the part of IBM, detailed below, violated either or both the monopolization and attempt to monopolize clauses of *§ 2* of the Sherman Act. [5] In order to reverse the district court's judgment as to either of these claims, it must be that after viewing the evidence in the light most favorable to CalComp, there is substantial evidence of every essential element of that claim.

1. Monopolization

HN13[] There are three essential elements to a successful claim of *§ 2* monopolization:

(a) the possession of monopoly power in the relevant market;

(b) the willful acquisition or maintenance of that power; and

(c) causal "antitrust" injury.

[15]** The first two elements are derived from *§ 2* itself, and were explicated in *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. See *Greyhound Computer Corp. v. IBM, 559 F.2d 488, 492 (9th Cir. 1977)*; *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977)*.

As reiterated in Greyhound, ***HN14***[] monopoly power the first element "is the power to control prices or exclude competition." *559 F.2d at 496*, Quoting *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The Du Pont definition of monopoly power has been applied principally with reference to the defendant's share of the relevant product and geographic markets. *Greyhound, 559 F.2d at 496*. See *United States v. Grinnell Corp., 384 U.S. 563 at 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778* ; *United States v. E. I. du Pont de Nemours & Co., 351 U.S. at 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264* ; *American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*; *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975)*. But see *Moore v. Jas. H. Matthews & Co., 550 F.2d at 1219* ("the **[**16]** requisite power also can be demonstrated by evidence of the exercise of actual control over prices or exclusion of competitors").

HN15[] The second element of a successful monopolization claim requires that the conceded monopolist have engaged in "willful" acts directed at establishing or retaining its monopoly, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. at 571, 86 S. Ct. at 1704*. [6] That case found the defendant's acts sufficient to meet the *§ 2* conduct requirement because they constituted "unlawful and exclusionary practices." *Id. at 576, 86 S. Ct. 1698*.

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addition, See *Hanson v. Shell Oil Co., 541 F.2d 1352, 1357-59 (9th Cir. 1976)*, Cert. denied, ***429 U.S. 1074, 97 S. Ct. 813, 50 L. Ed. 2d 792 (1977)***; *Peltier v. Exxon Corp., 527 F.2d 757, 759 (9th Cir. 1975)*; *Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 11-13 (9th Cir. 1973)*, Cert. denied, ***417 U.S. 932, 94 S. Ct. 2643, 41 L. Ed. 2d 235 (1974)***. As the Supreme Court has noted, "(t)he same rule" generally applicable in civil cases "governs in ruling upon motions for directed verdict in treble damage suits under the antitrust laws." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 n.6, 82 S. Ct. 1404, 1409 n.6, 8 L. Ed. 2d 777 (1962)*.

[5] Sherman Act *§ 2*, *15 U.S.C. § 2*, provides:

HN12[] Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

[6] "The Act was deemed by its sponsors not to be applicable to one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well.' (T)he exception was an indication that power obtained or maintained by the kind of behavior that competition is thought to foster, if not compel, was immune even though businesses and business opportunities were destroyed in the process. In short, . . . protection of incentives to competitive behavior would prevail over dispersion of market power." C. Kaysen & D. Turner, Antitrust Policy 20 (1959), Quoting 21 Cong.Rec. 3151-52 (1890) (remarks of Sen. Hoar).

[17]** ***HN16***[] The plaintiff need not show that the conceded monopolist's acts were of a kind that would be unlawful for an ordinary enterprise. *Greyhound Computer Corp. v. IBM, 559 F.2d at 498*. Rather, the plaintiff must show that the defendant's acts "unnecessarily excluded competition" from the relevant market. Id. Nor is it necessary to show a specific intent to eliminate a competitor. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1, 26 (9th Cir. 1960)*, *Modified, 289 F.2d 933 (1961)*, Rev'd on other grounds, *370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)*. ***HN17***[] The defendant's acts are properly analyzed analogously to contracts, combinations and conspiracies under *§ 1* of the Sherman Act: the test is whether the defendant's acts, otherwise lawful, were **[*736]** Unreasonably restrictive of competition. [7] See *Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973)*. [8] **[**19]** While this "in large measure" has the effect of making acts of monopolization "merely the end products of conduct which violates *§ 1*," "that is not always true." *United States v. Griffith, 334 U.S. 100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*. *Section 1* ***HN18***[] is limited to concerted activity and contractual **[**18]** restraints, while under *§ 2*, individual activity may also give rise to liability. See Moore v. Jas. H. Matthews & Co., 473 F.2d at 332-33. [9]

The third element plaintiff's resultant "antitrust" injury has already been discussed, Part II Supra.

2. Attempt to Monopolize

HN19[] There are four elements to a successful claim of *§ 2* attempt to monopolize:

(a) specific intent to control prices or destroy competition with respect to a part of commerce;
(b) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose;
(c) a dangerous probability of success; and
(d) causal "antitrust" injury.

The first element was explained in *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*, wherein the Supreme Court differentiated the requisite levels of **[**20]** intent under the monopolization and attempt to monopolize clauses of the Sherman Act:

> ***HN20***[] While the completed offense of monopolization under *§ 2* demands only a general intent to do the act . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt . . . .

The intent to "build monopoly," given the Du Pont definition of monopoly power, is logically synonymous with the intent to control prices or exclude competition in the relevant market. See *Gough v. Rossmoor Corp., 585 F.2d 381, 390 (9th Cir. 1978)*; *Marquis v. Chrysler Corp., 577 F.2d 624, 641 (9th Cir. 1978)*; *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)*;

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[7] Thus, appellant's contention that "Any act taken by the monopolist satisfies the literal "monopolizes' language of the statute" is overly broad. See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d at 23* (after noting that jury instruction susceptible of similar interpretation was overly broad since under it, it was "difficult . . . to see how a monopolist can make any business decision . . . nor how it can make any sale or purchase (for example) at an advantageous price," court held its use not reversible error in view of other instructions which "modified and tempered its broadness").

[8] Rossmoor involved claims under *§ 1* and both the monopolization and attempt to monopolize clauses of *§ 2*. *487 F.2d at 376*. We held that whether the conduct requirement of each of these statutory proscriptions was met depended, under all three clauses, on the effect on "commercial competition: whether the defendant's conduct . . . unreasonably restrains competition in the market place." Id. See also *FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 397, 73 S. Ct. 361, 365, 97 L. Ed. 426 (1953)* ("when the Sherman Act is involved the crucial fact is the impact of the particular practice on competition"); *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 53 S. Ct. 471, 77 L. Ed. 825 (1933)* (both *§ 1* and *§ 2* "set up the essential standard of reasonableness").

[9] Conversely, not all violations of *§ 1* constitute acts of monopolization under *§ 2*. The monopoly must be "acquired or maintained . . . By means of " the *§ 1* violation, *United States v. Griffith, 334 U.S. 100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)* (emphasis added), "and not all violations of *§ 1* have the requisite causal effect." 3 P. Areeda & D. Turner, ***Antitrust Law*** P 626, at 81 (1978).

Greyhound Computer Corp. v. IBM Corp., 559 F.2d at 504; *Knutson v. Daily Review, Inc., 548 F.2d at 813-14*; *Lessig v. Tidewater Oil Co., 327 F.2d 459, 474* (9th Cir.), Cert. denied, *377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1964)*. "Direct ***HN21***[] evidence" of specific intent to control prices or destroy competition, however, is not always necessary when the attempt claim is "founded upon a substantial claim of restraint of **[**21]** trade" i. e., a *§ 1* violation. In these circumstances the requisite specific intent may be inferred. *Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1051-52 (9th Cir. 1974)*; See **[*737]** *Gough v. Rossmoor Corp., 585 F.2d at 390*; *Janich Bros., Inc. v. American Distilling Co., 570 F.2d at 854*; *Knutson v. Daily Review, Inc., 548 F.2d at 814*; *Bushie v. Stenocord Corp., 460 F.2d 116, 120-21 (9th Cir. 1972)*. Market power is relevant to determining whether such an inference is proper; but where a *§ 1* violation "clearly" exists, proof of market power is unnecessary to support an inference of specific intent. [10] *Janich Bros., Inc. v. American Distilling Co., 570 F.2d at 854 n.4*; *Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 12-13 (9th Cir. 1973)*, Cert. denied, *417 U.S. 932, 94 S. Ct. 2643, 41 L. Ed. 2d 235 (1974)*.

[22]** Conversely, "even though the restraint effected may be reasonable under *§ 1*, it may constitute an attempt to monopolize forbidden by *§ 2* if a specific intent to monopolize may be shown." *United States v. Columbia Steel Co., 334 U.S. 495, 531-32, 68 S. Ct. 1107, 1126, 92 L. Ed. 1533 (1948)*. However, "ordinarily specific intent is difficult to prove," *Hallmark Industry v. Reynolds Metals Co., 489 F.2d at 12*; See, e. g., *United States v. Columbia Steel Co., 334 U.S. 495 at 532-34, 68 S. Ct. 1107, 92 L. Ed. 1533*, and thus more commonly it is shown indirectly by proof of illegal conduct and, where necessary, market power.

The "predatory or anticompetitive conduct" element of *§ 2* attempt, like the conduct element of monopolization, encompasses more than violations of *§ 1*. See, e. g., *Knutson v. Daily Review, Inc., 548 F.2d at 814* (attempt requires proof of "some illegal (under *Section 1*) Or predatory activity") (emphasis added). The reason for this was stated in Moore v. Jas. H. Matthews & Co., 473 F.2d at 332:

> *Section 2* is not limited to concerted activity. A jury, therefore, could find that individual actions . . . constituted monopolization or attempted monopolization violating **[**23]** *section 2*, even if it found no concerted activity.

Additionally, "*section 1* also prohibits "contracts' that restrain trade," *Id. at 333*, and since individual actions may violate *§ 2*, no contractual agreement is required. Nonetheless, under *§ 2* attempt as with *§ 1* monopolization individual conduct is measured against the same "reasonableness" standard governing concerted and contractual activity under *§ 1*. See Note 7 Infra; *Greyhound Computer Corp. v. IBM Corp., 559 F.2d at 505 n.37* ("s 2 was intended to prohibit Unreasonable restraints of trade that exclude competition even when they are imposed by a single trader") (emphasis added). [11]

[24]** ***HN23***[] The third element of *§ 2* attempt, the requirement that a defendant's demonstrated specific intent to control prices or destroy competition have a "dangerous probability of success," may be satisfied either by direct proof of market power, See *Janich Bros., Inc. v. American Distilling Co., 570 F.2d at 853*, or by inference from the proven specific intent itself, See *Greyhound Computer Corp. v. IBM Corp., 559 F.2d at 504*. Because this element may be inferred from the existence of a specific intent in proper cases, it is not an "essential" element of an attempt claim, *Lessig v. Tidewater Oil Co., 327 F.2d at 474*. For the same reason, neither is proof of any particular degree

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[10] ***HN22***[] Since "under the rule of reason market definition is required to establish a *§ 1* violation," such evidence is necessary where specific intent is sought to be shown by inference unless a Per se violation of *§ 1* is made out. *Gough v. Rossmoor Corp., 585 F.2d at 390*; See *Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1140* (9th Cir.), Cert. denied, ***419 U.S. 1023, 95 S. Ct. 500, 42 L. Ed. 2d 298 (1974)***.

[11] See generally *Janich Bros., Inc. v. American Distilling Co., 570 F.2d at 854-58*; *Greyhound Computer Corp. v. IBM Corp., 559 F.2d at 505*; *Chisholm Brothers Farm Equipment Co. v. International Harvester Co., 498 F.2d at 1145*. Because monopoly power is a necessary element of the completed offense of *§ 2* monopolization but is not necessary for attempt, it follows that the same conduct may provide a basis for the monopolization offense and yet be excluded as a basis for the attempt offense. This is so since a defendant's monopoly power or lack thereof is part of the "reasonableness" calculus; conduct reasonable for other firms is not necessarily reasonable for the monopolist.

of market power necessarily an "independent" element of such a claim. *Hallmark Industry* **[*738]** *v. Reynolds Metals Co., 489 F.2d at 12 n.3*. [12]

HN24[] In addition to the first **[**25]** three elements necessary to establish a prima facie case of attempt, the fourth element causal "antitrust" injury is as necessary to confer standing to sue and to support a claim for damages under *§ 2* attempt as it is under *§ 2* monopolization. *15 U.S.C. § 15*; See *Greyhound Computer Corp. v. IBM Corp., 559 F.2d at 505* & n.38; Part II supra.

C. CalComp's Evidence

The foregoing analysis of the elements of *§ 2* monopolization and attempt to monopolize demonstrates that if CalComp presented sufficient evidence to go to the jury on the issue of IBM's monopoly power in a relevant market, both of its *§ 2* claims may be analyzed together. The only remaining elements necessary to establish the monopolization offense in this case would be monopolizing conduct and causal "antitrust" injury. If CalComp failed to show either of these, its attempt claim must necessarily also fail: first, because as discussed Supra, [13] **[**26]** "conduct lawful for a monopolist must, a fortiori, be excluded as a basis for the attempt offense," [14] and second, because the requirement of causal "antitrust" injury is common to both.

1. Market Evidence

Earlier it was noted that CalComp sought to define three relevant product markets: (a) a general purpose computer systems market; (b) an all disk drive and associated controller market; and (c) a plug-compatible disk drive and associated controller market (which excluded disk products for use with the CPU's of other manufacturers). [15] Several experts and industry executives testified, and a great deal of documentary evidence was admitted, in an effort to support each of these market definitions. Not only did the evidence concerning the various market definitions often conflict, but also the testimony and documents purportedly supporting a single market were sometimes internally inconsistent. Still, we assume Arguendo that the third category is an appropriately defined product market. As noted earlier, it is the only market about which CalComp has **[**27]** standing to sue. See Part II Supra.

The evidence of IBM's share of the product markets was similarly irresolute. For example, CalComp introduced the testimony of employees of IBM and other industry members concerning IBM's share of the loosely defined general purpose computer systems market; their estimates ranged from as low as 60% To as high as 80%, while IBM's proof was designed to show that none of these figures was even based on the particular market alleged. CalComp offered expert testimony that in 1970, 1971 and 1972, IBM's share of the all disk drive and associated controller market was 79.4%, 70.1% And 67.6% Respectively, while IBM's evidence was that its share was under 30% During these years: CalComp's figures reflected cumulative shipments of disk products, while IBM's data was based on annual shipments. IBM contended that because its share of market was rapidly declining (from 100% When it invented **[**28]** disk products in 1960 to 25% In 1975), cumulative measures were misleading. In the plug-compatible market, IBM again, because it invented these products began with a 100% Share; here too, CalComp's own evidence showed that IBM's share of market declined steadily.

While the district judge expressly made no finding on the adequacy of proof of share of a relevant market, he noted "in passing" that he was not inclined to direct a **[*739]** verdict solely on that ground. Because we conclude that there was no substantial evidence that any of IBM's alleged acts both constituted unreasonable conduct for a

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[12] Of course, proof of market power may be necessary to establish specific intent. See note 10 Supra; *Janich Bros., Inc. v. American Distilling Co., 570 F.2d at 854 n.4*.

[13] See note 11 Supra.

[14] 3 P. Areeda & D. Turner, ***Antitrust Law*** P 828, at 321 (1978). As stated there, "(i)t would be perversely illogical to hold a defendant without (monopoly) power liable for conduct practiced with legal immunity by a monopolist."

[15] The data presented by both parties assume that the relevant geographic market is the United States.

monopolist and produced causal "antitrust" injury to CalComp, we need not become enmeshed in the hundreds of pages of conflicting and complex evidence on this element of CalComp's claim. For purposes of this decision, we assume that IBM possessed monopoly power in the third purported market during the period 1963 to 1972.

We may therefore accept, with one important addition, CalComp's statement in its brief that the main issue of this appeal is "whether the Acts and Practices of IBM . . . constitute a violation of either the monopolization or attempt to monopolize clauses of *Section 2* **[**29]** of the Sherman Act, or both." Should we decide this question in the affirmative, the additional question we must answer would be whether any loss CalComp suffered actually resulted from the asserted *§ 2* violation (as opposed to lawful competitive practices).

2. Evidence of *§ 2* Violations

CalComp argues that IBM directly injured it in three ways. Principally, CalComp contends that IBM engaged in "predatory" pricing by cutting its peripheral equipment prices in response to competition from CalComp and other manufacturers. CalComp also attempts to show that IBM made design changes on certain of its CPUs, disk drives and controllers of no technological advantage and solely for the purpose of frustrating competition from plug-compatible manufacturers. Finally, it urges that IBM raised CPU prices in an effort to offset revenue losses caused by its price reductions on peripheral equipment, and that these price increases constituted impermissible conduct for a monopolist. [16]

[30]** a. Price cuts on peripherals

When IBM introduced its new System 370 Model 145 in September, 1970, it designated as the standard disk drive for use with this CPU a reworked version of earlier disk drives that had been replaced by competitive equipment and returned to IBM. The monthly rental for this three-drive disk product, the 2319A, was 30% Below that for IBM's other four-, two-, and single-drive disk products on a per-drive basis in part because the reuse of earlier disk drives permitted reduced development and manufacturing costs. The integrated control function in the Model 145-2319A system was also priced 60% Lower than earlier stand-alone controllers, also due at least in part to cost-saving design changes. As opposed to the System 370 Models 155 and 165, which were "high-end" processors using the newly-designed 3300 high-speed disk product, the Model 145 was to be the lower-priced mainstay of System 370 for commercial applications. Viewing all of the relevant evidence in the light most favorable to CalComp, IBM's purpose in offering the lower-priced 2319A disk drive in conjunction with its Model 145 was twofold: primarily, to regain market share from peripheral equipment **[**31]** manufacturers who were flourishing under IBM's high price umbrella; [17] **[**32]** and secondarily, to reduce the overall **[*740]** price of the 145 system, thereby providing the lower-priced alternative to the higher-performance, higher priced models using the 3300 disk product that was to be

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[16] CalComp also claims that prior to IBM's price cuts on disk products, it offset losses on CPUs with "monopolistic profits" from its then high-priced disk equipment. Even if we were to accept that CalComp's evidence was sufficient to go to a jury on the issue of whether such an antitrust violation occurred, a directed verdict would still be required because of the lack of any showing of causal injury. CalComp did not introduce substantial evidence (and indeed, would have had difficulty if it had attempted to do so) that it was "injured in (its) business or property by reason of" IBM's High prices on disk products. *15 U.S.C. § 15*. Cf. *Greyhound Computer Corp. v. IBM Corp., 559 F.2d at 499* ("Greyhound can hardly complain of IBM's increase in its rental rates for main frame equipment, since this change could only work to the advantage of leasing companies").

[17] CalComp quoted the chief financial officer of IBM's Data Processing Group as saying, "(w)e have strategically put ourselves into a weak position as a result of IBM's very high profit on disk products." CalComp's Chairman stated that IBM's loss of disk products business "was heading straight toward 100%, like in two or three years," and that IBM "had to react because they were losing so much business that no other choice was open to them. I wouldn't call that a punitive reaction. I'd call it a defense of market position." Another of CalComp's witnesses, a securities analyst who followed the computer industry in general and IBM in particular, testified that IBM "was facing very strong competition in the marketplace" from plug-compatible manufacturers, and that there was "an acceleration in terms of migration to non-IBM equipment." The same witness had earlier described IBM's disk price cuts in one of his reports as "dropping the traditional price umbrella for drive manufacturers." Still another CalComp witness, a former IBM employee, testified that if IBM had not responded to the "accelerating" competition for peripheral equipment sales, it would have lost "most or all" of this business.

the 145's market niche. [18] CalComp introduced no evidence that the lower-priced 2319A was not "substantially profitable," as IBM asserted. [19]

[33]** Three months after the announcement of the 2319A, IBM introduced the 2319B disk drive for use with all System 360 models. Like the 2319A, this was also a "retread" manufactured from older IBM disk drives that had been replaced with other equipment and returned by customers. IBM similarly priced the three- drive 2319B more than 30% Below its other disk drives on a per-drive basis. Also, it made no "additional use" charges (for use above a fixed number of hours per month) for the 2319B as it did with its other disk drives, in effect a further reduction in price Vis-a-vis these other products. [20] **[**34]** The 2319B, viewing all of the evidence in the light most favorable to CalComp, was introduced for the express purpose of abating competitive inroads by other peripheral manufacturers. [21] CalComp introduced no evidence that the 2319B, like the 2319A, was not "substantially profitable." [22]

Following IBM's 2319B announcement, virtually all of the plug compatible manufacturers reduced their own prices below the 2319B. [23] As a further response to this **[*741]** competition, [24] IBM reduced its prices on peripheral

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[18] Other evidence indicated that by reducing the price of the system, the 2319A also helped IBM in competing with systems manufacturers such as RCA.

[19] IBM's evidence was that the profit on each of its disk products was greater than 20% Of revenue before taxes, and that the 2319A in particular was expected to yield a profit of 33%.

In its Amicus brief, Memorex Corp., another peripheral products manufacturer, contended that IBM's cost accounting system is too "inexact" to rely on for such determinations of profitability. Its argument is that by allocating the fixed cost burden for a particular product in part according to the product's revenues, "costs" are artificially reduced when a product's price is cut, and hence profitability is artificially increased. The evidence at trial, however, supports the single conclusion that IBM indeed fairly expected significant profits from its disk products even after price reductions. In response to IBM's price cuts, CalComp and other manufacturers reduced their prices again below IBM's, with the effect that, according to CalComp, they "received much smaller profit margins" as opposed to incurring losses. CalComp's own evidence established that prior to its price cuts, IBM's projected profits on its disk products ranged from 47% To 58%. In addition, IBM's evidence on profitability that Memorex challenges consisted of its internal calculations relied on at the time the decision to go forward with each product was made. As one of CalComp's experts testified, profit expectations at announcement or introduction of a product at a particular price are the primary consideration in analyzing a firm's pricing behavior. Finally, there is Absolutely no evidence that IBM priced its disk products below marginal cost, which ordinarily is required to show predatory pricing as a means of obtaining or maintaining a monopoly in violation of *§ 2*. See *Janich Brothers, Inc. v. American Distilling Co., 570 F.2d at 855-58*, and text Infra.

[20] CalComp argues on appeal that IBM's failure to cut prices on existing disk products for use with System 360 CPUs to the level of the 2319B constituted "discrimination." Since the 2319B "retread" was available to all IBM System 360 users, however, this fact is of little consequence.

[21] See note 17 Supra.

[22] See note 19 Supra. IBM's evidence was that the 2319B was expected to return a profit before taxes equal to 32% Of revenues.

[23] According to CalComp's Chairman, CalComp, like other plug-compatible manufacturers, generally had to offer discounts from the systems manufacturers' prices in order to convince users to take their copy instead of the original.

[24] CalComp introduced evidence of IBM studies reviewed by IBM management shortly before the announcement of FTP that included an analysis of the extent to which two of IBM's competitors, Telex and Memorex, could afford to increase manufacturing and sales volume and reduce prices on disk products. In particular, the studies concluded that Memorex would remain viable despite IBM's introduction of its 2319 disk drives, and that by 1976 IBM would lose 28.8% Of the plug compatible disk market. IBM's financial group also reported, however, that if Memorex achieved 60% Of the plug-compatible disk market, such rapid growth in marketing overhead and working capital requirements would require substantial additional financing particularly if Memorex met IBM price cuts in the area of 17%-22%.

The obvious concern in these reports to management was the increasing gains by peripheral manufacturers and the lengths to which price competition by Memorex in particular might be carried. Accepting CalComp's inferences from this evidence, FTP products in still another way with the introduction of its Fixed Term Plan ("FTP") on May 27, 1971, described by CalComp as "the single most important act in the CalComp litigation and the principal basis for its damage claim." Prior to the introduction of FTP, IBM offered its products only for sale or 30-day lease, although virtually all of its competitors offered reduced prices for longer leases ranging from one to eight years. Under FTP, IBM customers were given the additional option of an 8% Discount for signing a one-year lease and a 16% Discount for a two-year lease on certain peripheral equipment, principally disk drives, tapes and printers. "Additional use" charges were also eliminated on FTP leases, consistent **[**35]** with the practice of most of IBM's competitors. Customers but not IBM could cancel the leases in return for a termination charge. Purchase prices on FTP products were also reduced by 15%. The evidence at trial was uncontroverted that FTP price reductions were expected to return a profit of 30% Of revenue before taxes. Lease revenues would be reduced through 1972, but through 1975, FTP was expected to generate $ 165 million more profit than would have been the case without FTP lease options. This increased profitability due to FTP stemmed not only from an expected increase in market share, but also from longer average lease lives and reduced sales, reconditioning and reinstallation costs.

[36]** Finally, following its adoption of FTP, IBM introduced two other new products: the Integrated Storage Controller ("ISC") and the Integrated File Adaptor ("IFA"). ISC and IFA were options available for use with certain System 370 models, allowing direct attachment of disk products to the CPU. Customers choosing one of these "inboard" storage control units could save money by avoiding purchase or lease of a separate controller for some of their disk products, because the price of the ISC and IFA options were lower. Thus, ISC and IFA represented price cuts Vis-a-vis IBM's "outboard" controllers. [25] However, there is little evidence in the record that the ISC and IFA inboard storage control units were priced in response to competition. Rather, the evidence indicates that these products were less expensive to produce. CalComp's chairman, for example, testified that IFA enabled the CPU to perform functions "which had been performed in the standalone controller," at a "much cheaper" cost of design and manufacture. For purposes of analysis, however, we will assume that the IFA and ISC options, like the 2319A, 2319B and FTP products, were priced primarily in response to competition from the **[**37]** plug compatible manufacturers.

The test of the reasonableness of the foregoing pricing actions, and the principal question facing us in this case, is whether IBM which was the inventor and dominant supplier of the disk products in question had the right to respond to the lower prices of its competitors with reduced, **[*742]** but still substantially profitable, prices on its own products. We conclude that it did.

CalComp's principal damages claim is for lost revenues as a result of price reductions it made following IBM's 2319B and FTP announcements. [26] But since these price reductions admittedly resulted from competition by IBM and since, as both CalComp's and IBM's evidence clearly demonstrates, IBM's stimulus to price competition was in turn competition from peripheral **[**38]** equipment manufacturers such as CalComp it is impossible to say that CalComp's losses represent compensable "injury" from acts of IBM unnecessarily Excluding or Restricting competition. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701* . Rather, IBM's price cuts were a part of the very competitive process the Sherman Act was designed to promote. To accept CalComp's position would be to hold that IBM could not compete if competition would result in injury to its competitors, an ill-advised reversal of the Supreme Court's pronouncement that the Sherman Act is meant to protect the competitive process, not competitors. See id.

In Grinnell, as noted Supra, the Supreme Court excepted from monopolizing conduct those actions directed toward **[**39]** establishing growth by means of "a superior product, business acumen, or historic accident." *384 U.S. at 571, 86 S. Ct. at 1704*. IBM's dominance in disk products, of course, was not due to historic accident.

was a direct response to these competitor gains, and the level of FTP price cuts was determined by IBM's estimation of the extent of its competitors' willingness to lower prices still further.

[25] CalComp's argument that ISC and IFA, by placing part of the control function "inboard," were designed solely to preclude plug-compatible manufacturers from part of the controller market is discussed under the heading "Design Changes" Infra.

[26] CalComp attributed its price reductions and consequent lost revenues solely to the 2319B and FTP price reductions. We need not discuss the resultant question of causation with respect to IBM's other price cuts in view of our result.

CalComp witnesses repeatedly testified that IBM's position and success were due to its capable management, technological leadership, market orientation and superior products. Particularly relevant is the fact that IBM invented the disk products that CalComp and other manufacturers copied. As one of CalComp's witnesses, a former chairman of Scientific Data Systems, acknowledged, "IBM pioneered in the use of moveable head disk technology . . . ." More bluntly, according to CalComp's Chairman:

> (I)f they (IBM) weren't there and hadn't created the market and hadn't made installations, we wouldn't have any market at all. So it's hard to call the guy who's created your opportunity a competitor although certainly IBM doesn't give up easily on any particular order.

Granted that IBM's technological innovations resulted in "growth as a consequence of a superior product," it was entitled to maintain its consequent dominant position in the market it created through "business acumen," **[**40]** which we take to include shrewdness in profitable price competition. ***HN25***[] The Sherman Act does not draw a distinction between competition on the bases of price and of performance: the two are inseparable parts of any competitive offering. Where the opportunity exists to increase or protect market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so. Cf. *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 612 n.1, 97 S. Ct. 861, 864, n.1, 51 L. Ed. 2d 80 (1977)* (in attempt context, purposes of " "increasing sales' and "increasing market share' are normal business goals, not forbidden by *§ 2*" without more). As Judge Aldrich observed in *Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 657 (1st Cir. 1961)*, "the antitrust laws do not require a business to cut its own throat."

The boundaries of reasonable price competition have recently been defined in this circuit. In *Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976)*, Cert. denied, *429 U.S. 1074, 97 S. Ct. 813, 50 L. Ed. 2d 792 (1977)*, we affirmed a directed verdict for a defendant charged with attempted monopolization, holding that the **[**41]** plaintiff's failure to show that the defendant's prices were below its marginal or average variable costs [27] "was a failure as a matter of law to **[*743]** present a prima facie case under *§ 2*." More recently in Janich Brothers, also an attempt case, we stated that " "pricing at marginal cost is the competitive and socially optimal result' " of *§ 2* enforcement. *570 F.2d at 857*, Quoting Areeda & Turner, Predatory Pricing and Related Practices Under *Section 2* of the Sherman Act, 88 Harv.L.Rev. 697, 711 (1975). The analysis in Hanson and Janich Brothers is precisely apposite in the monopolization context. Indeed, the preceding passage quoted in Janich Brothers dealt specifically with pricing by a monopolist. The thrust of this analysis is that price reductions up to the point of marginal cost are consistent with competition on the merits, since in this case only less efficient firms will be disadvantaged, while a firm pricing below marginal cost by definition incurs losses, so that competition on the basis of efficiency in this situation is frustrated.

[42]** We recognize that refinement of the marginal or average variable cost test will be necessary as future cases arise. For instance, limit pricing by a monopolist might, on a record which presented the issue, be held an impermissible predatory practice. See, e. g., P. Areeda & D. Turner, ***Antitrust Law*** P P 711-722 (1978); Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L.J. 284 (1977); Areeda & Turner, Williamson on Predatory Pricing, 87 Yale L.J. 1337 (1978); Williamson, A Preliminary Response, 87 Yale L.J. 1353 (1978); Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv.L.Rev. 868 (1976); Areeda & Turner, Scherer on Predatory Pricing: A Reply, 89 Harv.L.Rev. 891 (1976); Scherer, Some Last Words on Predatory Pricing, 89 Harv.L.Rev. 901 (1976). And we do not foreclose the possibility that a monopolist who reduces prices to some point above marginal or average variable costs might still be held to have engaged in a

[27] "Marginal cost" refers to the variable cost of the last unit of output, while "average variable cost," appropriately, refers to the average variable cost of all units. See Janich Brothers, 570 F.2d at 857 n.8, 858 n.11. Hanson determined that "because marginal cost is often impossible to ascertain" average variable cost was a sufficient judicial surrogate, *541 F.2d at 1358*; Janich Brothers concurred that "average variable cost is likely to approximate marginal cost." *570 F.2d at 858*. Given the variation in cost accounting systems among business firms and the likelihood of the significant differences in capacity utilization from case to case, we expect that acceptance of this rule of thumb would first require careful scrutiny of the particular facts in a case where the defendant's prices are very near average variable cost. That is not the case here.

predatory act because of other aspects of its conduct. On this record, however, IBM's pricing policies were not predatory.

The case before us presents an A fortiori situation as compared to Hanson and Janich Brothers. CalComp has not **[**43]** only failed to produce evidence of pricing below marginal or average variable cost, but it has also failed as well to introduce any evidence to controvert IBM's substantial proof that its price cuts were highly profitable. Moreover, the evidence of both parties established that IBM's disk price reductions were a response to lower-priced competition to which IBM was rapidly losing its disk business. Were *§ 2* interpreted not to exempt price cuts from attack under these circumstances, there could be no adequate guidelines for a jury to decide the issue of whether the prices at issue were "reasonable." The directed verdict as to CalComp's claims based on IBM's price competition was therefore proper.

b. Design changes

As noted above, when IBM introduced its System 370 Model 145 in September, 1970, it announced the 2319A as the standard disk product for use with the 145. The control function for the 2319A disk drive was integrated into the Model 145 CPU, and thus the interface between the disk drive and its control function was different from earlier models. [28] CalComp claimed that it was competitively disadvantaged as a result of these design changes, because it could not legally begin **[**44]** to copy the 2319A until IBM shipped the first of these disk drives, thereby disclosing the design requirements.

[*744] In February, 1971, IBM introduced its optional Integrated Storage Controller for use with its System 370 Models 158 and 168 which integrated the disk control function into the CPU. CalComp claimed it was injured by the introduction of ISC and the similar IFA, described above, because it was thereby precluded from replacing the control functions on CPUs with these options. [29]

[45]** CalComp characterized these design changes as "technological manipulation" which did not improve performance. It also complained of the fact that the newly integrated functions were priced below their non-integrated counterparts. But as we have stated, price and performance are inseparable parts of any competitive offering; and equivalent function at lower cost certainly represents a superior product from the buyer's point of view. The evidence at trial was uncontroverted that integration was a cost-saving step, consistent with industry trends, which enabled IBM effectively to reduce prices for equivalent functions. Moreover, there was substantial evidence as well that in the case of Models 145, 158 and 168 the integration of control and memory functions also represented a performance improvement.

One of CalComp's witnesses stated: "I think in general the manufacturer will try and minimize his costs and where he integrates the control unit the assumption must be that he is achieving a lower cost solution." [30] **[**47]** Other of CalComp's evidence showed that among the reasons a separate control unit is more expensive than integrated control circuitry are that the former requires its own cabinet, **[**46]** frames, power supply, additional cabling and electronics. According to an IBM witness, the monolithic systems technology that preceded the 145-2319A system required a large standalone controller, whereas the new generation technology represented by the 145-2319A system produced a comparable control function "which was in the area of ten times smaller . . . . (Y)ou could now

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[28] Unlike the 2319A, the 2319B introduced for use with all System 360 models attached to IBM's 2314 stand-alone controller.

[29] The System 370 Models 158 and 168 also featured substantial minimum memory integrated within the CPU. CalComp claimed that this redesign injured add-on memory manufacturers by making it impossible for them to compete for the integrated portion of these models' memories.

[30] This same witness reported that the inclusion of a minimum memory capacity within the CPU was made possible by the reduction in memory size, "reflecting the product evolution from relatively large magnetic cores to high density semi-conductor packaging." He continued:

As the basic cycle speed of the memory increases, it becomes important to minimize the distance between components. It may well be impractical to keep the new memories external to the processor . . . .

put that into the 145 system, utilizing its frames and its covers and then passing on the advantages of that to the customer in a price reduction." CalComp's Chairman stated that as a result of integration, the customer uses less floor space which "tends to be relatively expensive in a computer room." [31]

IBM, assuming it was a monopolist, had the right to redesign its products to make them more attractive to buyers whether by reason of lower manufacturing cost and price or improved performance. It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand. IBM need not have provided its rivals with disk products to examine and copy, See 3 P. Areeda & D. Turner, ***Antitrust Law*** P 738, at 286 (1978), nor have constricted its product development so as to facilitate sales of rival products. The reasonableness of IBM's conduct in this regard did not present a jury issue.

c. **[**48]** Increases in CPU prices

In July, 1971, IBM announced price increases on certain of its CPUs of up to 8%. **[*745]** The weighted average price increase of all CPUs was 1.5%. CalComp argued that these price increases, instituted two months after FTP was announced, were designed to offset the short-term revenue losses expected from FTP price cuts. After FTP users were "locked into" IBM peripherals for one or two year lease terms, according to CalComp, they would be unable to change CPUs, thus enabling IBM to raise CPU prices without appreciably affecting demand or profitability.

However, CalComp's own evidence indicated that the net effect of FTP and the CPU price increases was not expected to be a "wash" with respect to either CPU demand or overall profitability. CalComp introduced an IBM memo written after the CPU price increases went into effect stating that "the net effects of the Fixed Term Plan and (CPU) price change will probably be a wash insofar as Business volumes are concerned." (Emphasis added). The author of this memo went on to explain that FTP would have the effect of increasing peripheral volume, while the CPU price increases would probably induce "adverse reaction **[**49]** on the part of some customers . . . ." In terms of overall business volume, the author concluded, "(a)ny decrease in system acceptances which occurs will probably be offset by . . . the Fixed Term Plan." In other words, there was not a single demand function for CPUs and peripherals; IBM did not expect to raise CPU prices "with impunity," as CalComp asserts, by virtue of the effects of FTP.

Moreover, there was no evidence that CPU price increases actually offset the FTP price cuts. According to CalComp's amended complaint, "peripheral devices . . . account for between 50% And 75% Of the total value of a system configuration." The trial testimony of Richard Whitcomb, Director of Product Planning at Itel and a former IBM employee, and Edwin McCollister, Director of Market Development at Burroughs, confirmed this. Since, as discussed Supra, the FTP price cuts amounted to 8% And 16%, a jury would be hard pressed to conclude from CalComp's evidence that the CPU price increases in fact offset FTP losses i. e., that a weighted average price increase of 1.5% On CPUs made up for price cuts of 8% And 16% On peripheral products of equal or greater value.

Other evidence portrayed IBM's decision **[**50]** to raise CPU prices as motivated by inflation and cost concerns. IBM had not raised its mainframe prices in over four years; its 1971 increases were approved as cost-justified by the newly-formed Price Commission under the Economic Stabilization Program then in effect.

Viewed in the light most favorable to CalComp, this evidence does not provide support for its "offset" theory. Especially since we have already determined that the FTP price cuts allegedly facilitated by the CPU price

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[31] In *Telex Corp. v. IBM Corp., 367 F. Supp. 258, 304 (N.D.Okl.1973)*, Rev'd on other grounds, *510 F.2d 894 (10th Cir. 1975)*, dealing with a different record developed from the same underlying facts, the district court found with respect to IFA and ISC that there had been a "preponderant showing that these integrations represented a legitimate technological and performance advance consistent with trends in the industry and at significant decreased cost." No appeal was taken from this ruling.

increases were themselves profitable and reasonable even for a monopolist in any event, [32] it was proper to take the case from the jury on this issue.

[51]** IV. Conclusion

In its Amicus brief, the Department of Justice questioned that the district court could have directed a verdict in view of the complexity of the facts in this case. CalComp, too, contends that "this Court has (neither) the power (nor) obligation, to sift through the record to determine who should prevail" on appeal from the district court's directed verdict.

HN26[] The complexity of a plaintiff's case, however, does not entitle it to avoid a directed **[*746]** verdict if the evidence no matter how much of it there may be is weak. It is in fact the duty of both the trial and appellate courts to "sift through the record" to make this determination. Having closely analyzed each of CalComp's arguments and the evidence on both sides in support thereof, drawing all reasonable inferences in CalComp's favor, we conclude that the district judge was correct in taking the case from the jury.

(37) Nor does viewing the various acts of IBM collectively change our conclusion. The number of legal and evidentiary issues has required us to consider each instance of IBM's alleged monopolizing conduct separately for purposes of analytical clarity. However, we are mindful of the fact that **[**52]** "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 (1962)*; See *Knutson v. Daily Review, Inc., 548 F.2d 795, 814 (9th Cir. 1976)*. But there can be no synergistic result such as CalComp claims from a number of acts none of which show causal antitrust injury to CalComp.

In Continental Ore, the Supreme Court held that the plaintiffs were entitled to introduce evidence "that there was a conspiracy and monopolization in existence when they came into the industry, And that they were eliminated in furtherance thereof." *370 U.S. at 710, 82 S. Ct. at 1416* (emphasis added). Such proof connecting the acts allegedly directed against systems manufacturers and leasing companies to the acts affecting CalComp was lacking in this case. Moreover, even assuming that IBM gained monopoly power in a relevant market by virtue of the former categories of acts, the latter acts constituted reasonable, pro-competitive conduct for a monopolist. CalComp suffered no "antitrust" **[**53]** injury from these, nor indeed any injury at all as that term is defined in § 4 of the Clayton Act. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Accordingly, the judgment of the district court entered on its directed verdict is

AFFIRMED.

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[32] In its Telex decision, the Tenth Circuit held that IBM's conduct in this regard was not violative of *§ 2*, focusing on the profitability of both the CPU and FTP prices rather than on IBM's possible motivation. Regardless of intent, the court implied, *§ 2* condemns only the monopolist's "use of monopoly power," and the facts in Telex showed that IBM's lowering peripheral prices and raising CPU prices was not a case of "an economic giant (dropping) prices to a level where it is not receiving an adequate return and . . . instead (relying) on its reserves or other activities to continue producing and marketing the particular product." See *510 F.2d at 925-26*.

Outboard Marine Corp. v. Pezetel

United States District Court for the District of Delaware

June 22, 1979

Civ. A. No. 77-51

Reporter

474 F. Supp. 168 *; 1979 U.S. Dist. LEXIS 11516 **; 1979-2 Trade Cas. (CCH) P62,792

Outboard Marine Corp., a Delaware Corporation, Plaintiff, v. Pezetel, a Foreign Trade Organization of the People's Republic of Poland, Melex USA, inc., a Delaware Corporation, Fern Clo Golf Car Co., Inc., a Pennsylvania Corporation, Ross Products, Inc., a Delaware Corporation, Defendants.

Core Terms

Counterclaim, antitrust, harassing, distributors, sham, golf cart, manufacturers, allegations, defendants', conspiracy, conspired, immunity, Sherman Act, baseless, adjudicatory, proceedings, customers, electric, motion to dismiss, lawsuits, abused, courts, merits, suits, judicial process, knowingly false, federal court, misconduct, agencies, importer

LexisNexis® Headnotes

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

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

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

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss for failure to state a claim, the court is bound to construe the counterclaim in the light most favorable to the defendants, taking all facts stated therein and all reasonable inferences therefrom as admitted.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

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

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Collaborative efforts by competitors to influence the legislative or executive branch of the government were immune from antitrust scrutiny even though undertaken with anti-competitive intent. No violation of the (Sherman) Act can be predicated upon mere attempts to influence the passage or enforcement of laws.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN3[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The antitrust immunity conferred by the Noerr-Pennington Doctrine is not absolute. The Supreme Court recognized in Noerr that a case could arise in which the conspiracy involving political activity was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and (in such a case) the application of the Sherman Act would be justified.

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

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

There are many forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Such misconduct could not be deemed "political expression," entitled to antitrust immunity. As examples of the types of conduct not immunized in the adjudicatory setting: perjury, bribery, a conspiracy in which a governmental authority participated and fraud.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5[] **Pleadings, Rule Application & Interpretation**

Fed. R. Civ. P. 8 does not require a detailed statement of facts, but it does require a plain statement showing entitlement to relief, not conclusions of law.

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

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

There is no privilege to resort to governmental processes as a sham or in bad faith.

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

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

There certainly is no privilege for misrepresentations to administrative agencies which base their decisions on information provided by the parties.

Antitrust & Trade Law > Sherman Act > General Overview

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

Isolated instances of unethical business practices do not rise to the level of Sherman Act § 1 liability.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

(Where) joint program of threatened litigation and publicity is alleged, (a claimant) must demonstrate (1) the presence of a systematic conspiracy; (2) the coercive goal as charged; (3) clearly false representations in a pattern arising above isolated incidents; (4) upon which prospective distributors might reasonably rely; (5) that these would-be distributors did so rely; and (6) that Pezetel-Melex suffered clearly identifiable market injury therefrom.

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > Criminal Activities

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

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

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

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

HN10[] **Unlawful Acts of Agents, Criminal Activities**

The Wilson Tariff Act, *15 U.S.C.S. § 8*, provides in part: Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

Counsel: [1]** William O. LaMotte, III, Morris, Nichols, Arsht & Tunnell, Wilmington, Del., for plaintiff; Charles Owen Verrill, Jr., and Donald A. Lofty, Patton, Boggs & Blow, Washington, D. C., of counsel.

James T. McKinstry, Richards, Layton & Finger, Wilmington, Del., for defendants Pezetel and Melex, USA, Inc.; Henry W. Sawyer, III, Stewart Dalzell, John Chesney, and Mark M. Wilcox, Drinker, Biddle & Reath, Louis B. Schwartz, Philadelphia, Pa., of counsel.

James T. McKinstry, Richards, Layton & Finger, Wilmington, Del., for Ross Products, Inc.; Gerald J. Brown, Cahill, Gordon & Reindel, Washington, D. C., of counsel.

Paul H. Spiller, Kimmel & Spiller, Wilmington, Del., for Fern Clo Golf Car, Inc.

Opinion by: SCHWARTZ

Opinion

[*170] OPINION

In this civil antitrust action, the plaintiff Outboard Marine Corporation ("OMC") has moved for the dismissal of the defendants' Counterclaim for failure to state a claim upon which relief can be granted pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. The Counterclaim has been asserted by Pezetel and Melex, Inc., two of the three remaining defendants in this litigation. [1.] Pezetel is a trade organization of the People's Republic **[**2]** of Poland and a manufacturer and exporter of electric golf carts to the United States. Melex USA, Inc., is its wholly owned subsidiary and as such, it functions as a domestic distributor of Pezetel's golf carts in those territories where Pezetel has not established a relationship with a domestic distributor. [2.] The plaintiff, Outboard Marine Corporation, is an American manufacturer whose subsidiary, Cushman, formerly manufactured gas and electric golf carts and has now been dissolved.

A detailed description **[**3]** of the American golf-cart market has already been set forth in this Court's prior opinion on defendants' motion to dismiss. See *Outboard Marine Corporation v. Pezetel, 461 F. Supp. 384 (D.Del.1978)*, and will only be repeated here to the extent necessary to provide a background for an illustration of the bases upon which the defendants' Counterclaim rests. In 1970 a predecessor of Pezetel, Electrim Foreign Trade Company for Electrical Equipment, Ltd., commenced manufacturing of an electric golf cart duplicative of one sold in the American market. Three years later, Pezetel succeeded Electrim as a Polish manufacturer and it then brought Melex into existence, a wholly owned subsidiary incorporated in Delaware, and at about the same time established agreements with several American distributors. In that year Polish-made golf carts constituted seventeen percent of the United States electric golf cart market and by 1975, Melex carts allegedly represented thirty-five percent of sales in the electric golf cart market in the United States. Meanwhile, OMC, unable to meet Pezetel's low prices, gave up the manufacture of electric and gas golf carts in 1975. In 1977, it filed this suit seeking **[**4]** treble damages resulting from its declining sales and eventual departure from the market place.

All defendants moved to dismiss the complaint for failure to state a claim on a number of grounds, none of which are particularly **[*171]** relevant to the present motion. Suffice it to say that as a result of their motion, several of plaintiff's counts and claims against two defendants were dismissed.

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1. On an earlier motion to dismiss the complaint for failure to state a claim, this Court ruled that several of the distributors against whom a cause of action had been asserted were not amenable to this Court's jurisdiction. *Outboard Marine Corporation v. Pezetel, 461 F. Supp. 384 (D.Del.1978)*. Ross Products and Fern Clo Golf Car, Inc., the only independent domestic distributors of Polish golf carts still in the litigation after the motion to dismiss, are not parties to the counterclaim.

2. *Id. at 389*.

HN1[] On a motion to dismiss for failure to state a claim, this Court is of course bound to construe the Counterclaim in the light most favorable to the defendants, taking all facts stated therein and all reasonable inferences therefrom as admitted. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Defendants' Counterclaim contains four operative paragraphs, paraphrased below: (1) Counterclaim P 16: OMC, in conspiracy with other manufacturers of golf carts, has "misused and abused" governmental processes by submitting complaints, petitions, testimony and other information to federal governmental agencies and offices including but not limited to the Treasury Department and United States Customs Service, the International Trade Commission, the Congress of the United States, **[**5]** and the federal court. (2) Counterclaim P 17: OMC and its coconspirators submitted to the Treasury Department and the United States Customs Service "knowingly false information" respecting the prices of electric golf carts built in Canada, in the course of agency proceedings that resulted in the imposition of dumping duties against Pezetel's distributors and eventually against Melex. (3) Counterclaim P 18: OMC conspired with other American manufacturers of golf carts to engage in "a joint program of threatened litigation and publicity." (4) Counterclaim P 19: OMC joined with other manufacturers in order to falsely convey to potential Melex customers that Melex "was about to go out of business." Although the Counterclaim is not crystal clear with respect to the precise impact of each of these challenged practices upon the financial well-being of Pezetel in the market place, the Counterclaim alleges that all four courses of action were undertaken with the intent "to arouse fear among (Pezetel's) distributors that they would be required to pay dumping duties or post bonds for the payment of such duties, and by arousing fear among customers of the prospective discontinuance of service **[**6]** and spare parts by Melex."

As to the first two charges above, the plaintiff invokes the immunity of the Noerr-Pennington doctrine, discussed more fully below. Both the claim of disparagement and the charge relating to the publicity campaign, PP 18, 19, do not implicate that doctrine and thus will be discussed separately.

I. SHERMAN ACT CLAIMS

A. APPLICATION OF THE NOERR-PENNINGTON DOCTRINE TO THE ALLEGATIONS OF THE COUNTERCLAIM

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, the Supreme Court held that *HN2*[] collaborative efforts by competitors to influence the legislative or executive branch of the government were immune from antitrust scrutiny even though undertaken with anti-competitive intent. "No violation of the (Sherman) Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern Railroad Conference v. Noerr Motor Freight, Supra, 365 U.S. at 135, 81 S. Ct. at 528*. The Supreme Court founded its decision in Noerr upon two considerations:

> In the first place, such a holding (that **[**7]** the Sherman Act applied to efforts to influence the passage or enforcement of laws) would substantially impair the power of government to take action through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of **[*172]** the freedoms protected by the *Bill of Rights*, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

365 U.S. at 137-38, 81 S. Ct. at 529-530.

HN3[] The antitrust immunity conferred by the Noerr-Pennington Doctrine is not absolute, however. The Supreme Court recognized in Noerr that a case could arise in which the conspiracy involving political activity was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and (in **[**8]** such a case) the application of the Sherman Act would be justified." *Id. at 144, 81 S. Ct. at 533*. Until the Supreme Court's decision in *California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, the scope of the so-called "sham" exception remained unexplored. In California Motor

Transport, several trucking firms brought suit against some of their competitors alleging that the latter had conspired "to institute state and federal proceedings to resist and defeat applications by (plaintiffs) to acquire operating rights or to transfer or register those rights." *Id. at 509, 92 S. Ct. at 611*. The Supreme Court held that a claim had been stated under the Sherman Act. What provoked the invocation of the "sham" exception were allegations in the complaint:

> that the power, strategy, and resources of the petitioners (defendants) were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The result, . . ., was that the machinery of the agencies and the courts was effectively closed to (plaintiffs), and petitioners indeed became "the regulators **[**9]** of the grants of rights, transfers and registrations" to respondents thereby depleting and diminishing the value of the businesses of respondents and aggrandizing petitioners' economic and monopoly power.

Id. at 511, 92 S. Ct. at 612 (citation omitted). Most troublesome to the Supreme Court were allegations that the concerted efforts of the defendants to bar the plaintiffs from any and all access to administrative and judicial tribunals "with or without probable cause, and regardless of the merits of the cases" resulted in a deprivation of meaningful access to the agencies and courts. Although the Court painstakingly emphasized that the Noerr-Pennington immunity extended to the adjudicatory setting, it distinguished between unethical practices in the legislative setting and unethical conduct in an adjudicatory proceeding: ***HN4***[] "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id. at 513, 92 S. Ct. at 612*. Such misconduct, the Court emphasized, could not **[**10]** be deemed "political expression," entitled to antitrust immunity. Id. As examples of the types of conduct not immunized in the adjudicatory setting the Court listed perjury, bribery, a conspiracy in which a governmental authority participated and fraud. *Id. at 512-13, 92 S. Ct. 609, 613*.

Paragraph 16 of the Counterclaim contains a variety of broadly worded and nonspecific charges that OMC has participated in or instituted a variety of baseless and harassing proceedings and has "abused and misused" the governmental process in a large number of governmental forums, "including but not limited to the United States Treasury Department and Customs Service, the International Trade Commission, the Congress of the United States, and the federal court." OMC argues that this charge is conclusory in its entirety, failing to specify what legal proceedings or what testimony before Congress was objectionable and on what ground, and therefore fails to comply with the minimal notice-pleading standards of *Rule 8* because OMC cannot discern what behavior must be defended. Moreover, OMC refers to a thread in the Noerr-Pennington case law that requires more specific pleading of facts arguably protected **[**11]** by the Noerr-Pennington Doctrine to counteract any possible "chilling" of *First Amendment* rights:

> **[*173]** (T)o state a claim for relief under the (California Motor Transport) exception, a complaint must include allegations of the specific activities, not protected by Noerr, which plaintiffs contend have barred their access to a governmental body.
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> In holding that plaintiffs' allegations are insufficient in this case, we are not adopting a rule that so-called "fact" pleading, as distinguished from "notice" pleading, is required in antitrust cases. . . . What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the *First Amendment*, the danger that the mere pendency of the action will chill the exercise of *First Amendment* rights requires more specific allegations than would otherwise be required.

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (citations omitted), Cert. denied, *430 U.S. 940, 97 S. Ct. 1571, 51 L. Ed. 2d 787 (1977)*. [3] **[**14]** The Court

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[3] To like effect is the thesis of the writer of Note, Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process, 86 Harv.L.Rev. 715, 725 (1973), which

agrees that P 16, conceded **[**12]** by defendant to be a "general" allegation, [4.] cannot stand alone. In so holding, however, the Court does not intimate that the higher pleading standard of Franchise Realty is adopted. The broadly worded claim simply encompasses too many unformulated subsidiary allegations. For example, the Counterclaim mentions some agencies specifically but intimates that others have also been subjected to abuse by OMC. Most perplexing is the language "including but not limited to." Moreover, the misconduct alleging "misusing and abusing governmental process" and the submission of "sham, false and misleading allegations and information without regard to the truth or merits made," [5.] does little or nothing to put the plaintiff on notice. Obviously, ***HN5***[] *Rule 8* does not require a detailed statement of facts, but it does require a plain statement showing entitlement to relief, not conclusions of law, like "misusing and abusing" and "sham, false and misleading," and vague references to generalized abuses in a variety of unspecified governmental forums. Such conclusory phraseology begs the question. See *Franchise Realty, supra at 1079*; *Clayton v. Clayton Bank, 424 F. Supp. 163, 166 (E.D.Mo. 1976)*. [6.] It is **[**13]** concluded that to the extent that P 16 was intended by the defendants to stand alone as a claim under the Sherman Act, it is hopelessly vague and would have to fail. As a consequence, Pezetel-Melex's claim that OMC has "abused and misused" Congress and unnamed federal agencies will be dismissed. The language relating to Pezetel-Melex's economic injury, however, will be deemed to have survived and read as applicable to each remaining operative paragraph. The charge of abuse of the federal court contained in P 16, however, creates problems of its own and will be discussed below.

[*174] Despite the breadth of the introductory paragraph, later claims, taken together with briefs and oral argument, demonstrate that the charges against OMC relating to the Noerr-Pennington Doctrine, **[**15]** focus on two distinct undertakings: (1) OMC has harassed the defendants by filing and/or threatening to file baseless and harassing lawsuits in the outcome of which OMC has no real interest. (2) OMC submitted or caused to be submitted knowingly false information to the Treasury Department and the United States Custom Service respecting the prices of golf carts built in Canada, with the intent and hope that the Department would determine that Pezetel-Melex was selling golf carts at less than their fair market value and that dumping duties would then be assessed, causing defendants competitive injuries. Discussed first will be the allegations respecting "threatened" and/or actual litigation, and then attention will be turned to the charge that OMC conspired with others to submit knowingly false information to a federal agency.

Unfortunately, a reading of the Counterclaim does not reveal whether defendants' antitrust claim involves the Threatening Of lawsuits, as P 18 of the Counterclaim suggests in the language: "OMC combined and conspired with (others) to engage in a joint program of threatened litigation and publicity" or alternatively, whether defendants claim that OMC has actually **[**16]** commenced harassing and baseless suits in federal court, as P 16 suggests. At oral argument counsel for defendants stressed the latter point, whereas P 18 itself focuses on a course of action that falls short of actual litigation. To the extent that the "joint program of threatened litigation" took the form of a publicity campaign and that no actual litigation was contemplated, the allegation involves the Noerr-Pennington

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suggests the burden of proving misconduct before an administrative tribunal be upon clear and convincing evidence, to prevent a chilling of *First Amendment* rights. At this stage of the proceedings, of course, the Court need not address the question whether a higher standard of proof should apply to the charges of the Counterclaim.

4. Doc. 70 at 100.

5. *Doc. 48 P 16*.

6. Specific identification of the governmental agency is particularly significant in the Noerr-Pennington area because the scope of the defense widens with the discretion of the forum. Professors Areeda and Turner emphasize:

HN6[] (T)here is no privilege to resort to governmental processes as a "sham" or in bad faith. Identifying such situations is difficult least difficult for judicial processes, more difficult for administrative adjudication, much more difficult for executive processes where it is virtually impossible to identify the "sham."

The breadth of a government organ's discretion indicates the sweep of facts and arguments which may legitimately be presented to it. In a political forum, almost no contention can be characterized categorically as frivolous.

Areeda & Turner, ***Antitrust Law*** I, P 203c at 44 (1978) (hereinafter "***Antitrust Law*** ").

Doctrine only peripherally, if at all, since no exercise of the *First Amendment* right of petition would have been implicated in a mere publicity campaign directed at the public generally and only at government incidentally. As such, the allegation will be discussed below in connection with the claim of business disparagement. [7.] To the extent that it is suggested by P 18, either alone or in combination with the abuse of judicial process charge of P 16, that OMC threatened to bring lawsuits against the defendants that it had every intention of actually filing, this Court agrees with the court in Clairol, Inc. v. Boston Discount Center, 1976-2 Trade Cas. P 61,108, at 70,021 (E.D.Mich.1976), that if resort to the courts is protected by Noerr-Pennington, then threats **[**17]** to do so, without more, are likewise immune from liability.

The Counterclaim P 16, however, may quite generously be read to allege that OMC has actually brought abusive and harassing suits in federal court. At oral argument, counsel of defendants amplified on this allegation by suggesting that the inference be drawn that Outboard Marine has abused the judicial process to Pezetel-Melex's antitrust injury by filing frivolous lawsuits in Michigan and North Carolina against two of Pezetel's distributors, Boylan, Inc., and Eddietron, Inc., respectively, both entities having been dismissed as parties to this lawsuit for lack of in personam jurisdiction. [8.] It is argued by the defendants that the baselessness of the lawsuits is obvious from the very economic nature of the defendant distributors. Because golf-cart distributorships are such low capital-investment enterprises, OMC cannot and does not reasonably expect to recover from them the losses attributable to OMC's **[**18]** demise as a golf-cart manufacturer, and hence the only purpose of such a maneuver, defendants argue, must be to harass. More specifically, it is urged that the plaintiff filed the suits against unlikely defendants in an effort to intimidate the distributors and harass Pezetel-Melex. The defendants have not alleged that OMC has acted illegally or improperly in its conduct of the litigation, but merely that the litigation was commenced for no reason other than its harassment value.

[*175] Because the spectre of the North Carolina and Michigan suits as an embellishment upon the Counterclaim only arose at oral argument, OMC has not squarely addressed the merits of Pezetel-Melex's contentions. [9.] It is held, however, that the defendants' allegation respecting abuse of the federal court, must be rejected for the reason that Pezetel-Melex has not shown, either by factual allegations or argument, that these suits are harassing and baseless other than by merely **[**19]** denominating them as such. First, no great effort need be expended in emphasizing that the merits of the lawsuits, as distinct from the particular parties named, are identical to those of the case presently pending before this Court. [10.] OMC's complaint here has in measure survived a motion to dismiss and no question exists that this litigation is not frivolous on its merits. [11.]

[20]** If the merits of the North Carolina and Michigan suits are not baseless, and the Court is confident in holding that any complaint identical to the one filed here is not, then defendants are left with their theory that harassment should be inferred from the relative impecunity of the distributors, Boylan and Eddietron. As defendants point out, however, Outboard Marine is no longer a participant in a golf-cart market and cannot be seriously interested in

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7. See notes 20-21 Infra and accompanying text.

8. *Outboard Marine Corp. v. Pezetel, Supra at 393*.

9. OMC has, however, voiced a continuing objection to the sufficiency of the Counterclaim on the basis that a "pattern" of baseless or repetitive acts has not been alleged. At least with respect to the two federal-court actions, however, the Supreme Court has strongly suggested that one harassing piece of litigation may be enough to invoke the protection of the antitrust laws under the California Motor Transport exception. *Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 635 n.6, 652-53, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977)* (plurality opinion of Rehnquist, J., and concurring opinion of Stevens, J.).

10. Doc. 70 at 101-02.

11. Nor is this Court particularly concerned that OMC may have included counts in the North Carolina and Michigan suits that were dismissed by this Court as against the remaining defendants here. Any cautious litigator interested in recovery would have adopted the same approach. Other courts may well view OMC's complaint in a different light and the plaintiff is entitled to act on that hope or expectation. Stated simply, the counts dismissed here were by no means dismissed as frivolous. See *Outboard Marine Corp. v. Pezetel, supra, at 399-403, 408-09*.

injunctive relief. Presumably for the same reason, OMC would have little interest at this late date in so harassing Pezetel's allegedly impecunious distributors that the latter determine to terminate business relationships with the Polish concern. Conversely, it is highly improbable that the elimination of two distributors would deliver a mortal wound to the defendants' American enterprise.

More fundamentally, however, this Court is unwilling to hold that a claim of harassing and baseless litigation can be stated merely through the allegation that an abuse of the judicial process has occurred and the argument that deeper-pocket defendants either are available or have already been sued. Nor do the Supreme Court decisions on the subject **[**21]** suggest anything to the contrary. In Vendo Co., Supra, the harassing aspect of the state-court litigation upon which the "sham" claim was founded were the merits themselves: the underlying covenants against competition sought to be enforced in the allegedly harassing litigation. Similarly, in *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, the government obtained a decree against a utility company, restraining them "from instituting, supporting, or engaging in litigation, directly or indirectly, against municipalities . . . who have voted to establish municipal electric power systems." *Id. at 369, 93 S. Ct. at 1025*. Even that case, however, involved at least four separate lawsuits, all carried by Otter Tail to the highest state court and all unsuccessful on the merits. *Otter Tail Power Co. v. United States, 331 F. Supp. 54, 61-62* & 62 n.4 (D.Minn.1971). [12.] It is concluded **[*176]** that the defendants' Counterclaim has not alleged harassment or similar misconduct with respect to the North Carolina and Michigan suits sufficient to come within the "sham" exception to the Noerr-Pennington Doctrine.

[22]** In support of the charge OMC combined with others to submit knowingly false information to federal agencies, Pezetel-Melex point to the following language of California Motor Transport for the proposition that Counterclaim P 17, without more, constitutes a violation:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes **[**23]** are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

California Motor Transport, supra, 404 U.S. at 513, 92 S. Ct. at 613 (emphasis added). On the one hand, Outboard Marine would have this Court focus very narrowly on the emphasized sentence above and dismiss the Counterclaim on the basis of Pezetel's concession that Melex, its distributor, has participated in the agency proceedings at which the false data is alleged to have been submitted and which ultimately resulted in an assessment of dumping duties against defendants. On the other hand, although Pezetel-Melex has conceded that it had access in the physical sense to the proceedings, [13.] **[**24]** it urges that the foregoing passage sketches with a broad brush several variations on the "sham" exception, only one of which is alleged by Pezetel in P 17 of the Counterclaim. [14.] Both sides' readings of the passage would be plausible if the case stood alone; although

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[12.] The Supreme Court in Otter Tail, Supra, ordered a remand for a determination whether the lawsuits fell within the "sham" exception of California Motor Transport, decided after the district court's opinion. While it is true that the complaint in Otter Tail, to the extent that it is quoted in the district court's opinion, See *331 F. Supp. at 56*, appears every bit as generally drafted as the Counterclaim here, the district court in that case was evidently under the impression, possibly correct at the time but certainly erroneous in light of California Motor Transport, that the Noerr-Pennington doctrine had no application to judicial proceedings such as state-court litigation. Now, it is clear that resort to the courts, even if taken with anti-competitive intent, is protected under the Noerr-Pennington doctrine.

[13.] Doc. 70 at 76-77.

subsequent lower-court decisions, however, discussed below, throw additional weight on defendants' side of the scale.

Initially, it is observed that if plaintiff's argument were accepted and access in the physical sense were enough to vitiate a "sham" claim under California Motor Transport, then it is exceedingly difficult to imagine how a claim could arise in a judicial setting, where the due process clause guarantees access and full participation for all parties. Certainly, the Court's **[**25]** language above included judicial proceedings. For this reason alone, plaintiff's bright-line argument respecting access would have to be rejected.

[*177] Pezetel places great reliance on a Fifth Circuit case predating *California Motor Transport, Woods Exploration & Producing Co. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971)*, Cert. denied, *404 U.S. 1047, 92 S. Ct. 701, 30 L. Ed. 2d 736 (1972)*, in which the court held that the submission of false data respecting the productivity of certain wells by Texas gas producers to a state regulatory body, in an attempt to persuade that body to reduce the allowable amount of gas that plaintiffs could take from their gas fields stated a claim under the Sherman Act. The similarity between Woods and the present dispute, defendants argue, is that in both instances, the complaint centered upon the fact that the governmental agency involved was forced by the regulatory process itself to rely on factual materials submitted by private parties and in both cases, the submission of false data resulted in a subversion of the regulatory process and deprived the claimants of any meaningful opportunity to take advantage of any access to **[**26]** the proceeding available to them. Although the Woods Exploration holding that the Noerr-Pennington Doctrine applies only to the political processes has been overruled in California Motor Transport, the Supreme Court's dicta quoted above strongly suggests that the Court did not consider the sort of misconduct exemplified by Woods Exploration outside the scope of antitrust attack. [15.]

[27]** The post-California Motor Transport case most directly on point is *Israel v. Baxter Laboratories, Inc., 151 U.S.App.D.C. 101, 103, 466 F.2d 272 (D.C. Cir. 1972)*, in which the plaintiff drug manufacturers complained that certain of their competitors had conspired to prevent plaintiff's new drug from being approved by the Food and Drug Administration by "suppressing, concealing and misconstruing information concerning the two drugs before the FDA; by arranging for the employment as a consultant to the FDA of a medical doctor who had a financial interest in (defendant); . . . and by misrepresenting the safety and efficacy of (plaintiff's product)." *Id. 151 U.S.App.D.C. at 103, 274*. Although the Israel court ultimately ordered a remand to the agency for a second determination whether plaintiff's drug should be given FDA approval, the Court of Appeals expressly preserved plaintiffs' right to prove their antitrust claims, plaintiffs having alleged that "the real purpose of defendants' joint efforts (before the FDA was) to

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14. As Pezetel-Melex read California Motor Transport, the sham exception may be based on a variety of models including: (1) upon the perjury-fraud-bribery model, as alleged in Counterclaim P 17; (2) upon an assertion that the conspirators participated in agency or court action with little or no interest in obtaining government action but simply to harass, a purely "sham" undertaking as described by the Supreme Court in Noerr, Supra ; (3) upon the charge that the antitrust plaintiff was excluded in a literal sense from the administrative forum that would lead to participation in a market, See California Motor Transport, Supra, so that the government merely acted as an unwitting surrogate for the conspirators. Doc. 70 at 69-71.

15. Even more factually apposite is the Supreme Court's own opinion in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, in which the counterclaim in a patent infringement action alleged that the plaintiff had obtained the patent by knowing and willful misrepresentations before the Patent Office. The Court held that such fraud, if proven in combination with the necessary market power, would violate § 2 of the Sherman Act. Of course, competitors possess no right of access to Patent Office initial patent application proceedings and thus in a limited sense, Walker Process does OMC no harm on its access argument. In that case, however, the Supreme Court rejected the argument made here that if misconduct occurred in the agency, the agency itself must rectify the error and the antitrust court cannot intervene:

The trial court dismissed its suit not because Walker failed to allege the relevant market, the dominance of the patented device therein, and the injurious consequences to Walker of the patent's enforcement, but rather on the ground that the United States alone may "annul or set aside" a patent for fraud in procurement. The trial court has not analyzed any economic data. Indeed, no such proof has yet been offered because of the disposition below. In view of these considerations, as well as the novelty of the claim asserted and the paucity of guidelines available in the decided cases, this deficiency cannot be deemed crucial.

Id. at 178, 86 S. Ct. at 351.

preclude, not induce, fair FDA consideration" of plaintiff's product. *Id. 151 U.S.App.D.C. at 108, 279*. In discussing *Woods Exploration, supra*, and the Circuit Court decision **[**28]** in California Motor Transport, the District of Columbia Circuit observed, "(t)he basic concern of the courts of appeal (and one District Judge) in both Woods and Trucking Unlimited may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption. **[*178]** " *Israel v. Baxter Laboratories, Inc., supra, 151 U.S.App.D.C. at 107, 466 F.2d at 278-79*. Other courts, although not all directly confronted by the allegation pleaded here, have interpreted California Motor Transport as creating a cause of action based upon unethical or illegal behavior before an adjudicatory body. See, e.g., *Rodgers v. Federal Trade Commission, 492 F.2d 228, 232 n.6* (9th Cir.), Cert. denied, *419 U.S. 834, 95 S. Ct. 60, 42 L. Ed. 2d 60 (1974)*; *Semke v. Enid Automobile Dealers Association, 456 F.2d 1361, 1366-67 (10th Cir. 1972)*. Similarly, lower federal courts have interpreted California Motor Transport as excluding gross misconduct in an adjudicatory setting or abuse of process from the Noerr-Pennington immunity. [16.] See *Rush-Hampton Industries v. Home Ventilating Institute, **[**29]** 419 F. Supp. 19, 24 (M.D.Fla.1976)*; *Control Data Corp. v. International Business Machines Corp., 306 F. Supp. 839, 849 (D.Minn.1969)*, *Aff'd, 430 F.2d 1277 (8th Cir. 1970)*. None of the cases cited above appear to concur with plaintiff's interpretation that the "sham" exception can only be successfully invoked when literal exclusion from the agency proceedings has occurred.

[30]** Having rejected plaintiff's objections respecting access, the Court turns to plaintiff's more troubling argument that any decision by the Treasury Department adverse to the defendants was the product of agency action, not of any impropriety on the part of plaintiff. Although OMC does not express it as such, this argument is essentially addressed to the not insignificant problem of causation raised by the Counterclaim. Even assuming that plaintiff conspired with others in the submission of false data to the Treasury Department, is the Court to assume that the Department made no independent fact-finding but relied exclusively on the data submitted by interested private parties? [17.] OMC makes much of the fact that Pezetel has not alleged reliance by the agency in its Counterclaim. Given that the matter is before the Court on a motion to dismiss, it is abundantly clear that all assumptions with respect to the quality of the proof must be in defendants' favor. Although the Court essentially agrees that Pezetel faces substantial difficulties in proving the elements of the violation charged in the Counterclaim: that a conspiracy existed for the purpose alleged, that the material was indeed **[**31]** knowingly false, that the governmental agency relied exclusively or in large measure on false material in reaching its conclusion, and that the antitrust injury actually flowed to Pezetel from the use of the data. But these difficulties in proof are simply that, and on a motion to dismiss, the pleadings will be construed in light of what can most optimistically be inferred from them. Consequently, although the Court agrees that causation is a formidable obstacle to success on the merits of the pleading presently before the Court, it is no barrier to survival of a motion to dismiss. See generally ***Antitrust Law*** I, supra, P 204 at 50.

[16.] The commentators agree with defendants' reading of California Motor Transport :

As compared with the legislative process, improper behavior in the adjudicatory or judicial context is more readily identified as improper and more widely regarded as reprehensible. To be sure, adjudication explicitly relies on the adversary process to develop "truth" and thus might seem to expect, and therefore to excuse, overstatements or even misstatements by a party. In fact, however, the expected standards of conduct are much higher. The Supreme Court recognized this by observing, for example, "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." Indeed, there are well developed and highly elaborated definitions of what is or is not proper behavior by litigating parties. . . . ***HN7***[] There certainly is no privilege for misrepresentations to administrative agencies which base their decisions on information provided by the parties.

Antitrust Law I, supra, P 204, at 48 (footnotes omitted).

[17.] In the case's present posture, no record has been made regarding the internal procedures of the Treasury Department both in general and with respect to the particular proceeding in which the misconduct is alleged to have occurred. Of course, the administrative law applicable to the proceeding involved is a question of law, inquiry into which could be made on a motion to dismiss; still, a question of fact would remain regarding the particular agency proceeding collaterally challenged here.

[32]** **[*179]** Finally, focusing narrowly on the language of Noerr defining the "sham" exception as government solicitation that is actually "nothing more than an attempt to interfere directly with the business relationships of a competitor," OMC argues that the fact that OMC was successful before the agency, in that the Treasury Department actually assessed dumping duties against Melex, takes OMC out from under any possible interpretation of the "sham" exception. Plaintiff asserts that "the absence of an antitrust violation is most obvious when the petitioner actually obtains the result he seeks . . .." ***Antitrust Law*** I, supra, P 202b at 38. It is observed, however, that the treatise quoted above excepted from this rule those cases in which improper means to achieve particular government action have been used. *Id. at 38 n.5*.

Moreover, the cases relied upon by OMC in support of its theory that success before the agency vitiates prior wrong-doing are distinguishable on the same ground, Viz., that no improper or illegal conduct was involved. In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board, supra, at 1079*, the allegations were simply that the conspirators' **[**33]** opposition before the Board was "sham" and "frivolous." Moreover, in light of the state agency's relatively political nature, "the relatively precise legal standards in light of which certain arguments may be characterized as "frivolous' are simply absent from the rough and tumble of the political arena." Id. As Outboard Marine well realizes, the action of the Treasury Department in assessing dumping duties against an importer is no more "political" than any adjudicatory (i. e., fact-finding) proceeding. Similarly, in *Central Bank of Clayton v. Clayton Bank, supra*, the allegations were nothing more than that the conspirators had propounded "sham and spurious" arguments to a state banking commissioner and bank board in opposition to plaintiff's application for a charter. The district court in Central Bank, while it interpreted California Motor Transport as including perjury within the sham exception held that "sham and spurious" were insufficient to state such a claim. [18.] *424 F. Supp. at 167*. Here, while concededly scant, the allegation concerns knowingly false statements before a particular adjudicatory body. In short, neither California Motor Transport's language that perjury is **[**34]** not condoned in the administrative context nor the other authorities reviewed above support plaintiff's position that the fact of success before a governmental agency can excuse improper conduct. Accordingly, that argument is rejected. [19.]

In summary, it is held that P 17 of the Counterclaim, alleging a conspiracy to submit knowingly false information to the Treasury Department and the United States Custom Service, is sufficient to state **[**35]** a claim under § 1 of the Sherman Act.

B. OTHER SHERMAN ACT § 1 CLAIMS

Paragraphs 18 and 19 of the Counterclaim allege in their entirety:

> 18. In furtherance of the conspiracy and combination described in P 16, OMC combined and conspired with other American manufacturers, including AMF and Johns-Manville, with the aid of common counsel and public relations counsel, to engage in a joint program of threatened litigation and publicity in order calculatedly to foment false impressions and fears among prospective Melex distributors as to the nature of Melex's competition, in order to discourage such distributors from selling Melex golf carts.
>
> 19. On information and belief, OMC, alone and in combination and conspiracy **[*180]** with other manufacturers, falsely conveyed to potential customers of Melex golf carts that Melex was about to go out of business.

As earlier observed, P 17, if interpreted to allege empty and harassing threats of litigation, is outside the scope of the Noerr-Pennington immunity. Presumably, if OMC possessed no intent to resort to the courts, then the crucial

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18. See notes 3-5 Supra and accompanying text.

19. As the discussion regarding "sham" litigation demonstrated, OMC's avoidance of dismissal of its federal-court claim here weighed heavily in favor of dismissal of Pezetel-Melex's charge that virtually identical federal-court complaints were harassing. The apparent inconsistency in these two positions is explained by the allegation that knowingly false information was considered by the Treasury Department, a charge which, if proven, would undermine the validity of any agency action taken in reliance upon the information.

connection between the conduct and the *First Amendment* is lacking, and neither the **[**36]** tort of business disparagement nor publicity campaigns generally implicates the *First Amendment*, at least under these circumstances. Unfortunately, neither side had adduced any case authority for its position that publicity campaigns and disparagement of rivals are or are not actionable under Sherman Act § 1, and the Court is left primarily with the remarks of the treatise-writers, which of course arise in a vacuum.

Although the Court would be unimpressed with the sufficiency of these claims, as they are alleged, under the Sherman Act if they stood alone, the focus of the inquiry shifts dramatically when they are viewed in light of the charge, which now must be accepted as true, that OMC conspired to submit false information to a government agency. If the latter claim is taken at face value, then Pezetel-Melex's assertions of unfair competition and business disparagement arise in the context of a counterclaim charging a concerted campaign that has at its center an antitrust violation. It is evident that such actions, even if taken in concert, however, must be subject to a de minimus rule, if the antitrust courts are not to become the battleground for a variety of intentional-tort **[**37]** suits. Whether such a de minimus rule could ever be enforced against an antitrust plaintiff at the pleading stage need not be faced by this Court, since the presence of a well-pleaded Sherman § 1 claim in P 17 removes the allegations from the area in which any de minimus rule could legitimately operate. For example, in *Control Data Corp. v. International Business Machines Corp., supra, at 848-49*, an allegation that IBM "wrongfully and deceptively developed, fostered an maintained a viewpoint among computer users . . . that computer software is an intangible without (market) value" survived a motion to dismiss. As here, that charge was accompanied by a serious allegation of agency misconduct, fraud in the United States Patent Office. Consequently, if OMC combined with others to take action violative of the antitrust laws, then other courses of action against identical competitors for identical anticompetitive goals might be actionable. [20.]

[38]** Having so concluded, however, it is emphasized that charges of unfair competition, such as those alleged in P P 18 and 19 of the Counterclaim, could only result in antitrust liability irrespective of whether defendants ultimately succeed in their proof of the agency misconduct allegation when the conduct is systematic, wide-ranging and has a clearly discernible market effect. [21.] ***HN8***[] Isolated instances of unethical business practices do not rise to the level of Sherman Act § 1 liability.

In the case of the business disparagement of Pezetel-Melex's product to customers by OMC and its conspirators, a pervasive and systematic campaign must be proven, and the elements of a demonstrated violation must include "cumulative proof that the representations (to buyers) were **[*181]** **[**39]** clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and not readily susceptible of neutralization or other offset" by Pezetel-Melex. ***Antitrust Law*** III, § 738a, at 279.

As for P 18, in which the ***HN9***[] "joint program of threatened litigation and publicity" is alleged, the defendants must demonstrate (1) the presence of a systematic conspiracy; (2) the coercive goal as charged; (3) clearly false representations in a pattern arising above isolated incidents; (4) upon which prospective distributors might reasonably rely; (5) that these would-be distributors did so rely; and (6) that Pezetel-Melex suffered clearly identifiable market injury therefrom.

II. CHARGES UNDER THE WILSON TARIFF ACT

[20.] It is emphasized, however, that this holding is perfectly in accord with the position of Areeda and Turner, much pressed by Outboard Marine, that unfair competition of the sort alleged by the Counterclaim should generally be ignored in the antitrust forum. ***Antitrust Law*** III, supra, P 737, at 278. First, as defendants argue, the suggestion of the authors that business disparagement of rivals should "presumptively be ignored," necessarily contemplates that the charge survive a motion to dismiss. Otherwise, the result would be to completely exclude such charges from the antitrust realm. Second, to permit the defendants to proceed with the claim does not relieve them of a formidable burden of proof.

[21.] Of course, if defendants did prevail on their claim that OMC submitted knowingly false information to the Treasury, then some overlap in the market effect (i. e., damages) flowing from the two courses of conduct would probably exist.

Incorporating all the factual allegations of the complaint, the defendants assert that Outboard Marine's practices violated ***HN10***[] the Wilson Tariff Act, *15 U.S.C. § 8*, which provides in pertinent part:

> Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, **[**40]** either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

Id. *§ 8*. Pezetel-Melex did not mention this count of the Counterclaim either in its brief or its oral argument. Plaintiff urges, however, that the Act only applies to combinations "by or between two or more persons or corporations, either of whom . . . is engaged in importing any article . . . into the United States." Pezetel-Melex have not alleged either that OMC is an importer or that the conspiracy involves any other importer of goods. It is concluded that the Counterclaim fails to allege conduct falling within the scope of the Wilson Tariff Act and the latter will be dismissed.

An order will be entered in conformity with this Opinion.

Berkey Photo, Inc. v. Eastman Kodak Co.

United States Court of Appeals for the Second Circuit

April 18, 1979, Argued;April 30, 1979, Submitted ; June 25, 1979, Decided

Nos. 1019, 1070, Dockets 78-7445, 78-7448

Reporter

603 F.2d 263 *; 1979 U.S. App. LEXIS 13692 **; 1979-1 Trade Cas. (CCH) P62,718; 53 A.L.R. Fed. 768

BERKEY PHOTO, INC., Plaintiff-Appellee-Cross Appellant, v. EASTMAN KODAK COMPANY, Defendant-Appellant-Cross Appellee.

Prior History: [1]** Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, District Judge. The district court upheld certain jury verdicts in this private antitrust action; set aside others; entered judgment for plaintiff in the amount of $87,091,309.47, comprising attorneys' fees, costs, and treble damages; and decreed certain equitable relief.

Disposition: Affirmed in part, reversed in part, and remanded for further proceedings.

Core Terms

camera, film, photofinishing, format, monopolist, manufacturers, monopoly power, damages, sales, monopoly, color, markets, competitors, new film, magicube, decree, monopolization, Sherman Act, rivals, predisclosure, purchaser, anticompetitive conduct, innovation, consumers, anticompetitive, products, Pocket, color print, photographic, antitrust

LexisNexis® Headnotes

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

HN1[] **Monopolies & Monopolization, Actual Monopolization**

The existence of monopoly power, the power to control prices or exclude competition, is the primary requisite to a finding of monopolization.

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

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

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

After possession of monopoly power is found, the second element of the *15 U.S.C.S. § 2* offense 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.

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

HN3[] **Monopolies & Monopolization, Actual Monopolization**

The mere existence of monopoly power, whether lawfully or unlawfully acquired, is in itself violative of *15 U.S.C.S. § 2*, provided it is coupled with the purpose or intent to exercise that power.

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

HN4[] **Monopolies & Monopolization, Actual Monopolization**

The key to analysis under *15 U.S.C.S. § 2* is the concept of market power. Although power may be derived from size, the two are not identical. A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market. Nevertheless, many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals.

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

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The mere possession of monopoly power does not ipso facto condemn a market participant. But, to avoid the proscriptions of *15 U.S.C.S. § 2*, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.

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

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

HN6[] **Monopolies & Monopolization, Actual Monopolization**

The use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *15 U.S.C.S. § 2*, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability. But a large firm does not violate *§ 2* simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as a firm is allowed to compete in several fields, it must be expected to seek the competitive advantages of its broad-based activity. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

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

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

Civil Procedure > Appeals > Standards of Review

HN7[] **Verdicts, General Verdicts**

Where the jury returns a general verdict for the plaintiff, the court is bound to construe the evidence and the possible inferences in the light most favorable to the plaintiff.

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

HN8[] **Monopolies & Monopolization, Actual Monopolization**

A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier. And in its advertising, a producer is ordinarily permitted, much like an advocate at law, to bathe his cause in the best light possible. Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of *15 U.S.C.S. § 2*.

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

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

Where a course of action is ambiguous, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct.

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

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

Although the antitrust laws afford latitude in permitting the factfinder to estimate the extent of the damages where precise calculation is impossible, they do not allow recovery where there has been no showing that plaintiff suffered cognizable injury.

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

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Although an injunction need not be limited to prohibiting repetition of past misconduct, it does not lie within the discretion of the trial judge to restructure a market that the defendant has neither monopolized nor attempted to monopolize.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Purchasers, Direct Purchasers**

Excessive prices, maintained through exercise of a monopolist's control of the market, constituted one of the primary evils that the Sherman Act was intended to correct. Where a monopolist has acquired or maintained its power by anticompetitive conduct, therefore, a direct purchaser may recover the overcharge caused by the violation of *15 U.S.C.S. § 2*.

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

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

HN13[] **Sherman Act, Remedies**

For a purchaser to recover damages under *15 U.S.C.S. § 2*, it must demonstrate that the monopolist has engaged in some anticompetitive conduct. Two further questions must be resolved, however, to give shape to the purchaser's treble damage suit: (1) if an overcharge paid during the limitations period was caused by the defendant's monopoly power, may a plaintiff satisfy the conduct element of the *§ 2* offense by proving anticompetitive actions that occurred more than four years prior to the commencement of suit? (2) If a defendant has violated *§ 2*, may a purchaser recover the excess of its price over a competitive price, or merely the increment attributable to its anticompetitive conduct?

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN14[] **Private Actions, Purchasers**

By statute, *15 U.S.C.S. § 15b*, a four-year period of limitations applies in private antitrust suits. The plaintiff, therefore, clearly can recover only for overcharges suffered since the beginning of the limitations period.

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

HN15[] Private Actions, Purchasers

It is plain from the treble-damage statute itself, *15 U.S.C.S. § 15*, that a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. Although the business of a monopolist's rival may be injured at the time the anticompetitive conduct occurs, a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN16[] Private Actions, Purchasers

So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. Thus, in this setting, as in the context of a continuing conspiracy to violate the antitrust laws, 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. As to those damages, the statute of limitations runs from the commission of the act.

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

HN17[] Private Actions, Purchasers

Even if injury and a cause of action have accrued as of a certain date, further 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.

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

HN18[] Private Actions, Purchasers

Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are "suffered."

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

Governments > Legislation > Statute of Limitations > Time Limitations

HN19[] Private Actions, Purchasers

A purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period.

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

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

HN20[] **Sherman Act, Remedies**

The true measure of damages in a *15 U.S.C.S. § 2* claim, the wrongful conduct rule, is the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market.

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN21[] **Private Actions, Remedies**

Plaintiffs in an antitrust action must prove injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Excessive prices are injury of the type the antitrust laws were intended to prevent. It is equally evident, however, that more than monopoly power is necessary to make the charging of a noncompetitive price unlawful. Accordingly, a purchaser may recover only for the price increment that "flows from" the distortion of the market caused by the monopolist's anticompetitive conduct.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Types of Contracts, Joint Contracts**

Joint ventures involving a monopolist have sufficient anticompetitive potential that they must be scrutinized with care lest they be permitted to fortify the already substantial entry barriers inherent in a monopolized market. The relevant variables might include: the size of the joint venturers; their share of their respective markets; the contributions of each party to the venture and the benefits derived; the likelihood that, in the absence of the joint effort, one or both parties would undertake a similar project, either alone or with a smaller firm in the other market; the nature of the ancillary restraints imposed and the reasonableness of their relationship to the purposes of the venture. In analyzing joint development agreements, as elsewhere in *15 U.S.C.S. § 1*, the factfinder must weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN23[] **Judgment as Matter of Law, Judgment Notwithstanding Verdict**

On a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the party for whom the verdict was rendered, and it must be given the benefit of all reasonable inferences.

Civil Procedure > Appeals > Standards of Review

HN24[] **Appeals, Standards of Review**

Where the trial judge has taken great care to balance the probative value of the evidence against the prejudice that may accrue from its introduction, it is inappropriate for the court to substitute its judgment for his.

Counsel: Alvin M. Stein, New York City (Barry J. Brett, Mark I. Schlesinger, Aurora Cassirer, Mark D. Offen, Parker, Chapin, Flattau & Klimpl, New York City, Neuman, Williams, Anderson & Olson, Chicago, Ill., of counsel), for plaintiff-appellee-cross appellant.

William Piel, Jr., New York City (Robert MacCrate, John L. Warden, Richard E. Carlton, Jerrold J. Ganzfried, Philip K. Howard, Shelley D. LaVine, William L. Farris, Sullivan & Cromwell, New York City, of counsel), for defendant-appellant-cross appellee.

Judges: Before KAUFMAN, Chief Judge, and SMITH and MULLIGAN, Circuit Judges.

Opinion by: KAUFMAN

Opinion

[*267] INTRODUCTION

To millions of Americans, the name Kodak is virtually synonymous with **[**2]** photography. Founded over a century ago by George Eastman, the Eastman Kodak Company has long been the preeminent firm in the amateur photographic industry. It provides products and services covering every step in the creation of an enduring photographic record from an evanescent image. Snapshots may be taken with a Kodak camera on Kodak film, developed by Kodak's Color Print and Processing Laboratories, and printed on Kodak photographic paper. The firm has rivals at each stage of this process, but in many of them it stands, and has long stood, dominant. It is one of the giants of American enterprise, with international sales of nearly $ 6 billion in 1977 and pre-tax profits in excess of.$ 1.2 billion.

This action, one of the largest and most significant private antitrust suits in history, was brought by Berkey Photo, Inc., a far smaller but still prominent participant in the industry. Berkey competes with Kodak in providing photofinishing services the conversion of exposed film into finished prints, slides, or movies. Until 1978, Berkey sold cameras as well. It does not manufacture film, but it does purchase Kodak film for resale to its customers, and it also buys photofinishing **[**3]** equipment and supplies, including color print paper, from Kodak.

The two firms thus stand in a complex, multifaceted relationship, for Kodak has been Berkey's competitor in some markets and its supplier in others. In this action, Berkey claims that every aspect of the association has been infected by Kodak's monopoly power in the film, color print paper, and camera markets, willfully acquired, maintained, and exercised in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*. It also charges that Kodak conspired with flashlamp manufacturers in violation of *§ 1* of the Act, *15 U.S.C. § 1*. Berkey alleges that these violations caused it to lose sales in the camera and photofinishing markets and to **[*268]** pay excessive prices to

Kodak for film, color print paper, and photofinishing equipment. [1.] A number of the charges arise from Kodak's 1972 introduction of the 110 photographic system, featuring a "Pocket Instamatic" camera and a new color print film, Kodacolor II, but the case is not limited to that episode. It embraces many of Kodak's activities for the last decade and, indeed, from preceding years as well.

[4]** After more than four years of pretrial maneuvering, the trial got under way in July 1977 before Judge Marvin E. Frankel of the Southern District of New York. Despite the daunting complexity of the case the exhibits numbered in the thousands Kodak demanded a jury. Accordingly, the trial was conducted in two parts, one to determine liability and the other to measure damages. It ran continuously, except for a one-month hiatus between the two segments, until the final verdict was rendered on March 22, 1978. The liability phase of the trial by itself consumed more than six months, and the damages aspect required approximately another month. Except for a few specific questions relating primarily to market definitions, the jury was asked to render what was essentially a general verdict on each count.

After deliberating for eight days on liability and five on damages, the jury found for Berkey on virtually every point, awarding damages totalling $ 37,620,130. Judge Frankel upheld verdicts aggregating $ 27,154,700 for lost camera and photofinishing sales and for excessive prices on film and photofinishing equipment, but he entered judgment n. o. v. for Kodak on the remainder. Trebled and **[**5]** supplemented by attorneys' fees and costs pursuant to § 4 of the Clayton Act, *15 U.S.C. § 15*, Berkey's judgment reached a grand total of $ 87,091,309.47, with interest, of course, continuing to accrue.

Kodak now appeals this judgment, as well as the two forms of equitable relief that we shall discuss below. It challenges virtually every aspect of the district court proceedings, from the theories of liability and damages presented to the jury to the sufficiency of the evidence to sustain them. It argues, furthermore, that Judge Frankel committed prejudicial error in the conduct of the trial. For its part, Berkey contends that the trial judge erred in not entering judgment on the full amount of the jury's verdict and in computing improperly the costs and fees that Berkey should recover.

Resolution of these competing claims requires us to settle a number of important and novel issues concerning *§ 2* of the Sherman Act. We believe that the district court committed several significant errors as it charted its course through the complexities of this case, and we are therefore compelled to reverse the judgment below in certain major respects. But we cannot accept Kodak's contention that **[**6]** a properly charged jury could not find monopolization of any of the relevant markets and resulting damage to Berkey. Accordingly, we remand for a new trial on several of the claims.

I. THE AMATEUR PHOTOGRAPHIC INDUSTRY

Before plunging into the welter of issues raised in this appeal, we must understand the industry out of which the litigation arose. It is, of course, a basic principle in the law of monopolization that the first step in a court's analysis must be a definition of the relevant markets. See, e. g., *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391-93, 76 S. Ct. 994,* ***[*269]*** *100 L. Ed. 1264 (1956)*. Although Kodak does not now challenge the jury's delineation of the markets, a survey of this terrain remains essential. The jury found monopolization or other anticompetitive conduct in no fewer than five distinct markets within the amateur photographic industry, and in several instances Kodak was held to have misused its control over one market to disadvantage rivals in another.

[1.] Berkey had charged several other violations that are not before us on this appeal. During the liability trial, Berkey withdrew or the court dismissed claims under the Clayton Act, §§ 3 & 7, *15 U.S.C. §§ 14* & *18*, as well as allegations arising from some of Kodak's early acquisitions, its use of patents, its relations with Polaroid Corp., and its other activities in the instant photography field. Despite jury findings of *§ 2* liability, Berkey did not attempt to prove damages with respect to color negative printers and chemicals, and the jury found no damages with respect to amateur movie cameras. Kodak's purchases of flashcubes, magicubes, and flipflash arrays led to a $ 245,100 jury verdict under the Robinson-Patman Act, *§ 2(f)*, *15 U.S.C. § 13(f)*, which was set aside by Judge Frankel because there was no evidence of injury to Berkey.

Accordingly, to evaluate the verdicts, it is necessary to describe not only the individual markets but also the interrelationships among them.

The principal markets relevant here, **[**7]** each nationwide in scope, are amateur conventional still cameras, conventional photographic film, photofinishing services, photofinishing equipment, and color print paper. The numerous technological interactions among the products and services constituting these markets are manifest. To take an obvious example, not only are both camera and film required to produce a snapshot, but the two must be in compatible "formats." This means that the film must be cut to the right size and spooled in a roll or cartridge that will fit the camera mechanism. Berkey charges that Kodak refused to supply on economical terms film usable with camera formats designed by other manufacturers, thereby exploiting its film monopoly to obstruct its rivals in the camera market. Similarly, Berkey contends, since the emulsions and other constituents of a film determine the chemicals and processes required to develop it, Kodak was able to project its power over film into the photofinishing market as well.

These and other market interactions will be discussed in depth as we analyze the verdicts and rulings below. First, however, we must describe in detail the individual markets themselves.

A. The Camera Market

[8]** The "amateur conventional still camera" market now consists almost entirely of the so-called 110 and 126 instant-loading cameras. These are the direct descendants of the popular "box" cameras, the best-known of which was Kodak's so-called "Brownie." Small, simple, and relatively inexpensive, cameras of this type are designed for the mass market rather than for the serious photographer. [2.]

Kodak has long been the dominant firm in the market thus defined. Between 1954 and 1973 it never enjoyed less than 61% Of the annual unit sales, nor less than 64% Of the dollar volume, and in the peak year of 1964, Kodak cameras accounted **[**9]** for 90% Of market revenues. Much of this success is no doubt due to the firm's history of innovation. In 1963 Kodak first marketed the 126 "Instamatic" instant-loading camera, [3.] and in 1972 it came out with the much smaller 110 "Pocket Instamatic." Not only are these cameras small and light, but they employ film packaged in cartridges that can simply be dropped in the back of the camera, thus obviating the need to load and position a roll manually. Their introduction triggered successive revolutions in the industry. Annual amateur still camera sales in the United States averaged 3.9 million units between 1954 and 1963, with little annual variation. In the first full year after Kodak's introduction of the 126, industry sales leaped 22%, and they took an even larger quantum jump when the 110 came to market. Other camera manufacturers, including Berkey, copied both these inventions but for several months after each introduction anyone desiring to purchase a camera in the new format was perforce remitted to Kodak.

[10]** Berkey has been a camera manufacturer since its 1966 acquisition of the Keystone Camera Company, a producer of movie **[*270]** cameras and equipment. [4.] In 1968 Berkey began to sell amateur still cameras made by other firms, and the following year the Keystone Division commenced manufacturing such cameras itself. From 1970 to 1977, Berkey accounted for 8.2% Of the sales in the camera market in the United States, [5.] reaching a peak of 10.2% In 1976. In 1978, Berkey sold its camera division and thus abandoned this market.

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2. More complicated cameras, such as those in the 135 format ("35-millimeter") commonly used by professionals and photographic hobbyists, were found not to be part of this market. The jury also rejected Kodak's request to include in the definition "instant" cameras, pioneered by the Polaroid Corporation, which produce a finished print within minutes, or even seconds, after the shutter is snapped.

3. Instant-loading cameras are not to be confused with the "instant" cameras referred to in the previous footnote.

4. In 1967 Berkey acquired a manufacturer of amateur photographic accessories, the Atlas-Warner Corp., along with three distributors of Atlas-Warner products.

5. Berkey entered into the manufacture of instant cameras in 1972, but discontinued this line in settlement of patent litigation instituted by Polaroid Corp.

B. The Film Market

The relevant market for photographic film comprises color print, color slide, color movie, and black-and-white film. [6.] Kodak's grip on this market is **[**11]** even stronger than its hold on cameras. Since 1952, its annual sales have always exceeded 82% Of the nationwide volume on a unit basis, and 88% In revenues. Foreign competition has recently made some inroads into Kodak's monopoly, but the Rochester firm concedes that it dominated film sales throughout the period relevant to this case. Indeed, in his summation, Kodak's trial counsel told the jury that "the film market . . . has been a market where there has not been price competition and where Kodak has been able to price its products pretty much without regard to the products of competitors."

Kodak's monopoly in the film market is particularly important to this case, because the jury accepted Berkey's contention, noted above, that it had been used **[**12]** to disadvantage rivals in cameras, photofinishing, photofinishing equipment, and other markets. Of special relevance to this finding is the color print film segment of the industry, which Kodak has dominated since it introduced "Kodacolor," the first amateur color print film, in 1942. [7.] In 1963, when Kodak announced the 126 Instamatic camera, it also brought out a new, faster color print film Kodacolor X which was initially available to amateur photographers only in the 126 format. [8.] Nine years later, Kodak repeated this pattern with the simultaneous introduction of the 110 Pocket Instamatic and Kodacolor II film. For more than a year, Kodacolor II was made only for 110 cameras, and Kodak has never made any other color print film in the 110 size.

[13]** C. Photofinishing Services and Photofinishing Equipment

Before 1954, Kodak's Color Print and Processing Laboratories (CP&P) had a nearly absolute monopoly of color photofinishing maintained by a variety of practices. Accounting for over 95% Of color film sales, Kodak sold every roll with an advance charge for processing included. Consumers had little choice but to purchase Kodak film, and in so doing they acquired the right to have that film developed and printed by CP&P at no further charge. Since few customers would duplicate their costs to procure the services of a non-Kodak photofinisher, Kodak was able to parlay its film monopoly to achieve equivalent market power in photofinishing. [9.]

[14] [*271]** This film/processing "tie-in" attracted the attention of the Justice Department, and in 1954 a consent decree changed the structure of the color photofinishing market drastically. Kodak was forbidden to link photofinishing to film sales, and it agreed to make its processing technology, chemicals, and paper available to rivals at reasonable rates. As a result, CP&P's share of the market plummeted from 96% In 1954 to 69% Two years later, and it has declined sharply ever since. In 1970, CP&P accounted for but 17% Of the market, and by 1976 its share reached a low of 10%. There are now approximately 600 independent photofinishers in the United States.

[6.] The jury included movie film and 35-millimeter film in this market, presumably because they are substantially identical to the film used in amateur still cameras. Instant film, however, a product chemically distinct from laboratory-processed film, was excluded.

[7.] Kodak marketed improved versions of Kodacolor in 1945, 1949, and 1955.

[8.] The new film was also initially sold for use in 35-millimeter cameras, which are not part of the amateur market. It did not replace Kodacolor in the amateur 127 and 620 sizes until one year later. "Film speed" refers to an emulsion's sensitivity to light. Thus Kodacolor X as compared to its predecessor could produce acceptable images under markedly inferior lighting conditions.

[9.] To be sure, Kodak could not in this fashion control the market for color reprints production of additional prints from slides or negatives. Here it resorted to other tactics. By refusing to sell the special paper or chemicals necessary to produce such reprints to rival photofinishers, it ensured since there was no other adequate source for these supplies that even this segment of the market did not escape its grip.

Berkey is one of the largest of these processors. It has been a photofinisher since 1933, but until 1954 its principal business was developing and printing black-and-white film. [10.] In addition, Berkey purchased Kodak black-and-white film, which was sold without a processing tie-in, for resale to its photofinishing customers. After the 1954 decree, Berkey applied to Kodak for the appropriate licenses and in 1956 began to process significant amounts of color film. It now finishes more 126 and 110 color print film than does Kodak. **[**15]**

A variety of equipment is used to process film, and the Kodak Apparatus Division (KAD) designs and produces most of the machinery used by CP&P. Kodak also sells some equipment to other photofinishers, but this is an insignificant portion of its business; indeed, until the introduction of the 110 system, Kodak made still film processing equipment for its own use only. Several other firms supply photofinishing equipment to the rival processors, and Berkey does not contend that Kodak monopolized or attempted to monopolize this market.

D. The Color Paper Market

The market for color paper that is, paper specially treated so that images from color film may be printed on it effectively came into being after entry of the 1954 consent decree. **[**16]** Before then, Kodak was for all practical purposes the only color photofinisher, and its requirements for color paper were met entirely by the paper division of Kodak Park Works in Rochester. The remaining processors, who dealt with non-Kodak color film and used non-Kodak paper, occupied only four percent of the color photofinishing market. Consequently, the vertical foreclosure created by CP&P's lock on photofinishing and its exclusive use of Kodak color paper was virtually complete.

Although the 1954 decree steadily loosened Kodak's grip in photofinishing, it did not immediately affect the firm's control of color paper. For more than a decade, the independent photofinishers that sprang up after the decree was entered looked only to Kodak for their paper supplies. Indeed, although entry by both foreign and domestic paper manufacturers has reduced Kodak's share substantially, to a low of 60% In 1976, the firm's color paper operations have remained remarkably profitable. Between 1968 and 1975, while its market share was falling from 94% To 67%, Kodak's earnings from operations as a percentage of sales remained virtually constant, averaging 60% For the period. Moreover, the most recent **[**17]** telling event in the market has not been entry but exit: GAF Corporation announced in 1977 that it was abandoning its effort to sell color paper, leaving Kodak with only one domestic and two foreign competitors.

Kodak, then, is indeed a titan in its field, and accordingly has almost inevitably invited attack under *§ 2* of the Sherman Act. Few, if any, cases have presented so many diverse and difficult problems of *§ 2* analysis. It is appropriate, therefore, to elucidate some fundamental principles of law relating to that statutory provision.

II. *§ 2* OF THE SHERMAN ACT

The Sherman Antitrust Act of 1890 has been characterized as "a charter of freedom, **[*272]** " *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359, 53 S. Ct. 471, 77 L. Ed. 825 (1933)*. For nearly ninety years it has engraved in law a firm national policy that the norm for commercial activity must be robust competition. The most frequently invoked section of the Act is the first, which forbids contracts, combinations, or conspiracies in restraint of trade. But the prohibition of *§ 1* is incomplete, *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60-61, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*, for **[**18]** it only applies to conduct by two or more actors. If sufficiently powerful, however, a single economic entity may also stifle competition. 1 R. Callmann, The Law of Unfair Competition, Trademarks, and Monopolies 341-42 (3d ed. 1967). Accordingly, in *§ 2* of the Sherman Act, Congress made it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" any part of interstate or foreign commerce. It is *§ 2* to which we give our principal attention in analyzing this case.

In passing the Sherman Act, Congress recognized that it could not enumerate all the activities that would constitute monopolization. *Section 2*, therefore, in effect conferred upon the federal courts "a new jurisdiction to apply a

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[10.] Prior to 1954 a small part of Berkey's business consisted of processing Anscocolor film manufactured by a rival of Kodak's, Ansco into both slides and color prints. Using paper and chemicals supplied by Ansco, Berkey was also able to produce color prints from Kodachrome slides.

"common law' against monopolizing." 3 P. Areeda & D. Turner, ***Antitrust Law*** 40 (1978). In performing that task, the courts have enunciated certain principles that by now seem almost elementary to any student of ***antitrust law***. But, because *§ 2* must reconcile divergent and sometimes conflicting policies, it has been difficult to synthesize the parts into a coherent and consistent whole. To provide a framework for deciding the issues presented by this case, therefore, **[**19]** we begin by stating what we conceive to be the fundamental doctrines of *§ 2*.

A. Monopoly Power as the Essence of the *§ 2* Violation

The gravamen of a charge under *§ 1* of the Sherman Act is conduct in restraint of trade; no fundamental alteration of market structure is necessary. Thus, certain restrictive practices among competitors, such as price fixing, are illegal Per se. That the conspirators lack the market power to affect prices is immaterial. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. *Section 2*, by contrast, is aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition.

HN1[] Indeed, there is little argument over the principle that existence of monopoly power "the power to control prices or exclude competition," *E. I. du Pont de Nemours & Co., supra, 351 U.S. at 391, 76 S. Ct. at 1005* is "the primary requisite to a finding of monopolization." 1 M. Handler, Twenty-five Years of Antitrust 691 (1973). The Supreme Court has informed us that "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil **[**20]** and stand condemned under *§ 2* even though it remains unexercised." *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948)*.

This tenet is well grounded in economic analysis. There is little disagreement that a profit-maximizing monopolist will maintain his prices higher and his output lower and the socially optimal levels that would prevail in a purely competitive market. E. g., F. Scherer, Industrial Market Structure and Economic Performance 13-19 (1970). The price excess represents not a reasonable return on investment but the spoils of the monopolist's power. E.g., L. Sullivan, Handbook of the Law of Antitrust 25-26 (1977); 2 P. Areeda & D. Turner, Supra, at 323-34.

It is not a defense to liability under *§ 2* that monopoly power has not been used to charge more than a competitive price or extract greater than a reasonable profit. Learned Hand stated the rationale in the Alcoa case, *United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945)*. He said in his incisive manner that the Sherman Act is based on the belief:

> that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that **[**21]** immunity **[*273]** from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

Judge Hand explained, in addition, that Congress was not "actuated by economic motives alone" in enacting *§ 2*. Id. Considerations of political and social policy form a major part of our aversion to monopolies, for concentration of power in the hands of a few obstructs opportunities for the rest.

Because, like all power, it is laden with the possibility of abuse; because it encourages sloth rather than the active quest for excellence; and because it tends to damage the very fabric of our economy and our society, monopoly power is "inherently evil." *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 345 (D.Mass.1953)*, Aff'd per curiam, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*; See *United States v. Grinnell Corp., 236 F. Supp. 244, 258 (D.R.I. 1964)*, Aff'd in part, *384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. If a finding of monopoly power were all that were necessary to complete a violation of *§ 2*, our task in this case would be **[**22]** considerably lightened. Kodak's control of the film and color paper markets clearly reached the level of a monopoly. And, while the issue is a much closer one, it appears that the evidence was sufficient for the jury to find that Kodak possessed such power in the camera market as well. [11.] But our inquiry into Kodak's liability cannot end there.

[11.] See our discussion of the relevant markets, Part I Supra. Kodak sold approximately two-thirds of all amateur conventional still cameras throughout most of the relevant period. The frequency with which flashlamp manufacturers approached Kodak with

B. The Requirement of Anticompetitive **[**23]** Conduct

Despite the generally recognized evils of monopoly power, it is "well settled," See J. von Kalinowski, Antitrust Laws & Trade Regulation P 802(3), at 8-41 (1979), that *§ 2* does not prohibit monopoly Simpliciter or, as the Supreme Court phrased it in the early landmark case of *Standard Oil Co. of New Jersey, supra, 221 U.S. at 62, 31 S. Ct. 502*, "monopoly in the concrete."

Thus, while proclaiming vigorously that monopoly power is the evil at which *§ 2* is aimed, courts have declined to take what would have appeared to be the next logical step declaring monopolies unlawful Per se unless specifically authorized by law. To understand the reason for this, one must comprehend the fundamental tension one might almost say the paradox that is near the heart of *§ 2*. This tension creates much of the confusion surrounding *§ 2*. It makes the cryptic Alcoa opinion a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes.

The conundrum was indicated in characteristically striking prose by Judge Hand, who was not able to resolve it. Having stated that Congress "did not condone "good trusts' and condemn "bad' ones; it forbad all," *Alcoa,* ***[**24]*** *supra, 148 F.2d at 427*, he declared with equal force, "The successful competitor, having been urged to compete, must not be turned upon when he wins," *Id. at 430*. Hand, therefore, told us that it would be inherently unfair to condemn success when the Sherman Act itself mandates competition. Such a wooden rule, it was feared, might also deprive the leading firm in an industry of the incentive to exert its best efforts. Further success would yield not rewards but legal castigation. The antitrust laws would thus compel the very sloth they were intended to prevent. We must always be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition. E.g., *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48 (2d Cir. 1979)*.

In Alcoa the crosscurrents and pulls and tugs of *§ 2* law were reconciled by noting **[*274]** that, although the firm controlled the aluminum ingot market, "it may not have achieved monopoly; monopoly may have been thrust upon it." *148 F.2d at 429*. In examining this language, which would condemn a monopolist unless it is "the passive beneficiary of a monopoly," *Id. at 430*, we perceive Hand **[**25]** the philosopher. As an operative rule of law, however, the "thrust upon" phrase does not suffice. It has been criticized by scholars, 3 P. Areeda & D. Turner, Supra, at 20; L. Sullivan, Supra, at 96-97; Handler, Some Unresolved Problems of Antitrust, 62 Colum.L.Rev. 930, 934 (1962), and the Supreme Court appears to have abandoned it. See *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; 1 M. Handler, Supra, at 692. Grinnell instructs that ***HN2***[] after possession of monopoly power is found, the second element of the *§ 2* offense 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." *384 U.S. at 570-71, 86 S. Ct. at 1704*.

This formulation appears to square with the understanding of the draftsmen of the Sherman Act that *§ 2* does not condemn one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well." *United Shoe Machinery Corp., supra, 110 F. Supp. at 341* (quoting legislative history). Thus the statement in Alcoa that even well-behaved monopolies are forbidden by *§* ***[**26]*** *2* must be read carefully in context. Its rightful meaning is that, if monopoly power has been acquired or maintained through improper means, the fact that the power has not been used to extract improper benefits provides no succor to the monopolist.

But the law's hostility to monopoly power extends beyond the means of its acquisition. Even if that power has been legitimately acquired, the monopolist may not wield it to prevent or impede competition. Once a firm gains a measure of monopoly power, whether by its own superior competitive skill or because of such actions as restrictive combinations with others, it may discover that the power is capable of being maintained and augmented merely by

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suggestions for joint development of products and their willingness to acquiesce in arguably one-sided agreements is further evidence of Kodak's power in the camera market. See our discussion of Berkey's *§ 1* allegations, Part V Infra. The precipitous decline, beginning in 1976, of Kodak's share of the camera market was evidence that the jury could consider, although it was not dispositive.

using it. E. g., *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*. That is, a firm that has achieved dominance of a market might find its control sufficient to preserve and even extend its market share by excluding or preventing competition. A variety of techniques may be employed to achieve this end predatory pricing, lease-only policies, and exclusive buying arrangements, to list a few.

Even if the origin of the monopoly power was innocent, therefore, the **[**27]** Grinnell rule recognizes that maintaining or extending market control by the exercise of that power is sufficient to complete a violation of *§ 2*. As we have explained, only considerations of fairness and the need to preserve proper economic incentives prevent the condemnation of *§ 2* from extending even to one who has gained his power by purely competitive means. The district court judge correctly indicated that such a monopolist is tolerated but not cherished. Thus, the rule of Grinnell must be read together with the teaching of Griffith, ***HN3***[] that the mere existence of monopoly power "whether lawfully or unlawfully acquired," is in itself violative of *§ 2*, "provided it is coupled with the purpose or intent to exercise that power." *334 U.S. at 107, 68 S. Ct. at 945*.

HN4[] The key to analysis, it must be stressed, is the concept of market power. Although power may be derived from size, E. g., *United States v. Swift & Co., 286 U.S. 106, 116, 52 S. Ct. 460, 76 L. Ed. 999 (1932)*, the two are not identical. F. Scherer, Supra, at 352. A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. **[**28]** These benefits are a consequence of size and not an exercise of power over the market. [12.] Nevertheless, many anticompetitive **[*275]** actions are possible or effective only if taken by a firm that dominates its smaller rivals. See *Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 925-26 (10th Cir.)*, Cert. dismissed, *423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)*. A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors. See, e. g., *Lorain Journal Co., supra.* Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even "honestly industrial." *Alcoa, supra, 148 F.2d at 431*.

[29]** In sum, although the principles announced by the *§ 2* cases often appear to conflict, this much is clear. ***HN5***[] The mere possession of monopoly power does not Ipso facto condemn a market participant. But, to avoid the proscriptions of *§ 2*, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.

C. Monopoly Power as a Lever in Other Markets

It is clear that a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market. See, e. g., *Griffith, supra*; *Smith-Kline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.)*, Cert. denied, *439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978)*. Kodak, in the period relevant to this suit, was never close to gaining control of the markets for photofinishing equipment or services and could not be held to have attempted to monopolize them. [13.] Berkey nevertheless contends that Kodak illicitly gained an advantage in these areas by leveraging its **[**30]** power over film and cameras. Accordingly, we must determine whether a firm violates *§ 2* by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market. We hold, as did the lower court, that it does.

This conclusion appears to be an inexorable interpretation of the antitrust laws. We tolerate the existence of monopoly power, we repeat, only insofar as necessary to preserve competitive incentives and to be fair to the firm

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[12.] Nor is a lawful monopolist ordinarily precluded from charging as high a price for its product as the market will accept. True, this is a use of economic power; indeed, the differential between price and marginal cost is used as an indication of the degree of monopoly power, 2 P. Areeda & D. Turner, Supra, at 323-24; See Borden, Inc., 3Trade Reg. Rep. (CCH) P 21,490, at 21,502-03 (FTC 1978). But high prices, far from damaging competition, invite new competitors into the monopolized market. See Part IV Infra. Excessive prices may, however, create an illegal "price squeeze" in another market. See *Alcoa, supra, 148 F.2d at 438*.

[13.] The jury rejected this contention, which was submitted to them Dubitante.

that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct.

The Griffith case confirms this view. There, a **[**31]** chain of motion picture exhibitors operated the only theaters in a number of towns, and used its concomitant buying power to extract from distributors certain exclusive rights in other localities where it faced challengers. The Court held that monopoly power had been illegally used "to beget monopoly," *334 U.S. at 108, 68 S. Ct. 941*. Its rationale swept more broadly, however, for it admonished that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *Id. at 107, 68 S. Ct. at 945*.

This rule is linked to the prohibition against tying arrangements in the sale of goods and services. See 3 P. Areeda & D. Turner, Supra, at 223-24. *Indeed, in Northern Pacific Railway v. United States, 356 U.S. 1, 11, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958),* **[*276]** the Supreme Court described the "vice" of ties in language evocative of Griffith: "the use of economic power in one market to restrict competition on the merits in another." And to condemn a tie, the market for the tied product need not be monopolized. It suffices that a "substantial" amount of competition is foreclosed. *Times-Picayune Publishing **[**32]** Co. v. United States, 345 U.S. 594, 608-09, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *International Salt Co. v. United States, 332 U.S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*.

We need not rely solely on policy considerations or an analysis of the Griffith dictum to support the view asserted here. Indeed, whatever problems of murkiness may plague the Alcoa opinion, on this point it is pellucid. The defendant had employed its monopoly power in the ingot market to impose a price squeeze on the manufacturers of aluminum sheet. [14.] Although this court expressly noted that there was no attempt to monopolize the sheet market, it held the challenged practice to be "an unlawful exercise of "Alcoa's' power." *148 F.2d at 438*. A more recent case arriving at the same conclusion is *Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 711-13 (7th Cir.)*, Cert. denied, *439 U.S. 822, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978)*. There a manufacturer of precision scientific instruments with a monopoly in the market for electromagnetic microbalances allegedly threatened to refuse to sell these devices to retailers who did not stock its millibalances as well. The court ruled that this practice would **[**33]** violate *§ 2*, even though Ventron did not seek or gain a monopoly in the market for millibalances. [15.]

HN6[] Accordingly, the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2*, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability. But, as we have indicated, a large firm does not violate *§ 2* simply **[**34]** by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

We shall now apply to the case at bar the principles we have set forth above.

III. THE 110 SYSTEM

[14.] That is, Alcoa sold ingot to rival sheetmakers at such a high price that it gained a distinct competitive advantage for its own sales of sheet.

[15.] We cannot accept Kodak's argument that, read literally, *§ 2* prevents a plaintiff from recovering unless there was at least an attempt to monopolize the market in which it claims to have been injured. Since monopoly power itself is the target of *§ 2*, it is unreasonable to suggest that a firm that possesses such power in one market and uses it to damage competition in another does not "monopolize" within the meaning of the statute.

We turn now to the events surrounding Kodak's introduction of the 110 photographic system in 1972. In many respects, the factors present here are representative of the case as a whole. They involve four of the five principal markets and provide the basis for several of the damages verdicts upheld by the district court, including the largest, an award of $ 15,250,000, before trebling, for lost camera sales.

We commented earlier on the camera revolution **[**35]** sparked by Kodak's introduction of the 126 Instamatic in 1963. Ben Berkey, chairman of Berkey Photo, described the camera's cartridge-loading feature as "foolproof" and remarked that the new simple system gave the industry "a great boost." Even before the 126 was introduced, however, Kodak had set its sights on a new, smaller line of Instamatic cameras. The **[*277]** aim of Kodak's Project 30, or P-30, as it was often called, was a camera barely one inch thick but capable of producing photographs as clear and large as its bulkier cousins.

Kodak's desire to produce large, high-quality snapshots from a small camera created successive ripples in a number of ponds. As camera size decreases, so does the area of film exposed when the shutter is opened. Thus the negative must be substantially enlarged to produce a print, and the P-30 group was concerned that the Kodak color print film then in use, Kodacolor X, might not be equal to the task. There was fear that it was too "grainy" that full-size photographs printed from tiny Kodacolor X negatives would have an unacceptably speckled, pebbly appearance, reflecting the extreme magnification of the small light-sensitive grains constituting **[**36]** the film.

The early view at P-30 had been that despite this problem Kodacolor X would prove "quite adequate" for the new format. By 1966, however, the Kodacolor Future System Committee, considering Kodak's film sales in the 126 size as well as in the format being created by Project 30, began actively to consider the possibility of developing a new type of Kodacolor film. This engendered the second set of ripples, for the committee realized that basic changes in the film would require a new photofinishing process, conducted at temperatures higher than those used in the so-called C-22 method by which prints were made from Kodacolor X. Some committee members, therefore, expressed concern about the effect that a new process might have on independent photofinishers, who developed Kodak film and were purchasers of Kodak equipment and supplies. These concerns were shared by a number of Kodak scientists, such as D. M. Zwick, who feared an "unethical" attempt to create a "deliberate . . . incompatibility with systems other than Kodacolor." [16.]

[37]** Nevertheless, on May 10, 1967, the committee recommended that Kodak proceed with the development of the new film and finishing process, tentatively labeled P-118. This recommendation was adopted at a meeting of the Kodak management on September 20. Although management believed that many of the film improvements were desirable "without regard to the P-30 program," it decided that Kodak should consider marketing the new film in the P-30 size for approximately one year before introducing it in the 126 format. A firm date was not set at that time for introduction of P-118, but by 1969 Kodak decided that P-118 should be used to help launch the P-30 camera system in March 1972. This decision appears to have been influenced by the views of those Kodak officers who believed that

> (without) a new film, the (camera) program is not a new advertisable system. Without the film, our splicer and processors (for the new high-temperature photofinishing process) are not required.

To meet this self-imposed deadline for P-118, Kodak was required to act in great haste. Indeed, the minutes of a Film Process Subcommittee meeting of August 29, 1969, noted that the decision for a 1972 release date **[**38]** required a "crash program" by all participating divisions. Development schedules were altered and some tests

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16. Writing on March 9, 1967, Zwick saw "no need" for a new film, which would require a higher-temperature process: "We can make Small improvements in Kodacolor X grain and sharpness, in a film which could go through the C-22 process." On the same day, another Kodak scientist, N. H. Groet of the Color Photography Division, wrote that he was "convinced that Project 30 could go with the presently available Kodacolor X film." Like Zwick, Groet conceded that a finer-grained film "would be most welcome for P-30," but he did not believe that major changes in Kodacolor X would be necessary. Indeed, he believed that the new finishing process being considered by the Kodacolor Future System Committee

would raise hell in the photofinishing business, would do little to decrease the cost of the operation, and that the ultimate customer would not benefit.

eliminated altogether. Not surprisingly, then, as the target date approached, Kodak realized that its new film was plagued by a number of difficulties.

[*278] Shortly after initial production runs began in October 1971, Kodak recognized that "several product deficiencies" would exist in the film, now called Kodacolor II, at the time of introduction. Indeed, just eight days before the joint announcement of the new camera, film, and photofinishing process, a technical committee listed eleven "presently identified" problems that could affect "the customer's ultimate quality." Not only did Kodacolor II have a significantly shorter shelf life than had been anticipated, but it also proved grainier than Kodak had originally hoped. This problem was highly significant, of course, because low graininess was supposedly the quality that made Kodacolor II especially suitable for the Pocket Instamatic cameras. [17.]

[39]** Despite these deficiencies, Kodak proceeded with its plans for introduction of the 110 system, of which Kodacolor II had become an integral part. On March 16, 1972, amid great fanfare, the system was announced. Finally, said Kodak, there was a "little camera that takes big pictures." Kodacolor II was "a remarkable new film" indeed, the best color negative film Kodak had ever manufactured. There had long been other small cameras, Kodak explained:

> But they weren't like these. Now there are films fine enough, and sharp enough, to give you big, sharp pictures from a very small negative.

In accord with Kodak's 1967 plan, Kodacolor II was sold only in the 110 format for eighteen months after introduction. It remains the only 110-size color print film Kodak has ever sold. [18.]

As Kodak had hoped, the 110 system proved to be a dramatic success. **[**40]** In 1972 the system's first year the company sold 2,984,000 Pocket Instamatics, more than 50% Of its sales in the amateur conventional still camera market. The new camera thus accounted in large part for a sharp increase in total market sales, from 6.2 million units in 1971 to 8.2 million in 1972. Rival manufacturers hastened to market their own 110 cameras, but Kodak stood alone until Argus made its first shipment of the "Carefree 110" around Christmas 1972. The next year, although Kodak's competitors sold over 800,000 110 cameras, Kodak retained a firm lead with 5.1 million. Its share of 110 sales did not fall below 50% Until 1976. Meanwhile, by 1973 the 110 had taken over most of the amateur market from the 126, and three years later it accounted for nearly four-fifths of all sales.

Berkey's Keystone division was a late entrant in the 110 sweepstakes, joining the competition only in late 1973. Moreover, because of hasty design, the original models suffered from latent defects, and sales that year were a paltry 42,000. With interest in the 126 dwindling, Keystone thus suffered a net decline of 118,000 unit sales in 1973. The following year, however, it recovered strongly, in large **[**41]** part because improvements in its pocket cameras helped it sell 406,000 units, 7% Of all 110s sold that year.

Berkey contends that the introduction of the 110 system was both an attempt to monopolize and actual monopolization of the camera market. It also alleges that the marketing of the new camera constituted an impermissible leveraging of Kodak's film monopoly into the two photofinishing markets, services and equipment. [19.]

HN7[] Because the jury returned what amounted to general verdicts for the plaintiff on each of these charges, we are bound in the following discussion to construe the **[*279]** evidence and the possible inferences in the light most favorable to Berkey. See, e. g., *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696* & n.6, *82 S. **[**42]** Ct. 1404, 8 L. Ed. 2d 777 (1962)*. We note En passant, however, that in large and complex cases such as

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17. Kodacolor II's grain, though disappointing, was clearly superior to that of Kodacolor X. Berkey does not appear to dispute the point. Shortly after introduction of the 110 system, a confidential memorandum prepared by a competitor in the film market compared Kodacolor II with Kodacolor X and found that the new film "yields a less granular image structure and, therefore, better detail rendition in an enlarged color print."

18. Three pre-existing Kodak films were, however, sold for other uses: Verichrome Pan for black-and-white snapshots, and Kodachrome X and Ektachrome X for color slides.

19. The jury found Kodak guilty of leveraging its monopoly power into the market for photofinishing chemicals, See note 1, Supra. Berkey withdrew this claim during the damages trial, citing its inability to obtain statistical proof of its own harm.

this, involving many novel legal issues, the better practice would have been to require special verdicts or the submission of interrogatories to the jury pursuant to *Fed.R.Civ.P. 49*. In that way the right to a jury trial of all factual issues is preserved [20.] while the probability of a laborious and expensive retrial is reduced. See *SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 988-90* & nn.13, 15 (D.Conn.1978), Remanded on other grounds, *599 F.2d 32 (2d Cir.1979)*. Certainly the already difficult task of reviewing a case of this magnitude would have been eased somewhat for this court if we knew precisely what the jury's findings were on several specific factual issues.

[43]** A. Attempt to Monopolize and Monopolization of the Camera Market

There is little doubt that the evidence supports the jury's implicit finding that Kodak had monopoly power in cameras. [21.] The principal issues presented to us regarding the effect of the 110 introduction in the camera market are whether Kodak engaged in anticompetitive conduct and, if so, whether that conduct caused injury to Berkey.

It will be useful at the outset to present the arguments on which Berkey asks us to uphold its verdict:

(1) Kodak, a film and camera monopolist, was in a position to set industry standards. Rivals could not compete effectively without offering products similar to Kodak's. Moreover, Kodak persistently refused to make film available for most formats other than those in which it made cameras. Since cameras are worthless without film, this policy effectively prevented other manufacturers from introducing cameras in new formats. Because of its dominant position astride two markets, and by use **[**44]** of its film monopoly to distort the camera market, Kodak forfeited its own right to reap profits from such innovations without providing its rivals with sufficient advance information to enable them to enter the market with copies of the new product on the day of Kodak's introduction. This is one of several "predisclosure" arguments Berkey has advanced in the course of this litigation.

(2) The simultaneous introduction of the 110 camera and Kodacolor II film, together with a campaign advertising the two jointly, enabled Kodak to garner more camera sales than if it had merely scaled down Kodacolor X to fit the new camera. The jury could conclude that Kodacolor II was an inferior product and not technologically necessary for the success of the 110. In any event, Kodak's film monopoly prevented any other camera manufacturer from marketing such a film-camera "system" and the joint introduction was therefore anticompetitive.

(3) For eighteen months after its introduction, Kodacolor II was available only in the 110 format. Thus it followed that any consumer wishing to use Kodak's "remarkable new film" had to buy a 110 camera. Since Kodak was the leading and at first the only manufacturer **[**45]** of such devices, its camera sales were boosted at the expense of its competitors.

For the reasons explained below, we do not believe any of these contentions is sufficient on the facts of this case to justify an award of damages to Berkey. We therefore reverse this portion of the judgment.

1. Predisclosure

Through the 1960s, Kodak followed a checkered pattern of predisclosing innovations to various segments of the industry. Its purpose on these occasions evidently was to ensure that the industry would be able to **[*280]** meet consumers' demand for the complementary goods and services they would need to enjoy the new Kodak products. But predisclosure would quite obviously also diminish Kodak's share of the auxiliary markets. It was therefore, in the words of Walter Fallon, Kodak's chief executive officer, "a matter of judgment on each and every occasion" whether predisclosure would be for or against Kodak's self-interest. Thus, well before the 1965 introduction of Super-8 movie films, Kodak, which had a relatively small share of the movie camera market, provided sufficient information to companies such as Keystone and Bell & Howell to enable them to make cameras to use the new **[**46]** film. It

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[20.] Since the issue is not presented on this appeal, we need not express our view on whether some actions may be too complex to be tried to a jury. The relevant cases are canvassed in Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv.L.Rev. 898 (1979).

[21.] See note 11 Supra.

also released processing information so that photofinishers could develop the film. But in 1963, when Kodak came out with Kodacolor X and the 126 Instamatic, it kept its own counsel until the date of introduction.

As early as 1968, some Kodak employees urged that advance warning of the P-30 system would be needed, at least to film processors and manufacturers of photofinishing equipment, to give them time to prepare for Kodacolor II and the new high-temperature finishing process, which was eventually labeled C-41. One memorandum noted that "P-30 will require more changes in photofinishing techniques than were required for P-13 (the 126 system). These differences . . . seem to indicate a minimum 6 month advance disclosure to other firms." [22.] Nevertheless, Kodak decided not to release advance information about the new film and format. The decision was evidently based on the perception of Dr. Louis K. Eilers, Kodak's chief executive officer at that time, that Kodak would gain more from being first on the market for the sale of all goods and services related to the 110 system than it would lose from the inability of other photofinishers to process Kodacolor II. An important **[**47]** factor in Eilers's thinking may have been that Kodak had already decided to manufacture the new film initially in the 110 format only. Since Kodacolor II could not be used in any pre-existing cameras, the demand for photofinishing services and equipment in the first several months would be within the capacities of CP&P and KAD.

Although Kodak had most seriously considered divulging advance information of the 110 system to processors and equipment manufacturers, it was a rival camera maker that forced a small breach in its wall of secrecy. In the summer of 1971, Bell & Howell, implicitly threatening legal action, began to pressure Kodak "to notify photographic equipment manufacturers in advance of its introduction of new films or film formats which require changes in equipment design." Harmer Brereton, Kodak's general counsel, insisted in letters to Bell & Howell that such predisclosure was not necessary and would **[**48]** raise legal problems of its own. Nevertheless, afraid that the two companies "were getting ready to get into the ring," Kodak determined to avoid litigation if it could, and it proposed an experimental predisclosure arrangement with the 110 system. On January 3, 1972, Brereton informed Bell & Howell that Kodak would soon introduce "a new cartridge-loading still camera and (slide) projector to accommodate a new film format." More information, Brereton explained, would be forthcoming only for a fee, necessary to compensate Kodak for its "very considerable research and development expenses" and to represent the value of such knowledge to the recipient.

Brereton's letter made clear that the information would be available to other camera makers "on a nondiscriminatory basis," and within the next two weeks Kodak explained the offer to Berkey. For a fee of $ 10,000 Kodak would provide a general description of the new film format and cartridge, a view of the cartridge and sample prints and slides, the anticipated dates of announcement and commercial introduction, and an outline of the terms on which Kodak would further disclose "such information **[*281]** as we believe will enable you to **[**49]** design and manufacture cameras to accept our new cartridge and film format." Berkey paid the $ 10,000 fee and also the supplemental fees, totalling $ 50,000 for eleven sheets of specifications and notes. For the $ 60,000 Berkey gained somewhat less than two months advance knowledge of information it needed to compete with Kodak in the sale of 110 cameras. The jury could unquestionably conclude that this was far from adequate to permit Berkey to be "at the starting line" when the 110 was introduced.

Judge Frankel did not decide that Kodak should have disclosed the details of the 110 to other camera manufacturers prior to introduction. Instead, he left the matter to the jury, instructing them as follows:

> Standing alone, the fact that Kodak did not give advance warning of its new products to competitors would not entitle you to find that this conduct was exclusionary. Ordinarily a manufacturer has no duty to predispose its new products in this fashion. It is an ordinary and acceptable business practice to keep one's new developments a secret. However, if you find that Kodak had monopoly power in cameras or in film, and if you find that this power was so great as to make it impossible **[**50]** for a competitor to compete with Kodak in the camera market unless it could offer products similar to Kodak's, you may decide whether in the light of other conduct you determine to be anticompetitive, Kodak's failure to predisclose was on balance an exclusionary course of conduct.

[22.] The same memorandum also recommended six-month predisclosure to competing film manufacturers.

We hold that this instruction was error and that, as a matter of law, Kodak did not have a duty to predisclose information about the 110 system to competing camera manufacturers.

As Judge Frankel indicated, and as Berkey concedes, a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced. See, e. g., *Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974)*. It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely **[**51]** be vitiated.

Withholding from others advance knowledge of one's new products, therefore, ordinarily constitutes valid competitive conduct. Because, as we have already indicated, a monopolist is permitted, and indeed encouraged, by *§ 2* to compete aggressively on the merits, any success that it may achieve through "the process of invention and innovation" is clearly tolerated by the antitrust laws. *United Shoe Machinery Corp., supra, 110 F. Supp. at 344*.

The Supreme Court's language in *United States v. National Lead Co., 332 U.S. 319, 67 S. Ct. 1634, 91 L. Ed. 2077 (1947)*, is instructive on this score. There, National Lead and du Pont were found to have engaged in an illegal patent pool that restrained commerce in titanium products. As part of its decree, the district court ordered the firms to make licenses available at reasonable fees and also to make available for a period of three years and at a reasonable fee certain information on processes exploiting these patents. The Supreme Court upheld these requirements as a reasonable remedy for the antitrust violations. *Id. at 334-35, 67 S. Ct. 1634*. It squarely rejected, however, the Government's attempt to extend the decree by requiring **[**52]** the defendants to furnish again for only three years and at a reasonable fee all information desired by any applicant relating to the methods and processes for manufacturing titanium pigments:

> The attempt of the Government to throw the field of technical knowledge in the titanium pigment industry wide-open would reduce the competitive value of the independent research of the parties. It **[*282]** would discourage rather than encourage competitive research. *Id. at 359, 67 S. Ct. at 1653*.

Moreover, enforced predisclosure would cause undesirable consequences beyond merely encouraging the sluggishness the Sherman Act was designed to prevent. A significant vice of the theory propounded by Berkey lies in the uncertainty of its application. Berkey does not contend, in the colorful phrase of Judge Frankel, that "Kodak has to live in a goldfish bowl," disclosing every innovation to the world at large. [23.] However predictable in its application, such an extreme rule would be insupportable. Rather, Berkey postulates that Kodak had a duty to disclose limited types of information to certain competitors under specific circumstances. But it is difficult to comprehend how a major corporation, **[**53]** accustomed though it is to making business decisions with antitrust considerations in mind, could possess the omniscience to anticipate all the instances in which a jury might one day in the future retrospectively conclude that predisclosure was warranted. [24.] And it is equally difficult to discern workable guidelines that a court might set forth to aid the firm's decision. For example, how detailed must the information conveyed be? And how far must research have progressed before it is "ripe" for disclosure? These inherent uncertainties would have an inevitable chilling effect on innovation. They go far, we believe, towards explaining why no court has ever imposed the duty Berkey seeks to create here.

[54]** An antitrust plaintiff urging a predisclosure rule, therefore, bears a heavy burden in justifying his request. Berkey recognizes the weight of this burden. It contends that it has been met. Kodak is not a monolithic monopolist, acting in a single market. Rather, its camera monopoly was supported by its activity as a film manufacturer. Berkey therefore argues that by not disclosing the new format in which it was manufacturing film, Kodak unlawfully

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[23.] This is apparent from the transcript of the conference to settle the language of the charge to the jury.

[24.] Berkey's argument that Kodak considered predisclosing the 110 system, and so could not be surprised when found liable for failing to do so, is thus a two-edged sword. It illustrates the difficulties in prediction even when the problem has been squarely faced.

enhanced its power in the camera market. Indeed, Kodak not only participates in but monopolizes the film industry. The jury could easily have found that, when Kodak introduced a new film format, rival camera makers would be foreclosed from a substantial segment of the market until they were able to manufacture cameras in the new format. Accordingly, Berkey contended that Kodak illegitimately used its monopoly power in film to gain a competitive advantage in cameras. Thus Berkey insists that the jury was properly permitted to consider whether, on balance, the failure to predisclose the new format was exclusionary. We disagree.

We note that this aspect of Berkey's claim is in large measure independent of the fact that a new film, Kodacolor **[**55]** II, was introduced simultaneously with the new format. It is primarily introduction of the format itself the size of the film and the cartridge in which it is packaged of which Berkey complains. Indeed, at oral argument counsel for Berkey contended that predisclosure would have been required even had Kodak merely cut down Kodacolor X to fit the new 110 camera and cartridge.

We do not perceive, however, how Kodak's introduction of a new format was rendered an unlawful act of monopolization in the camera market because the firm also manufactured film to fit the cameras. The 110 system was in substantial part a camera development. After all, P-30 existed long before the P-118 film project began, and much of the creative energy behind it was consumed by efforts to produce the camera itself. [25.] Indeed, Berkey not only argues **[*283]** that a new film was not necessary to introduce the new pocket cameras; it also concedes that the early models of its own 110 cameras, brought to market some eighteen months after it first learned of the new format, suffered because of the haste with which they were designed.

[56]** Clearly, then, the policy considerations militating against predisclosure requirements for monolithic monopolists are equally applicable here. The first firm, even a monopolist, to design a new camera format has a right to the lead time that follows from its success. The mere fact that Kodak manufactured film in the new format as well, so that its customers would not be offered worthless cameras, could not deprive it of that reward. Nor is this conclusion altered because Kodak not only participated in but dominated the film market. Kodak's ability to pioneer formats does not depend on it possessing a film monopoly. Had the firm possessed a much smaller share of the film market, it would nevertheless have been able to manufacture sufficient quantities of 110-size film either Kodacolor X or Kodacolor II to bring the new camera to market. It is apparent, therefore, that the ability to introduce the new format without predisclosure was solely a benefit of integration and not, without more, a use of Kodak's power in the film market to gain a competitive advantage in cameras.

Indeed, such authority as exists supports this conclusion. *ILC Peripherals Leasing Corp. v. International Business* ***[**57]*** *Machines Corp., 458 F. Supp. 423 (N.D.Cal.1978)* (Memorex), was a case similar in some respects to this one. IBM was the leading manufacturer of central data processing units (CPUs) and competed with Memorex and others to supply peripheral equipment for use in conjunction with IBM CPUs. When IBM made changes in the intricate interface the "computer "plug' " by which peripherals are attached to the central system, it did not provide advance information to Memorex, thereby forcing its rival to learn what it could after the new CPUs were shipped to customers. Memorex contended that to compete effectively in the peripherals market it needed to know, under some form of licensing arrangement, about interface changes as soon as IBM announced its products. *Id. at 436-37*. Noting the total absence of authority in support of this position, the district court indicated that plaintiff could properly be left to rely on "reverse engineering" to develop IBM-compatible equipment. IBM would thus be unchallenged for a time in the market for certain peripherals, but "(depriving) IBM of its lead time would remove its incentive to invent." *Id. at 437*.

The predisclosure demanded here is much more radical **[**58]** than that sought and rejected in Memorex. Berkey claims that it should have been given the information about Kodak's new film format long before product announcement and without any licensing fee. Moreover, the possibility lurking in Memorex that IBM, by creating technological incompatibilities, was tying peripherals sales to its CPUs is not present here. Cf. *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976)*. Kodak's new format was primarily a

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[25.] The "red-eye" problem experienced by the early 110 models, See note 35 Infra, does not detract from the fact that the new camera was indeed smaller and more convenient than its predecessors.

camera development, and the use of Kodacolor II did not in itself create any incompatibilities with an existing camera. Regardless of whether the district court decided Memorex correctly a question we are pleased to leave to our colleagues in the Ninth Circuit the case makes it manifest that there is no authority for the extreme position asserted by Berkey.

Our analysis, however, must proceed beyond the conclusion that introduction of film to meet Kodak's new camera format was not in itself an exercise of the company's monopoly power in film. Berkey contends that Kodak in the past used its film monopoly to stifle format innovations by any other camera manufacturer. Accordingly, it argues that Kodak was **[**59]** barred from reaping the benefits of such developments without making predisclosure to allow its rivals to share from the beginning in the rewards.

There is, indeed, little doubt that the jury could have found that Kodak, by refusing **[*284]** to make film available on economical terms, obstructed sales of cameras in competing formats. Thus, Kodak has never supplied film to fit the Minox, a small camera [26.] **[**60]** that uses a cartridge similar to that of the Instamatics and that has been on the market since the 1930s, or similar cameras by Minolta and Mamiya that were also introduced before the Kodak 126. Merchants of these cameras, including Berkey, made numerous requests that Kodak sell film packaged in their formats, with or without the Kodak name. As an alternative, they asked Kodak to sell bulk film rolls large enough to permit the camera manufacturers economically to cut the film down to the appropriate size and spool it. Kodak denied all such appeals. Some of the miniature cameras did survive but, as even Kodak's own economic expert testified, its policy drastically reduced the ability of rival manufacturers to compete by introducing new camera formats. [27.]

We accept the proposition that it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market. Indeed, Kodak itself was the defendant in the leading case establishing this point. *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*; Accord, *Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334, 339-40 (5th Cir. 1970)*, Cert. denied, *401 U.S. 912, 91 S. Ct. 880, 27 L. Ed. 2d 811 (1971)*. Moreover, as indicated by our discussion of *§ 2* principles, such a use of power would be illegal regardless of whether the film monopoly were legally or illegally acquired. It may be that Kodak violated **[**61]** the Sherman Act when it refused to sell Berkey bulk film for use in the Minolta camera, and Berkey might well have recovered for its loss of Minolta sales and for any additional expenses incurred because of Kodak's conduct.

But Berkey did not sue Kodak then for its refusal to sell film, and it concedes that it is not now claiming a right to damages on this basis. Rather, it contends that Kodak's past offenses created a continuing duty to disclose its new formats to competing camera manufacturers, and that its violation of that obligation supports the jury's verdict. For two reasons, however, we decline to recognize such a duty.

First, the benefits that would flow to Kodak's rivals in the camera market from such a rule bear no relationship to the injury caused them by the monopolist's refusal to sell films for their competing camera formats. There is no reason to suppose, for example, that the loss suffered by Berkey because Kodak undercut Minolta sales was at all comparable to the boon Berkey would have received had Kodak given it the opportunity to participate from the beginning in the 110 revolution. [28.] Indeed, some of the **[*285]** camera manufacturers who would be

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[26.] The Minox "spy camera" was even smaller, but substantially more expensive, than the 110.

[27.] Although Kodak does not manufacture cameras in the 135 format, it does sell film for them. This policy may represent a perception that the 135 format competes less directly with Kodak's popular cameras than do the Minolta and other miniature models.

[28.] Even if the format obstructed by Kodak were comparable to the 110, predisclosure would not be a necessary remedy, as the following example demonstrates. Suppose that Berkey, unaware that Kodak is planning to bring forth the 110 camera, asks Kodak to make film available for a new camera it has designed that happens to be identical in all respects to the 110 except that it requires a slightly different film format. Kodak, without a legitimate competitive reason and solely to prevent Berkey's camera benefited **[**62]** by predisclosure might not have participated in or even contemplated entering the market at the time Kodak committed its alleged violations. For them, predisclosure would be pure windfall.

[63]** Second, it would be inappropriate to hold that Kodak should spontaneously have recognized a duty to release advance information of its new products to its competitors. It is important to note that Berkey, which no longer sells cameras, does not advance its predisclosure argument as part of a demand for equitable relief. Where a firm has engaged in monopolistic practices, a court is not limited, in fashioning prospective remedies, to an injunction against future violations of law. See, e. g., *Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128, 68 S. Ct. 947, 92 L. Ed. 1245 (1948)*. Hence the function of the court includes "undoing" what the monopoly achieved by its illegal acts. *United States v. Paramount Pictures, Inc., 334 U.S. 131, 171, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*.

Accordingly, if Berkey were still a camera maker, it might be able to demand that Kodak, to nullify the effect of its monopolistic obstruction of new formats for competing cameras, be required to allow its rivals to share from the start in the business created by its own changes in format. Even in the equitable context, National Lead Would caution against a decree that might stifle future innovations. **[**64]** But Berkey, in any event, does not demand prospective relief. Instead it asks us to condemn Kodak retrospectively, holding that it violated *§ 2* and so is liable for damages, because it did not decide on its own initiative to take unusual, self-abnegatory actions as a corrective for unadjudicated prior offenses. This is without justification.

Conclusion. We have held that Kodak did not have an obligation, merely because it introduced film and camera in a new format, to make any predisclosure to its camera-making competitors. Nor did the earlier use of its film monopoly to foreclose format innovation by those competitors create of its own force such a duty where none had existed before. In awarding Berkey $ 15,250,000, just $ 828,000 short of the maximum amount demanded, the jury clearly based its calculation of lost camera profits on Berkey's central argument that it had a right to be "at the starting line when the whistle blew" for the new system. [29.] The verdict, therefore, cannot stand.

[65]** 2. Systems Selling

Berkey's claims regarding the introduction of the 110 camera are not limited to its asserted right to predisclosure. The Pocket Instamatic not only initiated a new camera format, it was also promoted together with a new film. As we noted earlier, the view was expressed at Kodak that "(without) a new film, the (camera) program is not a new advertisable system." Responding in large measure to this perception, Kodak hastened research and development of Kodacolor II so that it could be brought to market at the same time as the 110 system. Based on such evidence, and the earlier joint introduction of Kodacolor X and the 126 camera, the jury could readily have found that the simultaneous release of Kodacolor II and the Pocket Instamatic was part of a plan by which Kodak sought to use its

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sales, declines to supply the film. Berkey then concludes that marketing of its new camera would be economically unfeasible. Just three months later, without predisclosure to Berkey, Kodak introduces the 110, which is a great commercial success.

At first it might appear that in this extreme hypothetical case Berkey has a right to share the initial profits of the 110 camera through predisclosure. On closer examination, it becomes clear that the wrong to Berkey is not the absence of knowledge of the 110 but exclusion from the market of its own essentially identical camera. To be sure, most of Kodak's 110 sales would have been captured earlier by Berkey had it not been prevented from introducing its camera, so the volume of Kodak's 110 sales may assist in computation of Berkey's damages. That, however, is the only relevance of the 110 system to this hypothetical case. As the premise is varied to bring the hypothetical closer to the actual case at bar for example, by attenuating the physical similarity between the two cameras or the proximity of their arrival in the market even this relevance disappears. Kodak's violation is completed when it blocks Berkey's new camera format; nothing is added to the offense by its decision to introduce its own new format without predisclosure.

[29.] The three 110 damages theories, submitted to the jury in the alternative, attempted to measure the displacement of Berkey camera sales from the moment the 110 system was introduced. One theory, allocating to Berkey its "fair share" of all Kodak post-introduction camera sales, indicated untrebled damages of $ 16,073,000. The other two theories, addressing 110 sales only, suggested $ 13,668,000 and $ 15,835,000 respectively.

combined film and camera capabilities to bolster faltering camera sales. Berkey contends that this program of selling was anticompetitive and therefore violated *§ 2*. We disagree.

[*286] It is important to identify the precise harm Berkey claims to have suffered from this conduct. It cannot complain of a product introduction Simpliciter for the same reason it could not demand **[**66]** predisclosure of the new format: any firm, even a monopolist, may generally bring its products to market whenever and however it chooses. [30.] Rather, Berkey's argument is more subtle. It claims that by marketing the Pocket Instamatics in a system with a widely advertised new film, Kodak gained camera sales at Berkey's expense. And, because Kodacolor II was not necessary to produce satisfactory 110 photographs and in fact suffered from several deficiencies, these gains were unlawful. [31.]

[67]** It may be conceded that, by advertising Kodacolor II as a "remarkable new film" capable of yielding "big, sharp pictures from a very small negative," Kodak sold more 110 cameras than it would have done had it merely marketed Kodacolor X in 110-size cartridges. The quality of the end product a developed snapshot is at least as dependent upon the characteristics of the film as upon those of the camera. It is perfectly plausible that some customers bought the Kodak 110 camera who would have purchased a competitor's camera in another format had Kodacolor II not been available and widely advertised as capable of producing "big, sharp pictures" from the tiny Pocket Instamatic. Moreover, there was also sufficient evidence for the jury to conclude that a new film was not necessary to bring the new cameras to market. Walter Fallon testified that in 1967, as manager of Kodak's Film Emulsion and Plate Organization, he expressed the view that Kodacolor X "would give satisfactory pictures, satisfactory customer results" in the P-30 format. Documents introduced at trial indicated that this opinion was shared by at least two Kodak research scientists. [32.]

[68]** But necessity is a slippery concept. Indeed, the two scientists, Zwick and Groet, conceded that improvements in the quality of Kodacolor X would be "most welcome." Even if the 110 camera would produce adequate snapshots with Kodacolor X, it would be difficult to fault Kodak for attempting to design a film that could provide better results. The attempt to develop superior products is, as we have explained, an essential element of lawful competition. Kodak could not have violated *§ 2* merely by introducing the 110 camera with an improved film.

Accordingly, much of the evidence at trial concerned the dispute over the relative merits of Kodacolor II and Kodacolor X. There was ample evidence that for some months following the 110 introduction, Kodacolor II was inferior to its predecessor in several respects. Most notably, it degenerated more quickly than Kodacolor X, so that its shelf life was shorter. [33.] **[**69]** It is undisputed, however, that the grain of Kodacolor II, though not as fine as Kodak had hoped, was better than that of the older film. [34.]

In this context, therefore, the question of product quality has little meaning. A product that commends itself to many users because superior in certain respects may be rendered unsatisfactory to others by flaws they considered fatal. Millions of consumers, for example, evidently found the 110 **[*287]** camera highly attractive because of its "pocketability." Others, perhaps more concerned over the quality of their flash pictures, found the original models

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30. This is not to say, of course, that new product introductions are Ipso facto immune from antitrust scrutiny, and we do not agree with Kodak's argument that they are, See, e. g., *Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir. 1977)*, Cert. denied, ***439 U.S. 822, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978)*** (use of power over old product to promote sale of new); in all such cases, however, it is not the product introduction itself, but some associated conduct, that supplies the violation.

31. To the extent that Berkey argues that Kodak's past monopolization of film hindered any other firm from introducing a new photographic system, the contention is merely a repetition of that rejected in Part III.A.1 Supra.

32. See note 16 Supra.

33. Testimony and documents introduced at trial indicated that Kodacolor II lost much of its "speed", See note 8, Supra, within three to six months of manufacture. In addition, there were problems with "latent image keeping" the ability of the film to retain a scene until the film was developed.

34. See note 17 Supra.

unsatisfactory because of the high incidence of "red-eye." [35.] **[**70]** Similarly, some individuals would, if given the option and aware of the relevant factors, [36.] select Kodacolor II over Kodacolor X because of its superior grain, which was especially useful for a small camera; others might choose Kodacolor X because the original variety of Kodacolor II had to be used more quickly to produce attractive pictures.

It is evident, then, that in such circumstances no one can determine with any reasonable assurance whether one product is "superior" to another. Preference is a matter of individual taste. The only question that can be answered is whether there is sufficient demand for a particular product to make its production worthwhile, and the response, so long as the free choice of consumers is preserved, can only be inferred from the reaction of the market.

When a market is dominated by a monopolist, of course, the ordinary competitive forces of supply may not be fully effective. Even a monopolist, however, must generally be responsive to the demands of customers, for if it persistently markets unappealing goods it will invite a loss of sales and an increase of competition. [37.] If a monopolist's products gain acceptance in the market, therefore, it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion. Certainly the mere introduction of Kodacolor II along with the Pocket Instamatics did not coerce **[**71]** camera purchasers. [38.] Unless consumers desired to use the 110 camera for its own attractive qualities, they were not compelled to purchase Kodacolor II especially since Kodak did not remove any other films from the market when it introduced the new one. If the availability of Kodacolor II spurred sales of the 110 camera, it did so because some consumers regarded it as superior, at least for the smaller format. [39.]

[72]** Of course, Kodak's advertising encouraged the public to take a favorable view of both Kodacolor II and the 110 camera, but that was not improper. ***HN8***[] A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier. See *American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*; Borden, Inc., 3Trade Reg. Rep. (CCH) P 21,490 (FTC 1978). And in its advertising, a producer is ordinarily permitted, much like an advocate at law, to bathe his cause in the best light possible. [40.] **[**73]** Advertising that emphasizes **[*288]** a product's

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35. "Red-eye" is the appearance of a red glint in the eye of the snapshot's subject on a picture taken with a flashlamp. It is a result in large part of the small distance between the flash device and the camera lens. Hence, it was a greater problem for the original 110 cameras than for their larger predecessors in the 126 format.

36. See note 42 Infra.

37. See 3 P. Areeda & D. Turner, Supra, at 41-42.

38. Similarly, it appears that the Pocket Instamatic spurred sales of Kodak's film at the expense of its competitors, despite a red-eye problem that made the camera unacceptable to many consumers. But it would appear unreasonable on its face to allow a jury to conclude from this that the introduction of the 110 camera, which millions of other customers welcomed eagerly, was improper conduct.

39. Thus, the situation might be completely different if, upon the introduction of the 110 system, Kodak had ceased producing film in the 126 size, thereby compelling camera purchasers to buy a Kodak 110 camera. Or had Kodak shifted production in all formats from Kodacolor X to Kodacolor II before other photofinishers could process the new film, it would force photographers to procure their photofinishing services from CP&P. In such a case the technological desirability of the product change might bear on the question of monopolistic intent. See *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976)*.

40. Indeed, Kodak apparently did precisely that in introducing the 110 camera. Aware of the camera's substantial red-eye problem, the firm evidently decided "to provide enough ambient light for exposure without flash" at the press conference announcing the new system. This rather obvious ploy certainly did not amount to the type of deception that might, as we indicate in the following footnote, support an action under *§ 2*.

strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of *§ 2*. [41]

We conclude, therefore, that Kodak did not contravene the Sherman Act merely by introducing **[**74]** Kodacolor II simultaneously with the Pocket Instamatic and advertising the advantages of the new film for taking pictures with a small camera.

3. Restriction of Kodacolor II to the 110 Format

There is another aspect to Berkey's claim that introduction of Kodacolor II simultaneously with the Pocket Instamatic camera was anticompetitive. For eighteen months after the 110 system introduction, Kodacolor II was available only in the 110 format. Since Kodak was the first to have the 110s on the market, Berkey asserts it lost camera sales because consumers who wished to use the "remarkable new film" would be compelled to buy a Kodak camera. This facet of the claim, of course, is not dependent on a showing that Kodacolor II was inferior in any respect to Kodacolor X. Quite the opposite is true. The argument is that, since consumers were led to believe that Kodacolor II was superior to Kodacolor X, they were more likely to buy a Kodak 110, rather than a Berkey camera, so that the new film could be used.

HN9[] Where a course of action is ambiguous, "consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct," *United States **[**75]** v. United States Gypsum Co., 438 U.S. 422, 436 n.13, 98 S. Ct. 2864, 2873 n.13, 57 L. Ed. 2d 854 (1978)*; Accord, e. g., *Sargent-Welch Scientific Co., supra, 567 F.2d at 712*. We shall assume Arguendo that Kodak violated *§ 2* of the Sherman Act if its decision to restrict Kodacolor II to the 110 format was not justified by the nature of the film but was motivated by a desire to impede competition in the manufacture of cameras capable of using the new film. This might well supply the element of coercion we found lacking in the previous section. We shall assume also that there was sufficient evidence for the jury to conclude that the initial decision to market Kodacolor II exclusively in the 110 format during its introductory period was indeed taken for anticompetitive purposes. [42]

[76]** But to prevail, Berkey must prove more, for injury is an element of a private treble damages action. Berkey must, therefore, demonstrate that some consumers who would have bought a Berkey camera were dissuaded from doing so because Kodacolor II was available only in the 110 format. This it has failed to establish. The record is totally devoid of evidence that Kodak or its retailers actually attempted to persuade **[*289]** customers to purchase the Pocket Instamatic because it was the only camera that could use Kodacolor II, or that, in fact, any consumers did choose the 110 in order to utilize the finer-grained film.

To be sure, some of Kodak's advertisements emphasized the superior qualities of Kodacolor II, but the gist of these messages was merely that Kodacolor II, unlike previous films, would yield, "big, sharp pictures" from a small

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[41] There was evidence that Kodak indicated on the boxes in which Kodacolor II was sold that the film had a shelf life of 14 months, whereas in fact the film lost half its speed within three to six months. We need not decide whether this action amounted to deceptive advertising, or whether and under what circumstances such deception might amount to a violation of *§ 2*. See 3 P. Areeda & D. Turner, Supra, at 278-79. The Sherman Act is not a panacea for all evils that may infect business life. Before we would allow misrepresentation to buyers to be the basis of a competitor's treble damage action under *§ 2*, we would at least require the plaintiff to overcome a presumption that the effect on competition of such a practice was De minimis. See id. Berkey, however, has failed to provide any evidence that a significant number of Kodak 110 purchasers would have, if the Kodacolor II boxes had included accurate information on the shelf life of the film, bought a Berkey camera in a pre-existing format instead.

[42] We have already stated that in September 1967 Kodak's management noted that development of the new film was justified, even if Project 30 were never brought to fruition, because of the benefits it would yield to pre-existing formats. Kodak, however, tentatively decided at the same meeting that Kodacolor II would at first be sold in the 110 format only. See Part III.A Supra. Kodak's explanation for the initial restriction of Kodacolor II to the 110 size is that the advantages of the new film were most useful for small cameras; until the defects in Kodacolor II were eliminated, therefore, Kodak preferred to continue selling Kodacolor X in pre-existing formats. That Kodak did not advertise the restriction was evidence in support of its assertion that the plan was not undertaken for an anticompetitive purpose.

camera. In short, Kodak simply claimed to have achieved its goal of truly developing a Pocket Instamatic system whose color prints would be "as close as possible to the prints currently obtained from 126-size Kodacolor X." Stressing the "pocketability" of the 110 format, Kodak did not emphasize Kodacolor II as an independent reason to choose a **[**77]** photography system. Little of the advertising mentioned Kodacolor II by name. Of even greater weight is the fact that none in any way implied that the new film was available only in the 110 size. Accordingly, the content of Kodak's publicity, standing alone, would not permit a jury rationally to infer that Berkey was injured by the restriction of Kodacolor II to the 110 format.

The abstract possibility nevertheless remains that there might have been some customers who would have purchased a Berkey camera in one of the pre-existing formats but decided to select a Kodak 110 instead because they were aware that there was no alternative means of using Kodacolor II, even in the absence of advertising to that effect. Yet, although millions of amateur photographers bought Pocket Instamatics, Berkey did not produce anyone at the trial to testify that he was so motivated. Nor did Berkey present the testimony of camera dealers, or evidence of any kind, to establish that such customers existed. Indeed, Berkey declined to challenge the testimony of a camera dealer that he never promoted the fact that Kodacolor II was available only in the 110 size. [43.] We expressed our concern over the absence **[**78]** of such evidence at oral argument, but Berkey's post-argument brief [44.] did not point to any relevant items in the record that we had overlooked. We conclude, therefore, that the jury could not find that Berkey suffered more than De minimis injury, if any, because Kodacolor II was limited to the 110 format. ***HN10***[] Although the antitrust laws afford latitude in permitting the factfinder to estimate "the extent of the damages" where precise calculation is impossible, they do not allow recovery where there has been no showing that plaintiff suffered cognizable injury. *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63, 51 S. Ct. 248, 26 L. Ed. 2d 83 (1931)*; See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *Gottesman v. General Motors Corp., 436 F.2d 1205, 1210 (2d Cir. 1971)*.

[79]** Voluminous discovery and a prolonged trial have already given Berkey more than ample opportunity to adduce evidence, which it failed to do, in support of its consistently maintained claim that it lost camera sales because of restriction of Kodacolor II to the 110 format. It would make a mockery of the adversary system in a case of this character, where great expenditures of time and money have been made and where the plaintiff was represented by counsel of extraordinary ability and experience, to afford a new trial so that missing elements of proof could be produced, if, indeed, they exist.

To summarize our conclusions on the 110 camera claims, we hold:

1. Kodak was under no obligation to predisclose information of its new film and format to its camera-making competitors.

2. It is no basis for antitrust liability that Kodacolor II, despite certain deficiencies compared to Kodacolor X, may have encouraged sales of the 110 camera.

[*290] 3. Finally, although the restriction of Kodacolor II to the 110 format may have been unjustified, there was no evidence that Berkey was injured by this course of action.

We, therefore, reverse so much of the judgment **[**80]** as awarded Berkey damages based on the introduction of the 110 camera. [45.]

B. Photofinishing and Photofinishing Equipment Markets

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43. Advertisements of dealers, like those of Kodak, emphasized that Kodacolor II would yield sharp pictures but not that the film was exclusively available in the 110 size.

44. Because of the extraordinary complexity of this case, we invited the parties to submit post-argument briefs on any aspect of the case they felt merited further attention.

45. But see Part V Infra, where we hold that Berkey's claim arising from the introduction of the "flipflash" in 1975, the damages for which were not considered separately but were included in the total computation of damages for lost 110 camera sales, must be submitted to a new trial on these damages only.

The introduction of the 110 system provided the foundation not only for the enormous camera award but also for the much smaller damage items $ 55,700 and.$ 19,000, respectively, before trebling allotted for lost photofinishing profits and for overcharges on photofinishing equipment. These verdicts, moreover, were the basis for the only injunctive relief decreed below. We reverse and remand for a new trial so much of the judgment as was based on damages for the photofinishing and equipment claims, and we vacate and remand the equitable decree for further consideration in light of **[**81]** the principles set forth in this opinion.

1. Damages

Berkey's damages claims here are based on the fact that Kodacolor II, introduced along with the 110 camera, required the new, high-temperature C-41 finishing process instead of the C-22 process used for Kodacolor X and similar films. Thus independent photofinishers could not offer processing service for Kodacolor II the only color print film Kodak ever offered in the 110 size until they bought new equipment and received instruction in and supplies for C-41 processing. Moreover, Kodak did not give advance warning to the independents that the new film would be introduced, nor did it predisclose the C-41 process to other makers of photofinishing equipment. Accordingly, CP&P was able to begin processing Kodacolor II several weeks before its competitors.

Furthermore, it is urged that Berkey faced greater expense in finishing Kodacolor II than did CP&P, because Kodak refused to divulge the formulae for chemicals used in the C-41 process. Large photofinishers like Berkey preferred to buy these compounds from chemical suppliers in bulk, both to save money and to gain flexibility. But to be able to process Kodacolor II, they were forced **[**82]** to buy pre-mixed "kits" from Kodak at twice the price. Kodak, meanwhile, provided all but one of the CP&P plants with bulk chemicals. [46.] And, because for some time Kodak was the only manufacturer of machinery capable of processing the new film, the independent photofinishers were required to purchase this equipment in order to proceed at all. The jury found that Kodak's prices were excessive and almost certainly found also that the equipment Kodak sold to the independents was vastly inferior to its product for CP&P.

Because of its early jump and greater efficiency in the C-41 process, CP&P gained a disproportionately high share of 110 finishing, an effect Berkey contends lasted **[**83]** through the end of 1973. There was clear evidence that Kodak was aware of the impact its conduct would have on the business of its photofinishing rivals. One Kodak marketing officer urged introduction of Kodacolor II along with the 110 cameras in part to compel the independent photofinishers to buy Kodak C-41 equipment, [47.] and Kodak engineers realized that the machinery their firm planned to sell would not allow independents to do more than "limp through the C-22 to P-118 transition **[*291]** stage." Not surprisingly, one Kodak scientist noted early in the development of the 110 system that the new process would "raise hell in the photofinishing business" without benefit to the consumer. [48.] And, shortly after Kodacolor II came to market, a worried Kodak employee predicted that CP&P's announcement of its early readiness to process the new film would "cause some photofinishing reaction due to the fact that we are using 110 to gain business over their operations."

[84]** Kodak's conduct with respect to the independent photofinishers perhaps may be criticized as shoddy treatment of firms providing an essential service for Kodak products. Indeed, largely for that reason a number of Kodak employees urged that photofinishers and equipment manufacturers be given advance warning of the C-41 process. The purpose of the Sherman Act, however, is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful. See *Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564 (5th Cir. 1978)*. Moreover, it is clear that Kodak did not monopolize or attempt to monopolize the photofinishing or equipment markets. [49.] Thus, it is not liable under § 2 for the actions described above unless it

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[46.] Kodak also did not inform independent photofinishers, or even its own technical sales representatives assigned to help the independents process Kodak films, that there were two distinct "populations" of Kodacolor II with markedly different color characteristics. CP&P, however, was told of this divergence as soon as it was discovered.

[47.] See Part III.A Supra.

[48.] See id.

gained a competitive advantage in these markets by use of the monopoly power it possessed in other segments of the industry.

[85]** It bears emphasis that only the wielding of power will support recovery in this context; advantages inuring to Kodak's photofinishing and equipment arms by virtue of membership in an integrated firm will not. As we suggested earlier, a use of monopoly power is an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control. Thus, the classic example of such a use is a refusal to deal in goods or services needed by a competitor in a second market. E. g., *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*. But, a firm without control of the market that attempts this will simply drive the purchaser to take its patronage elsewhere.

Similarly, suppose that Kodak was aware that most consumers would prefer Kodacolor X but nevertheless decided to replace it by Kodacolor II, hoping thereby to place competing photofinishers at a disadvantage. A small film manufacturer attempting this tactic would find it ineffective and self-destructive the slack in C-22 films would be filled by other firms, and consumers would have no reason to buy a film they did not like. Kodak, by contrast, would **[**86]** face a far different calculus: consumers desiring film would have little choice but to buy Kodacolor II and would thereby ineluctably strengthen CP&P's hand in photofinishing.

It is not clear, however, whether in bringing forth the 110 system Kodak did anything that a smaller firm with integrated capabilities but no market control might not have done. [50.] Kodak did not use its power to shift the entire photofinishing market from C-22 to the C-41 process, for **[*292]** Kodacolor II was introduced only in the 110 size and at first represented a minuscule percentage of all color print photofinishing. Indeed, the film was not marketed in other formats until eighteen months later, long after the original surprise had worn off. [51.] **[**88]** In sum, Kodak's ability to gain a rapidly diminishing competitive advantage with the introduction of the 110 system may have been attributable to its innovation of a new system of photography, and not to its monopoly power. On the other hand, we cannot dismiss the possibility that Kodak's monopoly power in other markets was at least a partial root of its ability to gain an advantage over its photofinishing competitors and to sell them overpriced equipment. **[**87]** For example, it may be that, had Kodak possessed only a small portion of the film market, other manufacturers would have found it more feasible to bring out their C-22 films in the 110 size. CP&P would then have had no competitive advantage for a large percentage of 110 photofinishing. Moreover, absent a Kodak film monopoly, the independent photofinishers might not have felt an urgent need to buy expensive equipment for the C-41 process. [52.]

[49.] See Part II.C. & n.13 Supra. Although Kodak was for a time the only firm able to finish Kodacolor II, and for a longer period the only company able to provide equipment for the C-41 process, the new process and the machinery used in it did not define separate markets; rather, they were, like Kodacolor II and the 110 camera itself, new entries in markets of wider scope. Kodak held a temporary monopoly in C-41 processing and equipment only in the sense that every firm initially possesses a 100% Market share in its own innovations and the peripheral products and services associated with it. See *Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 915 (10th Cir.)*, Cert. dismissed, ***423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)*** (endorsing district court statement).

[50.] We do not, of course, intend to cast any doubt on the well-established doctrine, which we have reaffirmed, See Part II.B Supra, that certain actions may violate *§ 2* when taken by a monopolist even though they would be perfectly legitimate in the hands of a firm lacking market control. Rather, our consideration rests on a simple proposition: if an action that gains a firm a competitive advantage is effective because of the company's efficiency, prestige, and innovativeness, and not because of its control over the market, the action is not a use of power.

[51.] In 1972, fewer than one-tenth as many rolls of Kodacolor film were processed in the 110 format as were finished in the 126 size, and CP&P processed only about 15% Of the 110 rolls. Even in 1973, photofinishers processed more than three times as many 126 Kodacolor rolls nearly all of it Kodacolor X as Kodacolor rolls in the 110 format, and CP&P's share in the 110 size fell to approximately 6%.

[52.] We do not hold that Kodak, which did not have a monopoly in photofinishing equipment, was required to provide such machinery for other photofinishers. But a violation might be found if Kodak's ability to market equipment at an excessive price was attributable to its monopoly power in other areas.

We cannot resolve this ambiguity. The instructions to the jury did not draw with sufficient sharpness the distinction between exercises of power and the natural benefits of size and integration. Nor is the record so clear that we can say with certainty on which side of this demarcation the facts fall. The parties quite naturally gave relatively little attention to this aspect of the case, in light of the comparatively small sums involved. If the parties wish to pursue these claims to a final determination, therefore, a new trial will be necessary.

2. Equitable Relief

Although Berkey's claim for damages in the photofinishing market was limited to the events surrounding the 110 introduction, the plaintiff also made extensive allegations that Kodak had used its control over other markets to disadvantage **[**89]** photofinishing competitors. For example, Berkey complained about Kodak's policy, evidently discontinued after the commencement of this suit, in the sale of color paper. The emulsions on each production run of paper are slightly different, yielding a variance of color characteristics. Because tests and machinery adjustments are necessary each time a roll of paper from a new "emulsion run" is used, large photofinishers like Berkey naturally wish to buy as many rolls as possible from a single run. Kodak, however, refused to sell more than 400 rolls from any one run to each photofinisher. Given Kodak's monopoly power in color paper, this refusal to deal would, unless justified by a valid business reason, appear to violate *§ 2* and form the basis for a grant of equitable relief.

Citing several examples of what he considered to be uses of Kodak's "spectrum of monopoly powers" as a lever in the photofinishing field, Judge Frankel issued a wide-ranging decree that requires the defendant, as he explained, "to treat all photofinishers, including CP&P, alike in relevant respects." Accordingly, any technical information made available by any other branch of Kodak to CP&P must also be offered **[**90]** promptly on the payment of a $ 200 annual fee to cover postage, printing, and handling to all domestic firms providing amateur photofinishing services.

It is evident from our discussion, however, that this decree forecloses not only the use of monopoly power but the legitimate benefits of integration as well. **[*293]** ***HN11***[] Although an injunction need not be limited to prohibiting repetition of past misconduct, it does not lie within the discretion of the trial judge to restructure a market that Kodak has neither monopolized nor attempted to monopolize. Cf. *Schine Chain Theatres, Inc., supra, 334 U.S. 125-30, 68 S. Ct. 947*; *Paramount Pictures, Inc., supra, 334 U.S. at 166-75, 68 S. Ct. 915*. This portion of the judgment must therefore be vacated. On remand the district court may consider whether a narrower decree, limited to the prevention of uses of monopoly power, may be appropriate. In this regard, the court should consider to what extent the erosion of Kodak's share in the camera and color paper markets lessens the need for injunctive relief.

The decree also mandated the sale of color paper without a Kodak backprint, at the option of the purchaser. Judge Frankel indicated that Kodak's **[**91]** insistence on placing its backprint on the paper "was, or could be found to be, a device to force Kodak's photofinishing rivals to advertise their competition." Judge Frankel did not expressly consider whether his prohibition was a justifiable curtailment of Kodak's trademark rights. Whatever the merits of such a decree may be in the abstract and the judge himself indicated at one point that its primary impact would be to benefit Kodak's color paper competitors [53.] the need for its is nullified by Judge Frankel's own observation that Berkey's purchases of Kodak paper fell in 1977 to 7% Of its requirements. We therefore direct that the "backprint" relief be eliminated from any decree to be entered on remand.

IV. FILM AND COLOR PAPER CLAIMS

The second and third largest jury awards were those for monopolization of film and color paper, $ **[**92]** 11,500,000 and $ 8,803,000, respectively. Judge Frankel upheld the film verdict but granted judgment n. o. v. for Kodak on color paper. Kodak therefore appeals the former judgment and Berkey the latter. In each of these claims Berkey's contention is that it paid an excessive price for Kodak products. They therefore raise similar issues and we shall discuss them together. We remand both claims for retrial.

[53.] Judge Frankel's opinion appears to contradict itself on this point. Compare ***Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 425 (S.D.N.Y.1978)*** With id. at 433.

It is clear that Kodak possessed a monopoly in the film and color paper markets during the period relevant to this suit. Berkey contends that this power, which enabled Kodak to overcharge its customers, was acquired and maintained, at least in part, by anticompetitive conduct. Some of the evidence introduced by Berkey in support of its claims concerned events that occurred many years ago. In particular, Berkey succeeded in introducing a 1915 decision which was to play a dramatic role in an unfortunate incident near the close of the liability trial [54.] holding Inter alia that Kodak, by illegal acquisitions and other improper conduct, had monopolized the photographic paper market. Judge Frankel admitted this evidence as "background" only. Over Berkey's objection, he instructed the **[**93]** jury that it could not base liability on anticompetitive actions that Kodak had committed earlier than the beginning of the limitations period on January 29, 1969, four years before the commencement of suit.

Berkey contends, however, that Kodak has also bolstered its power since 1969 by numerous exclusionary means. In upholding the film verdict against Kodak's motion for judgment n. o. v., Judge Frankel pointed to two particular tactics that he considered to be exclusionary. Most importantly, he held that there was sufficient evidence for the jury to conclude that the introduction of the 110 system illegitimately buttressed Kodak's film sales. The judge also indicated that Kodak improperly stifled film competition by preventing CP&P, its photofinishing arm, from servicing non-Kodak films.

[*294] Judge Frankel concluded, with some hesitation, that the evidence of anticompetitive conduct within the limitations period was sufficient to support the entire liability award. The trial judge **[**94]** also had misgivings about his instruction to the jury on the measure of film damages, in which he explained that Berkey could recover the difference between Kodak's monopoly price and the price it would have paid for film in a competitive market. Nevertheless, he denied Kodak's motion for judgment n. o. v., sustaining the award of damages In toto.

Berkey's color paper claim did not fare as well in Judge Frankel's hands, however. As with the film claim, Berkey presented numerous instances of conduct that, it contended, were anticompetitive. Kodak, it charged, manipulated the structure of the photofinishing market to inhibit color paper competition and used its monopoly power in film to advantage its paper sales, designing its films so that they would not be as compatible with competitors' paper as with Kodak's. Moreover, CP&P received instructions to buy only Kodak paper, even though competing products offered advantages in both cost and quality. Judge Frankel surveyed these and other allegations and concluded that in each case either Kodak's conduct was perfectly proper, or that there was insufficient proof that it was tainted by anticompetitive purpose or effect, or that it had no **[**95]** impact on the color paper market. Accordingly, although there was clear evidence that Kodak's monopoly power had enabled it to maintain its color paper prices at a high level, the judge granted Kodak's motion for judgment n. o. v. on this claim.

HN12[] Excessive prices, maintained through exercise of a monopolist's control of the market, constituted one of the primary evils that the Sherman Act was intended to correct. Letwin, Congress and the Sherman ***Antitrust Law***: 1887-1890, 23 U.Chi.L.Rev. 221, 249-52 (1956). Where a monopolist has acquired or maintained its power by anticompetitive conduct, therefore, a direct purchaser may recover the overcharge caused by the violation of *§ 2*. E. g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 487-94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*.

But unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is **[**96]** probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can. See, e. g., L. Sullivan, Supra, at 117; 3 P. Areeda & D. Turner, Supra, at 41-42. If a firm has taken no action to destroy competition it may be unfair to deprive it of the ordinary opportunity to set prices at a profit-maximizing level. Thus, no court has required a lawful monopolist to forfeit to a purchaser three times the increment of its price over that which would prevail in a competitive market. 1 M. Handler, Supra, at 56-57. Indeed, as one commentator who might favor such a rule concedes, such judicial oversight of pricing policies would place the courts in a role akin to that of a public

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[54.] See Part V Infra.

regulatory commission. Id. We would be wise to decline that function unless Congress clearly bestows it upon us. See L. Sullivan, Supra, at 117-18.

HN13[] For a purchaser to recover damages under *§ 2*, therefore, it must demonstrate that the monopolist has engaged in some anticompetitive conduct. Two further questions must be resolved, however, to give shape to the purchaser's treble damage suit:

1. If an overcharge paid during the limitations period was caused **[**97]** by the defendant's monopoly power, may a plaintiff satisfy the conduct element of the *§ 2* offense by proving anticompetitive actions that occurred more than four years prior to the commencement of suit?

2. If a defendant has violated *§ 2*, may a purchaser recover the excess of its price over a competitive price, or merely the increment attributable to its anticompetitive conduct?

[*295] We hold that Judge Frankel erred in Kodak's favor on the first of these questions but that he was overly generous to Berkey on the second.

A. Conduct Prior to the Limitations Period

HN14[] By statute, *15 U.S.C. § 15b*, a four-year period of limitations applies in private antitrust suits. The plaintiff, therefore, clearly can recover only for overcharges suffered since the beginning of the limitations period. It remains to be decided, however, whether the conduct element of the offense may be satisfied by wrongful action occurring before the limitations period but that nevertheless made an enduring contribution to the monopolist's ability to charge an excessive price. Judge Frankel, without articulating reasons, concluded that *§ 15b* requires a negative answer.

Unless tolled, that provision **[**98]** requires suit to be "commenced within four years after the cause of action accrued." In effect, therefore, the judge held that the cause of action of a purchaser seeking to recover an illegal overcharge accrues when the defendant engages in the anticompetitive conduct that is a prerequisite for suit. We believe that the purchaser's claim cannot accrue until it actually pays the overcharge. Accordingly, Judge Frankel's ruling was erroneous.

HN15[] It is "plain from the treble-damage statute itself (*15 U.S.C. § 15*)" that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 (1971)*. Although the business of a monopolist's rival may be injured at the time the anticompetitive conduct occurs, a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price. The case of predatory pricing illustrates the point clearly. As soon as the dominant firm commences such a policy, other producers, who may be driven out of the market, are injured. But, clearly, purchasers **[**99]** are not, for they receive the temporary boon of artificially low prices. It is only when the monopolist, having devoured its smaller rivals, enjoys the spoils of its conquest by boosting its price to excessive levels that a purchaser "feels the adverse impact" of the violation. *Id. at 339, 91 S. Ct. 795*. And if the monopolist never consummates its scheme by taking this final step, the purchaser has no cause of action.

HN16[] So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. Thus, in this setting, as in "the context of a continuing conspiracy to violate the antitrust laws. . . . 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. . . . . (A)s to those damages, the statute of limitations runs from the commission of the act." *Id. at 338, 91 S. Ct. at 806*.

Untoward consequences would follow were we to hold that the anticompetitive conduct itself triggered the running of the limitations period. As the Supreme Court stated in Zenith Radio:

> *HN17*[] (I)t is hornbook law, in antitrust **[**100]** actions as in others, that even if injury and a cause of action have accrued as of a certain date, further 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, 91 S. Ct. at 806*.

HN18[] Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. Cf. *Continental Ore Co., supra, 370 U.S. at 709-10, 82 S. Ct. 1404*. Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are "suffered":

> **[*296]** Otherwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc. v. International Parts Corp., **[**101]** 392 U.S. 134, 139, 88 S. Ct. 1981, 1984, 20 L. Ed. 2d 982 (1968)*. . . .

Zenith Radio Corp., supra, 401 U.S. at 340, 91 S. Ct. at 807.

Our view is supported by the fundamental principles of *§ 2* that we outlined earlier in this opinion. Monopoly power, we indicated, is itself the primary target of *§ 2*. To be sure, a showing of anticompetitive conduct is necessary to support liability for damages, for otherwise the law would be unfair to a firm that has gained success solely by fair means. But there can be no unfairness in preventing a monopolist that has established its dominant position by unlawful conduct from exercising that power in later years to extract an excessive price. After all, it is only a pristine "origin," *Alcoa, supra, 148 F.2d at 429*, that may save a monopoly so long as it continues to refrain from anticompetitive activity from the condemnation of *§ 2*. The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it.

Moreover, it would undercut enforcement of the Sherman Act to hold that, if a monopolist merely retains its illicit market control for four years after its last anticompetitive **[**102]** action, it may charge an exorbitant price until its power is eviscerated in an appropriate suit for equitable relief. [55.] The rule urged by Kodak would mean that, as the Supreme Court has indicated in a related context:

> those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project.

Schine Chain Theatres, Inc., supra, 334 U.S. at 128, 68 S. Ct. at 957. An **[**103]** unlawful monopolist must be "deprived of the fruits" of its wrongful conduct, *Id. at 129*, and one of the forbidden fruits is an excessive price. In Grinnell, Judge Wyzanski also used the biological metaphor: *§ 2* requires "the rooting out of a plant . . . (that) represents an ultimate growth from seeds which have been declared unlawful." *236 F. Supp. at 258*. So long as a monopolist enjoys "the flower of evil," Id., at the expense of its customers, those victims must have a remedy.

HN19[] We hold, therefore, that a purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period. It should not be inferred that this ruling grants antitrust plaintiffs a license to embark on a search for Ichthyosauria that is, on a time-warped fishing expedition. A trial court in its discretion may always "set a

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[55.] If, as the Ninth Circuit has held in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 518 F.2d 913, 922 (9th Cir. 1975)*, dissolution or divestiture may only be ordered in a Government suit a question that we of course do not reach the rule for which Kodak argues would be even less tolerable.

reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it." *Continental Ore Co., supra, 370 U.S. at 710, 82 S. Ct. at 1416*. Moreover, the trial court might not be **[**104]** without flexibility to limit the proof where delay in bringing suit may have caused injustice to the defendants. See 3 P. Areeda & D. Turner, Supra, at 93.

B. Damages to a Monopolist's Purchaser

Assuming that a purchaser establishes a monopolist's liability to it for an unlawful price, two potential rules of damages come into view. Judge Frankel apparently stated, and in any event the jury **[*297]** clearly acted upon, what may be called the competitive price theory that a purchaser may recover for the entire excess of the monopolist's price over that which would prevail in a competitive market. We believe that this was error, and that ***HN20***[] the true measure of damages, which we shall refer to as the wrongful conduct rule, is the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market.

There is a dearth of cases on point. Indeed, the only citation in Judge Frankel's discussion of this point is to a rather vague Dictum in Alcoa. The reason for this lack of authority is that in most successful monopolization suits brought by purchasers the *§ 2* violation was merely a consequence of a *§ 1* offense that provided the rule **[**105]** of damages. Often, for example, the *§ 2* violation consists of a price-fixing conspiracy among firms controlling a large share of the market. The measure of the damages to one of the conspirators' customers is the difference between the price actually paid and the one at which the product would have sold absent the conspiracy. E. g., *Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*; *Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396, 51 L. Ed. 241, 27 S. Ct. 65 (1906)*. In such a case, the monopoly price is entirely attributable to the anticompetitive conduct. The two alternative rules of *§ 2* damages therefore merge and it is impossible to tell which would apply if the monopoly power, and hence the excessive price, resulted only in part from wrongful conduct. [56.]

[106]** Without any clear precedent to guide us, we must determine the proper measure of damages in a *§ 2* case by juxtaposing the basic rule for antitrust damages with the fundamental principles of law under *§ 2* that we outlined earlier in this opinion. The basic rule was set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, where the Supreme Court declared that ***HN21***[] plaintiffs in an antitrust action must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." It is true, as we have previously indicated, that excessive prices are "injury of the type the antitrust laws were intended to prevent." See Part II.A Supra. It is equally evident, however, that more than monopoly power is necessary to make the charging of a noncompetitive price unlawful. Accordingly, a purchaser may recover only for the price increment that "flows from" the distortion of the market caused by the monopolist's anticompetitive conduct.

Were the law otherwise, it would establish an unnecessary and unwarranted trigger mechanism. See 3 P. Areeda & D. Turner, Supra, at 86-87. A pristine **[**107]** monopolist, we have held, may charge as high a rate as the market will bear. But under the competitive price rule, if it committed any anticompetitive conduct beyond a De minimis Level it would suddenly be held liable for threefold the entire excess of its price over a competitive price. In effect,

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[56.] To the extent that any inference may be gleaned from the extended Hanover Shoe litigation, it favors the wrongful conduct rule. After the Supreme Court affirmed Judge Wyzanski's judgment in the celebrated United Shoe case, Hanover, a United customer, brought an action to recover illegal overcharges. The calculation of Hanover's damages was based on "the excess of leasing costs over what it would have cost to own the same machines had they been available for purchase," *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D.Pa.1965)*; See *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 487, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. Significantly, the hypothetical purchase prices for prior years were determined from the actual prices for 1955 the first year the lease-only machines were offered for sale and clearly, as later litigation would demonstrate, a period in which United retained its monopoly. See *United States v. United Shoe Machinery Corp., 266 F. Supp. 328, 331 (D.Mass.1967)*, rev'd on other grounds, *391 U.S. 244, 88 S. Ct. 1496, 20 L. Ed. 2d 562 (1968)*. Moreover, United's anticompetitive leasing policy was only a partial source of its monopoly power; the other roots were, as Judge Wyzanski indicated in his original opinion, "plainly beyond reproach." *110 F. Supp. at 344*. It appears, therefore, that damages in Hanover Shoe were limited to the price excess caused by United's wrongful conduct.

[*298] instead of being required simply to compensate its customers for the consequences of its wrongful action, it would be required to forfeit its legitimately acquired advantage. But the Sherman Act does, as we have said, tolerate the lawfully acquired and maintained monopoly. This principle would be undercut if a monopolist whose position has for the most part been attained legitimately is required to forfeit all fruits of its success because its power has merely been supplemented by improper conduct. [57.]

[108]** We recognize that if the monopolist, but for its illegitimate actions, would have had little or no market power, the wrongful conduct and competitive price rules may yield very similar results. The proper standard, though, is one that bases damages on the monopolist's actual record of misconduct. [58.]

C. Summary and Dispositions

The two issues we have discussed above establish the framework for a purchaser's action under *§ 2* of the Sherman Act. We believe this structure is not only compelled by law but sensible as well. The wrongful conduct rule indicates that a purchaser can recover for an overcharge paid to a violator of *§ 2* only to the extent that the price he paid exceeds **[**109]** that which would have been charged in the absence of anticompetitive action. An intermediate step in the analysis may be an attempt to estimate what the monopolist's market share would likely have been but for the illegitimate conduct; it would then be possible to gauge approximately what price the defendant would have been able to charge with that degree of market control. In any event, courts applying this rule must be aware of the practical limits of the burden of proof that may be demanded of treble damage plaintiffs. See *Zenith Radio Corp., supra, 395 U.S. at 123, 91 S. Ct. 795*; *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*; *Story Parchment Co., supra, 282 U.S. at 563, 51 S. Ct. 248*.

It may, of course, be difficult for a purchaser to demonstrate that conduct occurring many years before the commencement of suit contributed to an overcharge that it paid within the limitations period. That, however, is no reason for denying it the opportunity to do so. The treble damage provision, *15 U.S.C. § 15*, was intended in large part as an inducement to encourage potential plaintiffs to endure the considerable expense and labor of seeking recovery **[**110]** against violators of the antitrust laws. E. g., *Reiter, supra*, -- - U.S. at -- , *99 S. Ct. 2326*.

It is clear from our holdings that we believe both the film and color paper claims must be remanded for retrial. Judge Frankel upheld the film award for the entire excess of Kodak's prices over a hypothetical competitive price, although the only two examples of post-1969 conduct that he believed were wrongful could not have had a very large impact on Kodak's film prices. The verdict therefore cannot stand, but Berkey has a right to establish at a new trial that anticompetitive conduct, both before and after 1969, enhanced the price it paid for Kodak film.

Similarly, the judgment for Kodak on the color paper claim must be vacated. Judge Frankel did not allow the jury to consider pre-1969 conduct as a foundation for the verdict despite the concession by Kodak's own economic expert, to be discussed later, that the company's unlawful activities in **[*299]** years past may still have had a bearing on its power in the photographic paper market. Because Judge Frankel erred by instructing the jury on the competitive price theory of damages, however, we could not simply reinstate the large **[**111]** color paper award, even if we were to hold that the jury may validly have found that Kodak committed anticompetitive conduct in that market since 1969.

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57. The situation might be different in a Government equity action. It is interesting to note that Areeda and Turner would allow the break-up of a persistent monopoly in such a suit even in the absence of exclusionary conduct, 3 P. Areeda & D. Turner, Supra, at 63-64. They strongly advocate the position we are asserting here, however that "an injured plaintiff is not entitled to have damages based on the excess of the monopoly price over the competitive price but only to the price increment reasonably attributable to actionable behavior." *Id. at 73*; See *id. at 99*.

58. We express no view on how the trial judge should allocate the burden of proving this causal relation, or lack of it, when plaintiff makes a preliminary showing of persistent monopoly power and a substantial history of anticompetitive conduct. Cf. *Ohio Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914, 946 (S.D.N.Y.1965)*.

We have no occasion to consider the parties' arguments concerning the numerous other Kodak activities that, Berkey contends, were anticompetitive. Because of the general form of the verdicts, we have no way of knowing what the jury's findings were on these matters or which actions were believed to be anticompetitive. Nor do we know what the findings will be on retrial, if this litigation should continue. Indeed, now that we have set forth the broad outlines of principles in this area we earnestly hope that able counsel on both sides will find a way to dispose of this mammoth lawsuit without consuming more court time or incurring more legal expenses. If so, it will not be necessary to resolve any of the lesser questions. If not, there will be no need to retry the issue of monopoly power. Judge Frankel's instruction on this point appears to have been essentially correct, and there was clear evidence supporting the jury's implicit finding that Kodak held such power in the film and color paper markets.

V. THE *SECTION 1* CLAIMS

Our discussion **[**112]** thus far has centered around interpretation and application of the provisions of the Sherman Act to actions taken by Kodak alone. Berkey claims in addition, however, that Kodak engaged in two separate conspiracies, with the General Electric Company and Sylvania Electric Products, Inc., to restrain trade in the use of new flash devices with amateur cameras.

A. Background

Amateur photography performed in dim lighting ordinarily requires separate illumination so the scene may be captured on film. This is usually achieved by affixing some type of flash device to the camera. Its purpose is to produce a brief, high-intensity burst of light when the shutter is released.

Kodak does not make such devices. For approximately fifteen years, however, it has engaged in three separate "joint development programs" with lamp manufacturers to ensure that the desired lighting innovations would be compatible with Kodak cameras. In 1963, Sylvania Electric Products, Inc. approached Kodak with a prototype of a new battery-powered light device the flashcube [59.] and a modified Kodak 126 camera to fire it. Berkey argued that although Kodak did not make meaningful technical contributions to the flashcube, **[**113]** it nevertheless required Sylvania not to disclose its invention to any other camera manufacturer. Accordingly, for some time after the flashcube was introduced along with a line of Kodak flashcube cameras in 1965, Kodak was the only manufacturer able to sell cameras to use the device. [60.]

[114]** Berkey is barred by the statute of limitations from seeking damages for what it terms the "flashcube conspiracy," but it urges that the events in 1963-65 do much to illuminate two more recent incidents. Viewed in the light most favorable to Berkey, as we have indicated the law requires us to do at this appellate juncture, the evidence established that in 1967 Sylvania came to Kodak with another flash invention the magicube. This device was similar **[*300]** to the flashcube in appearance but did not require batteries. Instead, each of the four lamps in the cube was ignited by percussion, much as a bullet is fired when the firing pin strikes the cartridge. This was a major advance over the flashcube, eliminating dead batteries and other electrical malfunctions that were major causes of lamp failures and consequent missed pictures.

Once more, the two firms entered into a joint project to exploit the Sylvania invention. Over Sylvania's protests, Kodak insisted again that details of the new device be withheld from the public and the trade. Kodak, Berkey contended, maintained this position until just two months before magicubes and magicube cameras were ready for shipment. [61.] Sales **[**115]** of Kodak magicube cameras commenced in July 1970. Berkey, it appears, was the first

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59. The flashcube contains four flashbulbs mounted on the face of a small cube, each containing its own reflector. The cube is rotated after each shot, so four flash pictures may be taken without the need to change cubes.

60. Several other camera makers complained bitterly to Sylvania following this episode. They were particularly disturbed that Sylvania had assigned its camera patents to Kodak, keeping only its lamp patents. One Sylvania official wrote:

Also during the past years the royalties other camera manufacturers have paid to EK to use Sylvania flashcubes on their equipment have disturbed them deeply. They keep telling us that the flashcube was a Sylvania development . . . why did they have to pay royalties?

competitor to offer its own magicube cameras, reaching the market in October, but its production capacity was at first limited. It was not until late 1971 that Berkey's magicube cameras were truly competitive with Kodak's.

[116]** Kodak's joint flash programs, however, were not confined to Sylvania. In 1969, the General Electric Company approached Kodak with proposals for several new flash devices. One was a percussion lamp similar to the magicube; another used a small crystal that could be economically built into a camera and that would, when struck, produce an electrical current sufficient to ignite flash material. The latter device, called "piezo" or "PE" because it used a piezoelectric crystal, provides the focus for the second conspiracy charged by Berkey.

Kodak was troubled by the GE proposal. It was already committed to Sylvania on the magicube project, and there was abundant evidence from which the jury could conclude that Kodak did not wish to introduce two new flash systems at approximately the same time. [62.] Rather, its marketing strategy was, as we noted in connection with our discussion of the 110 system, to withhold introduction of improved camera models until the maximum benefit from the prior model had been reaped. The jury's verdict could reflect its belief that Kodak embarked on a carefully balanced campaign. Kodak desired to cool GE's ardor for its inventions sufficiently to delay introduction **[**117]** of the piezo device for several years, and, at the same time, to avoid the appearance of deferment so that the lamp manufacturer would not seek another camera maker to exploit its invention. [63.]

After several years of intermittent discussion, Kodak and GE decided to move forward with the piezo device. In a contract executed on October 31, 1972, they agreed to aim for a Spring 1975 introduction of GE piezo flashlamps and Kodak cameras designed to fire them. Disclosure before hand to other lamp and camera manufacturers was forbidden. At a joint press conference **[**118]** in April 1975, the two firms announced the GE "flipflash" [64.] and two **[*301]** new lines of Kodak 110 cameras designed to accommodate it. Kodak had the field to itself for several months. This time, however, Berkey was not the first non-Kodak camera manufacturer to enter the arena. It did not market its own flipflash cameras until early 1976, months after Japanese and Chinese models had begun to appear.

B. Joint Development Projects and § 1

Berkey contends that Kodak's agreements with the magicube and flipflash manufacturers violated § 1 of the Sherman Act. In particular, it charges that although Kodak did not make any meaningful technological contribution to either system, the secrecy agreements it extracted from GE and Sylvania prevented other camera makers from competing in the production of cameras **[**119]** that could cooperate with the new flash devices. Evaluating all the evidence presented on these issues, the jury found Kodak's conduct to be unreasonable restraints of trade.

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61. As Kodak's trial counsel conceded, there was conflicting evidence concerning the terms of the secrecy agreement. The written agreement permitted disclosure to "other responsible camera manufacturers," but Sylvania never made disclosure to anyone but Polaroid, which only manufactured instant cameras and was thus not a competitor of Kodak's. In October 1968, Sylvania pressed Kodak for an early announcement to the trade, but Kodak resisted, in part to "make sure that our foreign manufacturing plants could change to the new system." Kodak then instituted a "crash program" to get to market before, as the jury could have found, Sylvania unilaterally decided to disclose its invention to the trade.

In March 1970, Sylvania again complained to Kodak about delay, noting that rumors of the Kodak-Sylvania project had caused other camera manufacturers to press Sylvania for disclosure. Kodak agreed to a limited form of disclosure, but refused to permit release of, Inter alia, the design of the camera socket into which the magicube would fit.

62. In addition to the evidence adduced in connection with the 110 camera that Kodak had a policy of cyclical product introduction, a Kodak official testified that if the piezo would not be ready for the initial 110 introduction, Kodak could not use it for another two or three years.

63. For example, at a time when Kodak was committed to Sylvania and had shelved its own piezo plans, it complimented GE on its devices and urged them to continue development.

64. This device was a rectangular array of eight bulbs, set in four rows of two. The top four bulbs would be fired and the array would then be "flipped" and the remaining bulbs, now on top, would be used.

Kodak's challenge to these verdicts is relatively simple. It argues that both projects "involved millions of dollars of research and development expense by Kodak," and "led directly to the introduction of innovative new products" that "gained wide success." Accordingly, it urges, Berkey's *§ 1* claims are nothing more than "a mirror image" of the *§ 2* predisclosure arguments we rejected in Part II of this opinion.

There is a vast difference, however, between actions legal when taken by a single firm and those permitted for two or more companies acting in concert. To repeat a simple example, a monopolist may, assuming he acquired his power legally, charge any nonpredatory price for his product, but agreements among competitors to raise prices have been recognized as Per se violations of the Sherman Act since Socony-Vacuum. See Part II Supra. We have stated that we respect innovation, and we have construed *§ 2* of the Act to avoid an interpretation that would stifle it. But this is Toto caelo different from an **[**120]** agreement among a few firms to restrict to themselves the rewards of innovation. Such conduct is not immune to examination under *§ 1*. Citing a case we believe to be inapposite, [65.] Kodak contends that it is "not a "restraint of trade,' reasonable or unreasonable, jointly to develop a new product." Where a participant's market share is large, however, we believe joint development projects have sufficient anticompetitive potential to invite inquiry and thus stand on a different footing.

Joint development programs can benefit competition, See *United States v. Line Material Co., 333 U.S. 287, 310, 68 S. Ct. 550, 92 L. Ed. 701 (1948)*, but they are not without their costs. In analyzing joint research by direct competitors, one commentator **[**121]** has suggested that if several substantial firms in an industry join in research at a scale the remaining firms could not attain, and if the others are not permitted to join the group, the favored competitors might obtain a decisive and unjustified advantage over the rest. L. Sullivan, Supra, at 298-303. The benefits and detriments of joint research will vary with the circumstances, Sullivan suggests, and the market power of the participant firms is likely to be the most significant factor. Id.; accord, Turner, Patents, Antitrust and Innovation, 28 U.Pitt.L.Rev. 151, 158-59 (1966).

Kodak and GE, of course, are not direct competitors, and Kodak and Sylvania were at best potential competitors when the magicube was being developed. [66.] Nevertheless, **[*302]** because of Kodak's market power over cameras, the exclusionary potential of horizontal research pools was present. In the case of the flipflash, for example, GE indicated early in 1971 that it could be at maximum production in two years. Kodak, however, counselled delay, at one point urging GE project officials to make a show of progress, "even if all you do is "paint the red base black,' " so that "we'll feel free to work with **[**122]** you." Otherwise, Kodak said, GE could not be assured of being part of Kodak's future flash plans, for "we would then have to ask all (lamp) manufacturers" to submit ideas. A few months later, the two firms executed the formal agreement binding them to joint development of flipflash and nondisclosure to rival lamp and camera manufacturers. From this and other evidence, the jury could have found in the verdict it returned that, without any technological justification, GE kept a desirable innovation off the market for two years solely to suit Kodak's convenience. There is a hollow ring to a claim of justification by appeal to the need to promote innovation, where the result of the conduct was such a clear loss to consumers.

[123]** We hasten to add that we do not hold that joint development agreements between a monopolist and a firm in a complementary market are Per se violations of *§ 1*. It may be, for example, that the market structure is such that only a dominant firm will have the resources necessary to exploit the complementary technology being offered. If such were the case, the alternative to joint development could be no development at all. Accordingly, Judge Frankel appropriately rejected Berkey's request for a Per se charge. See generally *Continental T. V., Inc. v. GTE*

[65.] *United States v. Citizens & Southern National Bank, 422 U.S. 86, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*, involved the antitrust implications of an attempt to evade Georgia's branch banking laws and has nothing to do with joint development ventures by firms in complementary markets.

[66.] Until 1962, Argus Camera was operated as a division of Sylvania. In May of that year, Sylvania sold Argus for a small amount of cash and $ 7.8 million in promissory notes. Over the next seven years, as a result of recapitalizations of Argus, Sylvania was, at various times, a major creditor, common shareholder, and preferred shareholder of its former division, on occasion placing a nominee on Argus's Board of Directors. Berkey contended that Sylvania's relationship with Argus permitted the jury to infer that the lamp manufacturer was a potential camera competitor as well.

Sylvania, Inc., 433 U.S. 36, 49-50 & n.16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). Nevertheless, as Areeda and Turner have noted, **HN22**[] joint ventures involving a monopolist have sufficient anticompetitive potential that they must be scrutinized with care lest they be permitted to fortify the already substantial entry barriers inherent in a monopolized market. 3 P. Areeda & D. Turner, Supra, at 114. The relevant variables might include: the size of the joint venturers; their share of their respective markets; the contributions of each party to the venture and the benefits derived; the likelihood that, in the absence of the joint effort, one **[**124]** or both parties would undertake a similar project, either alone or with a smaller firm in the other market; the nature of the ancillary restraints imposed and the reasonableness of their relationship to the purposes of the venture. This list is not intended to be exhaustive, nor do we suggest that each element applies to every case. In analyzing joint development agreements, as elsewhere in § 1, "the factfinder (must) weigh 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., supra, 433 U.S. at 49, 97 S. Ct. at 2557.

On the record before us, we have little doubt that a properly instructed jury could find that the magicube and flipflash agreements violated § 1. [67.] It remains, therefore, to examine Kodak's challenges to the charge to the jury. Kodak asserts that Judge Frankel erred in instructing the jury to consider whether (1) Sylvania's substantial interest in Argus Camera Co. rendered it a potential camera competitor of Kodak, and (2) the "legitimate purposes" of the **[*303]** magicube and flipflash agreements might be accomplished by "less restrictive alternatives" **[**125]** than those actually chosen. We believe, however, that the charge provided accurate guidance for the jury's deliberations.

Kodak claims that there was an absence of evidence that an agreement between it and Sylvania not to compete existed; this assertion, **[**126]** however, misses the point. As we noted above, the possibility of individual entry or expansion into the monopolized market is a highly relevant consideration in assessing a joint venture such as the magicube agreement. We agree with the district judge that Sylvania's large interest in Argus was sufficient to raise for the jury the possibility that absent the joint project with Kodak, Sylvania might have produced magicube cameras with Argus.

More troublesome is the contention that Berkey would not have benefited had Sylvania chosen to "go it alone" and therefore lacked standing to raise the Argus issue. Cf. Brunswick Corp., supra. But magicube entry on the small scale available to Argus may well have been less harmful to Berkey and to camera competition in general than was entry by a monopolist such as Kodak. See 3 P. Areeda & D. Turner, Supra, at 114. In any event, the only objection to the Argus charge that Kodak presented to the district court related to whether Sylvania's ownership of Argus was too remote in time to be relevant to the magicube project, not the "standing" and "non-competing agreements" contentions now raised on appeal. Accordingly, the latter objections have been **[**127]** waived. Fed.R.Civ.P. 51; Spano v. N. V. Koninklijke Rotterdamsche Lloyd, 472 F.2d 33 (2d Cir. 1973).

Kodak also challenges a direction that the jury

> should consider whether, under all the circumstances, the legitimate objectives of the programs might have been achieved by alternative means with less restrictive effects, including predisclosure or provisions for royalty-free licensing.

Kodak contends that this in effect directed a verdict for Berkey because, in retrospect, lawyers can always "conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade," American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975). We agree with the Third Circuit that a better charge would be to require that "the restraints . . . not exceed "the limits Reasonably necessary

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[67.] In particular, there was in each instance evidence that Kodak used its camera monopoly to extract secrecy agreements from the lamp manufacturers, and that the benefits it derived from the agreements far exceeded the value of its technological contributions. We note, in passing, that Kodak contends that Berkey should be barred from recovery because a Berkey official once told an officer of GE that Berkey was not interested in innovation, preferring to copy Kodak designs. The evidence concerning this conversation was conflicting, however, and we must assume the jury resolved the conflict in Berkey's favor. Accordingly, we need not determine the effect such a Berkey policy would have on its right to complain of Kodak's illicit agreements with the lamp makers.

to meet the competitive problems,' " Id. (quoting *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380-81, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)* (emphasis added by the court)). American Motor Inns noted, however, *Id. at 1248*, that the existence of alternatives is obviously of vital concern in evaluating putatively anticompetitive **[**128]** conduct. See, e. g., *White Motor Co. v. United States, 372 U.S. 253, 271-72, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)* (Brennan, J., concurring); *Foster v. Maryland State Savings & Loan Association, 191 U.S.App.D.C. 226, 590 F.2d 928, 934-35 (1978)*, Cert. denied, *439 U.S. 1071, 99 S. Ct. 842, 59 L. Ed. 2d 37 (1979)*; 1 M. Handler, Supra, at 708. Read as a whole, See, e. g., *Chavis v. Finnlines Ltd., O/Y, 576 F.2d 1072, 1076 (4th Cir. 1978)*, Judge Frankel's *§ 1* charge simply presented the availability of less restrictive alternatives to the jury as one among many possibilities to be considered. The quoted paragraph did not in any way diminish the earlier instructions based on the rule of reason, including the specific admonition that no single test determines reasonableness.

Finally, we must address Kodak's contention that even if the less restrictive language passes muster, the reference in this context to predisclosure as a specific alternative does not. [68.] As is clear from both the charging conference and Kodak's requests to charge, Kodak views the "fact that these products were developed by two **[*304]** companies, rather than by Kodak alone" as immaterial to the issue of predisclosure. **[**129]** But, given the significantly different posture of single-firm and multi-firm conduct under the Sherman Act and Kodak's arguably minimal technological contributions to the two projects, we believe it was quite appropriate for the jury to consider whether Kodak's refusal to permit Sylvania or GE to disclose their inventions to other camera manufacturers was unreasonable.

Accordingly, we affirm the judgment insofar as it holds Kodak liable for violating *§ 1* of the Sherman Act by its conduct in the flash programs. The question of appropriate damages, however, still remains.

C. Damages

The flipflash introduction was not the subject of a separate damage claim but rather was used as a secondary ground for the 110 camera award. Because we decided in Part III that the judgment must be reversed insofar as it allowed damages in connection with the introduction of the original 110 cameras, **[**130]** there must be a new trial to assess Berkey's damages arising out of the flipflash episode.

As for the magicube, Judge Frankel presented the damages claim to the jury in two parts, one for the latter half of 1970 and the other for 1971. The jury awarded Berkey $ 330,000, pretrebling, for lost camera sales in 1970. Judge Frankel upheld this award, and Kodak does not challenge it here. Berkey calculated its 1971 damages to be $ 1,759,000, but the jury awarded $ 1,417,330, a reduction of approximately 20%. Judge Frankel, however, granted judgment n. o. v. for Kodak on this award, and Berkey appeals.

Berkey's computation for 1971 was reached by comparing its 126 camera sales in that year to those in 1972. By then, Berkey argued, the deleterious consequences of the magicube conspiracy had dissipated, and so 1972 sales represented a fair estimate of the record Berkey's Keystone Division would have achieved the previous year had it been "at the starting line" when the magicube was introduced. The trial court, however, rejected this theory as speculative. Judge Frankel pointed out that the dramatic 400% Rise in Berkey camera sales in 1972 was not due solely to an increase in the availability **[**131]** and popularity of Berkey's magicube camera; indeed, Berkey's 126 magicube camera sales declined substantially in 1972. Rather, the augmentation of Berkey's market share was attributable to the introduction of a new and greatly improved version of its Everflash camera, which utilized a built-in electronic strobe light rather than a disposable cube. Thus, Judge Frankel held, the comparison urged by plaintiff "invited an award of damages measured by the success of Berkey's own innovation."

Berkey contends that the judge's ruling was based on an erroneous perception that the Everflash and magicube cameras were to be regarded as noncompeting products with no impact on one another. As Berkey points out, the jury's finding of a single relevant still camera market, including all 126 cameras as well as 110s, suggests that these

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[68.] Kodak has waived its right to contest the charge on royalty-free licensing by failing to raise an objection below. *Fed.R.Civ.P. 51*.

products do compete with each other. The strobe built into the Everflash perhaps may be regarded merely as an alternative to the magicube as a light source for cameras that are otherwise similar. On the other hand, a Berkey executive testified that the Everflash introduced in late 1971 was a very different and markedly superior camera. These were factors that the jury **[**132]** was properly given to consider. Its verdict, representing a 20% Deduction from Berkey's demand for 1971, suggests that it did so. [69.]

Moreover, there was substantial evidence that Berkey suffered injury into 1971 as a result of the magicube conspiracy. Berkey was not able to introduce a magicube camera until late 1970, and even then its inventories remained low. Because of its haste, Berkey's original cameras were defective for some time. Where there is a basis on which a jury can reasonably infer significant antitrust injury, we should be very hesitant before determining that damages cannot be awarded. *Story Parchment **[*305]** Co., supra, 282 U.S. at 561-62, 51 S. Ct. 248*. ***HN23***[] On a motion for judgment n. o. v., the evidence must be viewed in the light most favorable to the party for whom the verdict was rendered, and it must be given the benefit of all reasonable inferences. E. g., *Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970).* **[**133]** In our view, Judge Frankel gave insufficient weight to this standard.

The trial judge's decision, however, clearly represented a legitimate concern over the size of the award. It may be true, as the jury evidently found, that most Everflash buyers would have bought a magicube camera in 1972 had the strobe camera not become suddenly successful. It does not necessarily follow, however, that the magicube camera selected by most of those consumers would likely have been, as Berkey's damages theory seems to assume, a Keystone model. Accordingly, if Judge Frankel had merely ordered a remittitur on the ground that the award was excessive, we could not say that he had abused his discretion. See *Heyman v. Kline, 456 F.2d 123, 130-31 (2d Cir. 1972)*. As it is, however, we reverse the grant of judgment n. o. v. and remand for retrial the question of damages for lost camera sales in 1971. In this instance, as in the others where we have directed a new trial, we hope the parties will find another means of disposition.

VI. THE PECK INCIDENT

The lengthy proceedings below were unfortunately marred by a bizarre series of events in the closing days of the trial on liability. Berkey charged that one **[**134]** of Kodak's attorneys had joined forces with an important witness to destroy or conceal evidence unfavorable to the defense. As the facts unfolded at several side bar conferences, the district judge granted Berkey permission to attempt to impeach the witness by cross-examining him concerning the alleged concealment. Kodak challenges this ruling, asserting irreparable prejudice in the eyes of the jury due to the tale that ultimately unfolded from the witness stand. In addition, also on grounds of prejudice, it attacks Judge Frankel's decision to admit into evidence a 1915 decision entered against Kodak in a Government antitrust suit. To explain why we believe the district judge did not abuse his broad discretion in ruling on these matters, we must set forth the events in greater detail.

Professor Merton J. Peck, a former chairman of the Yale Economics Department, was Kodak's sole expert witness. His task was to explain Kodak's view of the relevant markets and the reasons for Kodak's persistently high market shares. In April 1977, several weeks before the trial began, Berkey availed itself of the right to depose its adversary's expert witness under *Fed.R.Civ.P. 26(b) (4)*. Pursuant to **[**135]** a ruling by Magistrate Sol Schreiber, Mahlon Perkins, a Kodak attorney, furnished Berkey with several documents before the deposition commenced. These consisted of interim reports that Peck had drafted, along with Peck's appointment book for the first four months of 1977, the time sheets he kept while working as a consultant to Kodak, and a three-page summary of the materials supplied by Kodak that Peck had reviewed in preparing for his testimony. At the deposition, which was held at the offices of Berkey's counsel, Perkins represented in Peck's presence that all of the information and data upon which the witness had relied was now available to Berkey, and that there was no record of those documents Peck had read but did not utilize.

In the course of the deposition it came to light that Peck had periodically forwarded all his own notes and papers to Donovan Leisure Newton & Irvine, the law firm then representing Kodak. He explained that he had done so because the materials were covered by a confidentiality order and because he lacked the requisite storage space.

[69.] By contrast, the jury awarded all but $ 4,000 of the claimed amount for 1970.

Perkins then represented to Berkey that all of these documents had been destroyed evidently before the magistrate's order **[**136]** under his personal supervision. Peck averred that he could not recall when he first became aware that the documents were being destroyed, but that he continued to return material to Perkins's firm after learning that it was not being retained.

[*306] In another pretrial maneuver, Berkey sought an advisory ruling as to the admissibility of the district court opinion in *United States v. Eastman Kodak Co., 226 F. 62 (W.D.N.Y.1915)*, Appeal dismissed, *255 U.S. 578, 41 S. Ct. 321, 65 L. Ed. 795 (1921)*. In that decision, somewhat inaccurately referred to throughout this litigation as "the 1915 decree," Kodak was found to have monopolized the amateur camera, film, and paper industries through acquisitions and other exclusionary practices. Judge Frankel ruled that the "decree" was too ancient to be probative of the current structure of the relevant markets, and that its value would be outweighed by the danger that the jury would give excessive weight to a judicial holding. See *Fed.R.Evid. 403*. The judge indicated, however, that he would reassess this decision should Kodak raise the defense that monopoly power had been "thrust upon" it.

Peck took the stand as the final witness for Kodak **[**137]** at the liability trial. When John Doar, lead trial counsel for Kodak and a man of national repute, asked him to explain how Kodak had obtained its market power, Alvin Stein, who has represented Berkey from the inception of this litigation, immediately asked for a conference at side bar. He argued that if Peck were allowed to testify that Kodak's strength was drawn from its innovative capacities, Berkey should be permitted to introduce the 1915 "decree," both as substantive rebuttal evidence and to impeach Peck. Judge Frankel twice offered to permit Mr. Doar to withdraw the question. When Kodak's counsel declined the invitation, the court ruled that the 1915 "decree" could be admitted as background only, representing "one source, though it is far in the past, of Kodak's power over the years." But, as Mr. Stein commenced his cross-examination of Peck, Judge Frankel reversed his course, deciding that, even considering the need to impeach Peck, the prejudicial potential of the decree overwhelmed its probative value.

On Friday, January 6, the 109th day of trial, Mr. Doar requested a ruling as to the scope of the cross-examination concerning the nonproduction and purported destruction of **[**138]** Peck's work papers. Judge Frankel responded by noting that it was irrelevant to Peck's credibility whether Kodak documents that the expert had testified he merely studied and returned to defense counsel had been destroyed. The court ruled, however, that if Peck had yielded his own papers to counsel with knowledge that they might be destroyed, this fact would certainly bear on the weight of his testimony. Stein was admonished to be "low key, brief, and to the point" on cross-examination.

Mr. Stein then began to question Peck about his preparation of a memorandum dated April 21, 1975, the earliest report over his name that had been produced at the deposition. When Stein inquired if this was the earliest writing Peck had prepared for Kodak, the economist replied in the negative. The jury was excused as Kodak for the first time produced a letter dated November 25, 1974, from Peck to a member of the team of Kodak attorneys. The contents of the document, marked as PX 666, were stunning, for in it Peck admitted that he had not yet formulated a fully persuasive answer to two questions:

1. On what economic grounds can the 1915 court decision be rejected as irrelevant to the present situation?

[139]**

2. On what economic grounds can the argument that Kodak's dominant position since 1915 is not based on superior skills be rejected?

In short, the missive, which examined various aspects of the 1915 "decree," conceded that the anticompetitive conduct found in the court's opinion could not be ruled out as at least a partial explanation of Kodak's present market position. Attempting to explain why this explosive document had not been produced earlier, Doar stated that he did not believe it was within the scope of Magistrate Schreiber's order. Kodak had therefore never acknowledged that the letter existed.

Mr. Stein, of course, immediately requested permission to delve into Peck's knowledge of the circumstances surrounding the **[*307]** concealment and sudden appearance of the letter. Counsel also renewed his request that the 1915 "decree" itself be admitted into evidence to rebut Peck's assertions. Since Kodak's own expert had indicated that it might be relevant to the present day market, Judge Frankel admitted portions of the "decree" and ruled that Stein could inquire of Peck how it had come about that he had overlooked PX 666 when he stated in his deposition that he **[**140]** did not recall having written any letters prior to April 1975. Peck replied that he had forgotten that the letter existed. Stein then read excerpts from Peck's deposition testimony, establishing before the jury that Peck continued to send materials to Donovan Leisure after learning that they were not being preserved.

But the most striking revelation of all was still to come. Judge Frankel asked Kodak's counsel to search its files over the weekend of January 7-8 for any other relevant documents. On Monday morning, out of the presence of the jury, Mr. Doar made known his discovery that in fact all the documents that Perkins told Berkey had been destroyed still existed. Moreover, Peck, who had steadfastly maintained that his own files on the case were empty, discovered during the weekend copies of two documents including PX 666 that he had forwarded to Kodak's attorneys. Expressing his concern over the "delicate and troublesome" issues raised by these disclosures, Judge Frankel advised the attorneys that he believed the incident bore on Peck's credibility. Accordingly, he ruled that Mr. Stein should now be permitted to cross-examine Peck on his relations with Perkins.

Stein questioned **[**141]** Peck in some detail. Although the economist steadfastly denied he had deliberately concealed the fact that he had studied the 1915 decision, he conceded that Berkey was kept in ignorance of the fact. Peck agreed that a Kodak attorney had probably shown him the three-page summary of the documents on which he relied before it was submitted to Berkey at his deposition. The 1915 "decree" was not on the list. At the time of Peck's deposition, Stein pointed out, the professor had failed to recall the existence of PX 666 and had denied retaining copies of any of his working papers although his weekend search had uncovered a copy of the letter, which referred throughout to the Western District decision.

Stein also inquired into the circumstances of Peck's delivery of his papers to Perkins, and established that the material was sent to Perkins with impending discovery proceedings in mind, rather than merely because of the confidential nature of the documents. Additionally, Stein established that, although Peck had stated in his deposition of April 1977 that he did not recall when he first learned that documents were being destroyed, in fact he had discovered this fact only weeks before he **[**142]** was deposed. Counsel then went on to question Peck about the decree and its bearing on his testimony concerning the origins of Kodak's market position.

Kodak argues that Judge Frankel committed prejudicial error in allowing even limited reference to the 1915 court "decree," and A fortiori in permitting cross-examination of Peck on the subject of the alleged destruction of documents. But because the scope of cross-examination, especially when it pertains to the credibility of witnesses, is peculiarly within the province of the trial court, See *Lewis v. Baker, 526 F.2d 470, 475 (2d Cir. 1975)*, and in light of the exceptional circumstances we have recited, we cannot say that Judge Frankel's rulings constituted an abuse of discretion.

As the trial court's continuing efforts to reassess the balance of prejudice and probative value of the 1915 "decree" attest, this question was not susceptible of facile resolution. But we think it clear that when PX 666 came to light the scales were decidedly tipped in favor of the limited admissibility that he approved. The Peck letter demonstrated that Kodak's lone expert witness had seriously considered the relevance of the market activities described **[**143]** in the 1915 "decree" to the present market structure of the industry, and that he had serious doubts whether the violations found there could be **[*308]** safely characterized as irrelevant to Kodak's current power in the marketplace.

We are also of the view that the cross-examination of Peck remained within permissible channels, particularly in light of the extraordinary revelations that preceded it. Peck conceded at his deposition that he continued to forward research materials to Kodak's lawyers after learning they were destroyed upon receipt, thereby providing more than a sufficient threshold showing of relevance to permit further inquiry on cross-examination. Suspicion could only have been increased by the sudden appearance of PX 666, a letter of great importance to Berkey's efforts to impeach Peck, which the writer claimed to have forgotten existed. And when Peck revealed on Monday that his files had contained a copy of this letter from the outset, deeper inquiry was certainly justified. As each new fact came to light, Judge Frankel carefully reassessed its relevance to Peck's credibility and gradually enlarged the scope of permissible inquiry into the witness's actions.

[144]** Mr. Stein's questions, therefore, far from consisting of the mere compendium of inflammatory rhetoric that Kodak describes, were legitimate challenges to Peck's credibility and to the independence of his judgment. [70.] Indeed, Judge Frankel, who throughout the unusual disclosures described here maintained an attitude of cautious restraint, noted in a colloquy with the attorneys that Peck's credibility had, in his judgment, been destroyed on the witness stand. To be sure, the jury need not have believed Berkey's argument that Peck had deliberately collaborated with Perkins in an effort to destroy or conceal documents unfavorable to Kodak's cause. But there was certainly more than an adequate basis to permit Berkey to contend that this inference was justified, and that, at best, Peck was a willing tool of Kodak.

[145]** We are not unmindful that the incidents described, as presented to the jury, led to the unfortunate consequence of casting Kodak's attorneys, and the defendant itself, in a highly unfavorable light. It is no less true, however, that the cross-examination elicited information that was highly relevant to an assessment of the independence of judgment and probity of one of Kodak's principal witnesses. [71.] ***HN24***[] Where the trial judge has taken great care to balance the probative value of the evidence against the prejudice that may accrue from its introduction, we think it inappropriate to substitute our judgment for his. See *Perel v. Vanderford, 547 F.2d 278 (5th Cir. 1977)*; *Hood v. United States, 125 U.S.App.D.C. 16, 365 F.2d 949, 951-52 (1966)*. [72.]

[146] [*309]** VII. ATTORNEYS' FEES AND COSTS

Under Section 4 of the Clayton Act, *15 U.S.C. § 15*, the successful plaintiff in a suit for treble damages may be awarded reasonable attorneys' fees. Judge Frankel awarded $ 5.3 million in counsel fees, calculated essentially on the hourly rate at which counsel agreed to bill their client. Berkey, which had asked for a fee of over $ 30 million, contends that because the trial court failed to take into account the difficulty of the litigation, the employment opportunities foregone by counsel, and the result achieved, the reduction of its request was arbitrary and must be reconsidered by this court. Judge Frankel's computation appears to be in conformity with the agreement between Berkey and Parker Chapin Flattau & Klimpl, its principal counsel in this case. [73.] **[**147]** And were it not for our holdings on appeal we would be inclined not to disturb this award. [74.] But inasmuch as we have reversed the

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[70.] A careful reading of the transcript reveals one brief interchange that was not relevant to Peck's own veracity, but only to that of Perkins himself. Peck was asked if he now was aware of the falsity of the representations Perkins made to Berkey that all the expert's papers had been destroyed. Peck replied that he did know this. Although we believe that the reference to Perkin's dissembling and Peck's present knowledge of it was immaterial, we do not think that this dialogue, or the reference to it in Mr. Stein's summation, was so prejudicial as to warrant a new trial. It was proper to argue to the jury that Peck played a role in the attempt to conceal information from Berkey, and to urge the jury to infer that Peck was either aware, or consciously chose not to recognize, that material was not in fact being destroyed, but withheld. The sole additional fact that it was Perkins who actively misrepresented the facts to Berkey was, at worst, incremental. We do not think that Kodak has met its heavy burden of demonstrating that this interchange, standing alone, caused it prejudice so severe as to call for reversal. See, e. g., *Gray v. Shell Oil Co., 469 F.2d 742, 751-52 (9th Cir. 1972)*, Cert. denied, ***412 U.S. 943, 93 S. Ct. 2773, 37 L. Ed. 2d 403 (1973)***.

[71.] See *Walker v. Firestone Tire & Rubber Co., 412 F.2d 60 (2d Cir. 1969)* (expert may be cross examined concerning falsity of testimony in earlier unrelated trial).

[72.] We have examined Kodak's other objections to the conduct of the trial and believe they are without merit. We also find insubstantial Kodak's contentions that the Sherman Act and the treble damages provision of the Clayton Act are unconstitutional on their face. Moreover, we do not think that our interpretation of the former statute has effected a fundamental alteration of the law of monopolization. Accordingly, we reject the view that the Sherman Act is unconstitutional as applied to the facts of this suit. See generally *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 495-502, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*.

[73.] In a letter dated March 4, 1976, Mr. Stein of Parker Chapin wrote to co-counsel that "the client has no commitment to any of the firms representing it in the case to pay a contingent fee or to compensate us on any measure other than time and effort expended." Moreover, despite the trial court's repeated requests, counsel failed to provide any information from which the judge could determine the size of the "success premium" Berkey allegedly agreed to pay its law firm.

[74.] Because of the conclusions we have reached on appeal, we have decided not to award costs to either party.

judgment for Berkey on its single most significant claim, and have remanded other claims for a new trial, it is plain that the award of attorneys' fees must be vacated for reconsideration by the district court. [75.]

[148]** VIII. SUMMARY

The disposition of this appeal may be summarized in schematic form as follows:

The Court below	This Court's holding
1. Awarded Berkey $45,750,000 treble damages for lost profits on 110 cameras.	Reversed.
2. Awarded Berkey $167,100 treble damages for lost photo finishing profits.	Reversed and remanded for a new trial.
3. Awarded Berkey $57,000 treble damages for excessive prices paid for photo finishing equipment.	Reversed and remanded for a new trial.
4. Awarded Berkey $34,500,000 treble damages for excessive prices paid for film.	Reversed and remanded for a new trial.
5. Granted judgment n.o.v. to Kodak on Berkey's claim for damages for excess prices paid for color print film	Reversed and remanded for a new trial.

[75.] Since the question was neither briefed nor argued, we do not decide under what circumstances a court may award fees for time expended by counsel on claims that ultimately prove unsuccessful. Compare *Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490, 493 (D.Mass.1963)*, Set aside on other grounds sub nom. *Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir.)*, Cert. denied, ***379 U.S. 931, 85 S. Ct. 329, 13 L. Ed. 2d 343 (1964)*** *With Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 483 (S.D.N.Y.1970)*, Modified on other grounds, *449 F.2d 51 (2d Cir. 1971)*, rev'd on other grounds, *409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)* And L. Sullivan Supra, at 794.

Judge Frankel also awarded Berkey $ 343,794.97 in costs, comprising court costs taxable under ***28 U.S.C. § 1920***, and certain expenses incurred in taking depositions. This award must also be vacated and reconsidered by the district court. We do make two observations for the guidance of the court below. Berkey's contention that the trial court erred in refusing to allow reimbursement for expert witness fees is clearly foreclosed by our decision in *Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 81 (2d Cir. 1971)*, rev'd on other grounds, *409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)*, in which we indicated that the only costs recoverable by a successful plaintiff in a private antitrust suit are those normally allowable under ***28 U.S.C. § 1920*** and *Fed.R.Civ.P. 54(d)*. Accord, *Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.)*, Cert. denied, ***379 U.S. 880, 85 S. Ct. 143, 13 L. Ed. 2d 87 (1964)***. Similarly, Berkey may not recover as costs of suit its expenditures for use of a computer retrieval service.

The Court below	This Court's holding
($8,803,000, pretrebling, awarded by the jury).	
6. Held that Kodak has violated § 1 of the Sherman Act by conspiring with Sylvania and General lectric in the introduction of the magicube and flipflash systems.	Affirmed. Because the flipflash conspiracy was not made a separate subject of damages at the first trial, a retrial is necessary to determine the resultant damages.
7. Awarded Berkey $990,000 treble damages for lost camera sales in 1970 resulting from the magicube conspiracy.	Affirmed.
8. Granted Kodak judgment n.o.v. on Berkey's claim for damages in 1971 arising from the same conspiracy ($1,417,330, pretrebling, awarded by the jury).	Reversed and remanded for a new trial on damages only.
9. Granted Berkey equitable relief.	Vacated and remanded for further proceedings consistent with this opinion.
10. Awarded Berkey attorneys fees and costs of $5,627,209.47.	Vacated for further consideration on remand.

[149]**

Neugebauer v. A. S. Abell Co.

United States District Court for the District of Maryland

June 25, 1979

Civ. No. Y-75-776

Reporter

474 F. Supp. 1053 *; 1979 U.S. Dist. LEXIS 11487 **; 1979-2 Trade Cas. (CCH) P62,933; 5 Media L. Rep. 1945

Robert F. Neugebauer v. The A. S. Abell Company, William Schmick, Jr., President, J. Stephen Becker, Vice-President and Business Manager, B. Herbert Reynolds, Circulation Director and Arthur A. Knapp, Supervisor and Manager of Home Delivery, Robert H. Cavanaugh, Director of Marketing, James Kotan, Representative, John Brockmeyer, District Advisor.

Core Terms

newspapers, monopoly, relevant market, monopolization, products, carriers, termination, retail price, manufacturer, delivery, distributor, antitrust, retail market, customers, prices, wholesale price, wholesale, squeeze, wholesale market, solicitation, retail, delivery service, home delivery, cross-elasticity, subscription, anti trust law, defendants', substitutes, deliver, papers

LexisNexis® Headnotes

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

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

To prevail in a claim of attempted monopolization, plaintiff must demonstrate that the defendant committed acts with specific intent to monopolize trade in the relevant market, and that there is a dangerous probability that the defendant will succeed in its attempt to monopolize the relevant market.

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

HN2[] **Regulated Practices, Market Definition**

Relevant market is defined in terms of product and geography. Defining a given product market requires that the definition be broad enough to include all substitutes yet narrow enough to exclude non-substitutes. The concept of substitutability requires an assessment of consumer use of the product in order to determine what other products are price sensitive to changes in the price of the original product so as to constitute interchangeable goods for the original product. The presence of substitutes within a given product market can have the effect of constraining monopoly pricing, since a monopolist's attempt to raise his price above a competitive level will, given substitution, prompt competitors already in the market or facing low entry barriers to begin underselling the monopolist. An economist assesses substitution by measuring the cross-elasticity of demand for a given product within the trade, and the cross-elasticity of demand may be defined as the percentage change in the quantity demanded of a product resulting from a small percentage change in the price of the product.

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

HN3[] **Monopolies & Monopolization, Actual Monopolization**

Illegal power must be appraised in terms of the competitive market for the product. Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others.

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

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

Trademark Law > Conveyances > General Overview

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

HN4[] **Ownership & Transfer of Rights, Assignments**

A manufacturer has a natural monopoly over his own products, especially when the products are sold under trademark. Unless the manufacturer used his natural monopoly to gain control of the relevant market in which his products compete, the antitrust laws are not violated.

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

HN5[] **Regulated Practices, Market Definition**

A single manufacturer's products might be found to comprise, by themselves, a relevant market for the purpose of a monopolization claim, if they are so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed.

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

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

HN6[] **Monopolies & Monopolization, Actual Monopolization**

Every manufacturer has naturally a complete monopoly of his particular product especially when sold under his own private brands.

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

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

HN7[] **Monopolies & Monopolization, Actual Monopolization**

A manufacturer is not forever bound to use the same system of distribution when sound business considerations suggest that a different method be used. Thus, a manufacturer can lawfully terminate an independent distributor and therefore sell exclusively through its own outlets.

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

HN8[] **Regulated Practices, Market Definition**

Proof of the relevant market is essential in an attempted monopolization case as well as a monopolization case.

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

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

HN9[] **Monopolies & Monopolization, Attempts to Monopolize**

It is well settled that a manufacturer may discontinue dealing with a particular distributor for business reasons which are sufficient to the manufacturer, and adverse effect on the business of the distributor is immaterial in the absence of any arrangement restraining trade.

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

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

Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

HN11[] **Remedies, Damages**

A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. A refusal to deal becomes illegal under the Sherman Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.

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**

A primary responsibility provision is not invalid unless it violates the rule of reason.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN13[] **Judgment as Matter of Law, Directed Verdicts**

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent may play leading roles. The standard for granting a judgment notwithstanding a verdict under *Fed .R. Civ. P. 50* is the same as that for granting a motion for a directed verdict. Accordingly, directed verdicts must be reviewed carefully in light of the standard which asks whether, viewing the evidence in the light most favorable to the non-moving party and without weighing the credibility of the witnesses, a reasonable jury could have reached but only one conclusion as to the verdict.

Counsel: **[**1]** Arnold Fleischmann, John A. Austin, and Charles E. Rosolio, Towson, Md., for plaintiff.

Edmund P. Dandridge, Jr., and J. Frederick Motz, and Richard L. Wasserman, Baltimore, Md., for defendants.

Opinion by: YOUNG

Opinion

[*1057] The plaintiff, Robert F. Neugebauer, has been an authorized carrier for the delivery of newspapers published by the defendant, the A. S. Abell Company, ("Abell"), under the direction of the named defendants. Abell publishes three newspapers, the Morning Sun, Evening Sun, and Sunday Sun ("Sunpapers") which have over ninety percent of their circulation in the Baltimore Standard Metropolitan Statistical Area ("SMSA") consisting of Baltimore City and Anne Arundel, Baltimore, Carroll, Harford and Howard counties. This more "urban" area of the Sunpapers' market is known as the Primary Market Area ("PMA"). Since November 8, 1956, plaintiff has been an authorized carrier, having purchased his delivery business, known as "Route 155" with defendants' approval and consent. In purchasing the route, plaintiff obtained the right to buy Sunpapers from the defendants and, in turn, sell them to customers located in a designated territory known as the area of "primary **[**2]** responsibility."

By an amended complaint in six counts, [1] plaintiff charged defendants with various antitrust violations in their dealings with him. The principal allegation is that defendants have acted to "squeeze" plaintiff out of the home delivery business by increasing the wholesale price charged for their newspapers. Since defendants also sell their newspapers directly in the retail market themselves through vending machines on the street and through their own direct delivery service, plaintiff claims that defendants' raising of the wholesale price has reduced his profits so as to drive him out of the home delivery business.

[3]** The case was tried before a jury for four days, and after some eight hours of deliberations, the jury was unable to agree upon a verdict. Prior to sending the case to the jury, the Court had denied defendants' motions for directed verdicts. Defendants have now renewed these motions by filing a Motion for Verdict under *Rule 50(b) of the Federal Rules of Civil Procedure*. After reviewing the evidence in this case, including the trial transcript, this Court will grant defendants' motion for a directed verdict and enter judgment accordingly.

I. THE FACTS

Since purchasing the delivery route, plaintiff has been continually involved in the servicing of his contract area, an operation which he claims is a full-time, seven-day-a-week business and which involves the assistance of his wife and some part-time employees in collecting the subscription price, sending out bills, and maintaining seven-day answering services. Plaintiff's difficulties began around May 8, 1968 when defendant Abell raised its wholesale rate for the newspapers sold to him. Five days later, plaintiff raised the retail price to his contract area's customers. By raising his prices, plaintiff was then charging his customers **[**4]** a rate in excess of Abell's suggested home delivery price, presumably to maintain his previous profit margin. This pattern continued for each increase of Abell's wholesale price thereafter.

Plaintiff alleges that in October, 1968, Abell began to retaliate for his failure to abide by the suggested prices and initiated a direct delivery solicitation of customers in Neugebauer's contract area to persuade plaintiff's customers to terminate their delivery service with him and enter into a cheaper direct subscription agreement with Abell. This solicitation period for direct delivery service continued until 1972. Plaintiff claims that Abell's solicitors informed his customers that the same delivery service was directly available from the Sunpapers at a lower subscription price.

Since Abell operates its direct delivery service at a loss, plaintiff suggests the only motivation for commencing the solicitation and direct delivery system was to retaliate **[*1058]** for plaintiff's unilateral price decisions and to coerce him into abiding by Abell's suggested rates. Thus, plaintiff faced the problem of being caught in a "price squeeze" since Abell set both the retail price charged to consumers **[**5]** as well as the wholesale price charged to carriers such as Neugebauer. If Neugebauer had to pay more for his newspapers at wholesale and could not pass on the price increase because of Abell's upper limit on the retail prices, then obviously he had to absorb the difference through decreased profits. Plaintiff alleges that the harm caused by Abell's price squeeze continues even now and serves to allow Abell to coerce plaintiff and other authorized carriers to adhere to Abell's suggested retail prices and to permit Abell to attempt to monopolize the newspaper retail market. Plaintiff submits that since Abell had no appropriate or substantial business reason for establishing the direct home delivery system, its activities were motivated by the misuse of its monopoly power in the PMA. He also asserts that defendants were in part motivated to take these actions against him because of his position in the Carriers Council, a group of independent newspaper carriers within the Sunpapers' Route Owners' Association, and as Chairman of the Maryland Independent Newspaper Distributors Association.

Defendants have responded arguing that they have never attempted to subject plaintiff to a price **[**6]** squeeze, and that they lack the requisite monopoly power to effectuate the practices of which plaintiff complains. Plaintiff's

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[1] The six counts are (1) price fixing and monopolization, *15 U.S.C. § 1*, *(2)* end use restrictions, *15 U.S.C. § 1*, *(3)* exclusive dealing, *15 U.S.C. § 14*, *(4)* price discrimination, *15 U.S.C. § 13a*, *(5)* monopolization, *15 U.S.C. § 2*, and *(6)* violations of the Maryland Antitrust Laws, Md.Com.L.Code Ann. § 11-204(a) & (b). By Memorandum and Order dated April 5, 1978, this Court granted defendants' motion for summary judgment as to counts 1 and 4 only.

theory amounts to an allegation that by virtue of its ability to control retail and wholesale prices, Abell is creating a price squeeze which has the effect of eliminating the wholesale market entirely.

Abell admits that plaintiff is an authorized carrier under contract to deliver Sunpapers to homes in a designated area of the Linthicum section of Anne Arundel County, an area within the PMA. When plaintiff entered into his present contract with Abell in 1972, Abell was using its own employees to deliver Sunpapers to some home subscribers in plaintiff's area. Abell has apparently continued the delivery service but does not solicit for it and has undertaken direct delivery service to new subscribers only at their specific request.

While Abell acknowledges its decision to raise its wholesale prices in May, 1968, it claims that the subsequent solicitation program has been mischaracterized by plaintiff. Toward the end of July, 1968, Abell, at its own expense, sent solicitors into plaintiff's area to make a door-to-door solicitation for subscriptions; however, **[**7]** Abell conducted this campaign at plaintiff's then-prevailing rates and turned over any new subscriptions to him. Transcript at 320-21. Three months later, faced with a serious decline in subscriptions, Abell decided to try to expand its circulation on a limited basis by soliciting in areas adjacent to those served by the independent authorized carriers. Abell offered these subscriptions at its then-prevailing suggested home delivery prices in areas where it already had responsibility for home deliveries. People hired as solicitors received explicit instructions to be followed "Without any deviation " and were told by Arthur Rode, the person in charge of solicitations in Baltimore City, that they were not to be competing with the independent carriers:

> I want to stress that you are not to make any attempt to take present subscribers away from the carrier. However, in the event the customer voluntarily expresses her dissatisfaction over her present service or price, we can then offer our services and prices direct to her from The Sunpapers.

Instructions for Solicitors from Arthur Rode (emphasis in original). See also Rode Affidavit of October 25, 1977. The record further **[**8]** indicates that when one of Abell's solicitors ignored these instructions, he was promptly dismissed from service.

II. PLAINTIFF'S THEORY OF THE CASE

Given Abell's direct delivery solicitation program, plaintiff concludes that Abell has acted so as to ensure itself a monopoly in the relevant newspaper Wholesale market. Since Abell is the sole distributor of Sunpapers **[*1059]** in the Baltimore Metropolitan Area, it constitutes plaintiff's sole source of supply. Plaintiff's theory about monopolization in the newspaper wholesale market is premised upon his claim that each of the separate Sunpapers editions (Morning, Evening, and Sunday) constitutes a unique product for which there is no substitute in the Baltimore market. In other words, Abell controls a one-brand market which has no effective substitute or competition. According to plaintiff, Baltimore's News American, an afternoon newspaper, appeals to a substantially different customer and is not a substitute for the Sunpapers.

Plaintiff also advances the novel theory of the Sunpapers competing directly with itself by selling at one price to the wholesale buyer (Neugebauer) and at another, higher, price to the retail buyer **[**9]** (the consumer). [2.] Increasing the wholesale price effectively reduces an independent carrier's profit by reducing the overall spread between wholesale and retail prices. By making plaintiff's activities uneconomical, Abell can then effectively terminate his wholesale activities and have the retail market all to itself.

[2.] In the Memorandum accompanying his Motion for Summary Judgment, at 19, plaintiff argued as follows:

Abell, a monopolist in the newspaper wholesale market in the Baltimore Metropolitan Area, in competing with plaintiff for customers on his route, has in effect sold newspapers to itself at the retail level of distribution and by virtue of its monopoly power at the wholesale level, has made it impossible for plaintiff to compete with the price charged by Abell through its direct delivery system.

Plaintiff raised the same point again in his Trial Memorandum at 18. As will be explained below, this argument makes sense only on the assumption that Abell can be found to have a "natural monopoly" of its own products in violation of the antitrust laws.

[10]** As the case went to trial, two main issues were to be presented to the jury: (1) whether the defendants were guilty of monopolizing the newspaper wholesale market in violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and *(2)* what that market consisted of. In order to make these determinations, the Court must first consider the nature of the market which plaintiff is claiming defendants monopolized.

III. RELEVANT MARKET

A. Proving a product market

HN1[] To prevail in a claim of attempted monopolization, plaintiff must demonstrate that the defendant committed acts with specific intent to monopolize trade in the relevant market, and that there is a dangerous probability that the defendant will succeed in its attempt to monopolize the relevant market. *Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 49 L. Ed. 518 (1905)*; *American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*.

Plaintiff contends that for the purposes of determining whether Abell has violated the anti-monopoly provisions of *15 U.S.C. § 2*, the relevant market must be narrowly construed to include Only the Sunpapers rather than some broader market **[**11]** which might include other newspapers regularly available in the SMSA such as the Washington Post, the News American, the Washington Star, the Annapolis Capital, and numerous community newspapers, as well as broadcast media like radio and television. Obviously, the narrower the market, the easier it is to show "possession of monopoly power in the relevant market." *United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 1699, 16 L. Ed. 2d 778 (1966)*.

According to plaintiff, there are several reasons for considering the Sunpapers alone to constitute the relevant product market. First, and somewhat obviously, no one other than Abell can supply the Sunpapers. Second, there are no other major newspapers which adult independent carriers can deliver in the Baltimore Metropolitan Area. [3.] Third, plaintiff claims that his contract **[*1060]** with Abell effectively prevents him from delivering other papers on his route. Finally, Abell publishes the only morning newspaper available for home delivery in the Baltimore Metropolitan Area. Thus, plaintiff's relevant market contentions relate to both the nature of the products sold and the area in which they are sold.

[12]** ***HN2***[]

Relevant market is defined in terms of product and geography. [4.] *United States v. E. I. duPont de Nemours, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* (hereinafter cited as the Cellophane case). Defining a given product market requires that the definition be broad enough to include all substitutes yet narrow enough to exclude non-substitutes. The concept of substitutability requires an assessment of consumer use of the product in order to determine what other products are price sensitive to changes in the price of the original product so as to constitute interchangeable goods for the original product. The presence of substitutes within a given product market can have the effect of constraining monopoly pricing, since a monopolist's attempt to raise his price above a competitive level will, given substitution, prompt competitors already in the market or facing low entry barriers to begin underselling the monopolist. An economist assesses substitution by measuring the cross-elasticity of demand for a given product within the trade, and the cross-elasticity of demand may be defined as "the percentage change in the quantity demanded of a product resulting from a small percentage **[**13]** change in the price of the product." R. A. Posner, Antitrust 437 (1974). See also C. E. Ferguson, Microeconomic Theory 106-08 (3d ed. 1972).

For example, if the price of a morning newspaper increased slightly and resulted in a large increase in consumer demand for afternoon or evening papers (or even a morning newspaper from a different publisher) the latter would constitute substitutes for the former, and the presence of interchangeability would demonstrate elastic demand. Conversely, if the newspapers were poor substitutes for each other, a small price rise in one would have little if any

3. The News American employs a different delivery system which primarily utilizes young boys and girls, known as "Little Merchants," who provide independent delivery services. Some adult carriers, however, are also used. Transcript at 246, 366.

4. The parties have agreed that the relevant geographical market is the PMA, or the Baltimore Metropolitan area.

impact on demand for the other. The concept of cross-elasticity of demand relates to the ability to use monopoly pricing as follows:

> The higher the cross-elasticity of demand between two products, the less will be the ability of a sole seller of one of the products to raise his price without suffering a **[**14]** reduction in sales volume so great as to offset the positive effect of the higher on profits.

R. A. Posner, Supra, at 438.

The Cellophane Court expressly sanctioned this cross-elasticity of demand analysis, recognizing that its application was necessary in order to determine if there had been monopolization:

> ***HN3***[] Illegal power must be appraised in terms of the competitive market for the product.
>
> Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.

351 U.S. at 393, 76 S. Ct. at 1006. In addressing the relevant market aspects of the case, the Court reasoned as follows:

> When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. . . .
>
> But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be part of the market. . . . What is called for is an **[**15]** appraisal of the "cross-elasticity" of demand in the trade. . . . The varying circumstances **[*1061]** of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal.

351 U.S. at 394-95, 76 S. Ct. at 1006-7.

Defining cross-elasticity of demand may be theoretically simple, however actually measuring it in a particular market presents certain practical difficulties. As a result, courts have wisely followed the Supreme Court's lead in recognizing the availability of certain "proxies" which may be indicative of the contours of a specific "market." Noting that the tests to be applied remain constant although the individual market being studied may vary, the Cellophane Court proposed that a market would be "composed of products that have reasonable interchangeability for the purposes for which they are produced price, use and qualities considered." 351 U.S. at 404, 76 S. Ct. at 1612.

The Supreme Court's **[**16]** subsequent application of the Cellophane test has emphasized the relevance of use and qualities rather than price elasticity [5.] and has developed into a functional interchangeability test eschewing the inconclusiveness of microeconomic data for the more practical but perhaps subjective standard of use and qualities. In *United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*, the Court rejected defendants' arguments that burglar alarm services were not interchangeable with fire alarm services and therefore could not be included in the same market of central station protection services. The Court, after looking at the use for which the various devices were intended, concluded that:

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5. Reliance on price elasticity has been discussed in E. Gellhorn, ***Antitrust Law*** and Economics 123-25 (1976) and R. A. Posner, Supra, at 438-41.

> there is here a single use, I. e., the protection of property, through a central station that receives signals. It is that service, accredited, that is **[**17]** unique and that competes with all the other forms of property protection. We see no barrier to combining in a single market a number of different products or services where the combination reflects Commercial realities. To repeat, there is here a single basic service the protection of property through use of a central service station that must be compared with all other forms of property protection.

384 U.S. at 572, 86 S. Ct. at 1704 (emphasis added).

B. Plaintiff's natural monopoly theory

At trial, plaintiff attempted to prove that the relevant product market was the wholesale newspaper market in the PMA. In advancing this argument, plaintiff suggested, however, that the monopolization was occurring at the Retail level. See Plaintiff's Trial Memorandum at 7-9. Presumably plaintiff means that by squeezing out plaintiff from the wholesale market, Abell can somehow further its attempt to monopolize the retail market. Yet this explanation makes no sense at all since, as a matter of law, defendant Abell would, under certain conditions, be perfectly capable of eliminating plaintiff altogether without a "squeeze" and without any antitrust liability. As will be explained **[**18]** below, Abell could do this directly by unilaterally ending its independent carriers program in order to conduct all home deliveries itself. In advancing his theory even further, plaintiff tries to show that the Sunpapers is a one-brand market, however, insofar as plaintiff contends that Abell constitutes the scope of the relevant market because it is the sole source of Sunpapers, plaintiff has merely stated the obvious while proving nothing.

Conceivably, plaintiff could show that consumers' preferences and willingness to buy a product regardless of how high its costs may create such an inelastic product that it is a one-brand market, I. e., one with no substitution. To demonstrate this, however, plaintiff would have the Court believe that Abell faces no competition whatsoever **[*1062]** from the News American and three other daily papers, a large number of weekly community papers, four television stations and several radio stations. See Transcript at 119A-20 (admission of such multimedia competition by plaintiff's expert witness). Each type of media is in the business of disseminating news to the general public, and from the "commercial realities" standard of *Grinnell, supra*, **[**19]** it would be exceedingly myopic to conclude that the Sunpapers and, say, the News American or perhaps even the Washington Post, are not basically fulfilling similar functions and are to some degree price sensitive in the Baltimore area.

The essential fallacy in plaintiff's argument, however, lies in his attempting to define the relevant product market not on the basis of commercial realities such as use and quality of the item but rather on the basis of the distribution system utilized by Abell. If accepted, the logic of plaintiff's argument would mean that the definition of the product market would turn on How defendant Abell distributed its product rather than on the nature of what was being distributed. [6] Additionally, plaintiff's theory would premise liability on the presence of two types of alleged monopoly, with monopoly again being defined in terms of the product distribution system. The first monopoly is that which defendant has over its own product when sold at wholesale. The second monopoly, one which plaintiff has failed to prove, is that acquired in competing with other products in the relevant market. Obviously, by definition, no one competes with Abell at wholesale: **[**20]** plaintiff can purchase Sunpapers for resale only from Abell because no one else makes them. Yet this type of "monopoly" is clearly not the sort forbidden by the antitrust laws.

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6. Plaintiff's arguments concerning demand cross-elasticities show a flaw parallel to that manifested in his attempt to define the relevant market in terms of the newspaper distribution system. For example, plaintiff contends that cross-elasticity of demand in the wholesale market is zero because each Sunpaper is a unique product unavailable from any supplier other than Abell. This argument is nothing more than the "natural monopoly" argument which, as a matter of law, fails to allege a violation of the antitrust laws. Plaintiff reasons that since He cannot demand Sunpapers from anyone other than Abell, Abell has no competition from possible substitutes. This logic would sap Cellophane and Grinnell of any meaning whatsoever and would hardly comport with Grinnell's requirement that "commercial realities" be evaluated. When these realities are considered, it becomes readily apparent that the relevant market for the application of the antitrust laws and cross-elasticity of demand principles is the newspaper retail market.

[21]** This conclusion follows directly from the ruling in *Bushie v. Stenocord Corporation, 460 F.2d 116 (9th Cir. 1972)*, which affirmed the trial court's grant of summary judgment as to counts alleging violations of *sections 1* and *2* of the Sherman Act. In Bushie, plaintiffs were terminated from their position as distributors of Stenocord dictating machinery products. The defendant had hired an employee to help vertically integrate its operation. Arguing that Stenocord was the relevant market, plaintiff advanced the theory "that the exclusive control which Stenocord has over the sale and servicing of Stenocord products, as a result of the termination of his dealership, constitutes a monopoly proscribed by Section Two." *460 F.2d at 120*. The court, however, held otherwise: "***HN4***[] A manufacturer has a "natural monopoly over his own products, especially when the products are sold under trademark . . . .' (Citation omitted). Unless the manufacturer used his natural monopoly to gain control of the relevant market in which his products compete, the antitrust laws are not violated." Id. (emphasis added). The analogy to the instant case is clear. Plaintiff Neugebauer, as a wholesale distributor of **[**22]** Sunpapers, faces a "natural monopoly" when dealing with Abell at the wholesale level. Yet, in arguing that the wholesale market is the relevant market, plaintiff must also show how the natural monopoly there somehow turns into an Illegal monopoly in the retail market which lessens competition in some impermissible, perhaps even predatory, manner.

[*1063] The Bushie court further amplified its explanation of the plaintiff's erroneous antitrust theories:

> ***HN5***[] A single manufacturer's products might be found to comprise, by themselves, a relevant market for the purpose of a monopolization claim, if they are so dominant In the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed. Cf. United States v. United Shoe Machinery Corp. (D.C.), *Supra, 110* F. Supp. (295) at 341-344; Industrial Building Materials, Inc. v. Interchemical Corp. (9 Cir.), *Supra, 437* F.2d (1336) at 1344. There is no suggestion in this case, however, that Stenocord dominated the market for office dictating machines generally, or that it controlled a major share of the market for machines of its **[**23]** particular type. To the extent that Bushie's argument suggests that the "relevant market" to be used in considering Stenocord's market share is to be arrived at by disregarding those other sellers of dictating equipment whose products are similar, both in design and function, because Bushie did not "consider" them competitors, we reject it. It is only by excluding such competition from the determination of the relevant market that Bushie hopes to show a market in which Stenocord would be the dominant figure. Since none of his proof would establish a "dangerous probability" of monopolization (*American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S. Ct. 1125, 90 L. Ed. 1575* . . .) in a properly defined market, summary judgment was proper.

460 F.2d at 121 (emphasis added). This passage makes it clear that the relevant market is the "market in which (the products) compete" which in the instant case is the retail market since, as plaintiff in effect argues, the wholesale market in Sunpapers is a natural monopoly lacking competition. It is clear, then, that for purposes of proving the relevant market, plaintiff has confused the natural monopoly in the wholesale market **[**24]** with the type of monopoly in the competitive retail market which, if found, might be the basis for imposing antitrust liability. [7.]

[7.] Plaintiff's Trial Memorandum, at 5, displays the confusion of relevant markets in the following passage:

Under any interpretation of the term "relevant market" it is clear that Abell has monopoly power in the newspaper wholesale market. First, Abell is the sole supplier of the Sunpapers and by reason of this fact, plaintiff and other authorized carriers have no alternative source of supply for their business, regardless of the wholesale price Abell charges them for the newspapers. Even under the broad DuPont definition for plaintiff's purpose there are no other products that are reasonably interchangeable because of the nature of his contractual relationship with Abell and the nature of the business in general. The Sunpapers is a "unique and distinctive" product to him because if he wishes to remain in his current business as a Sunpapers authorized carrier, the Sunpapers are the only product available to him for resale to his customers. For this reason, the situations in which the courts have defined the relevant market as simply the single product of the defendant is clearly applicable here.

The real issue raised here is whether plaintiff and Abell actually compete in the newspaper wholesale market. Plaintiff claims that they do and argues that defendant Abell, when selling at retail itself, establishes a stipulated "shadow" wholesale price for its own newspapers. In other words, plaintiff claims that Abell the wholesaler sells Abell papers to Abell the retailer. See note 2 Supra. Plaintiff must invent such a fictional wholesale price in order to overcome the natural monopoly argument; however, his efforts in this respect are belied by the cases, such as Bushie, which recognize that such a natural monopoly is not actionable under the antitrust laws. See Transcript at 129 where one of plaintiff's expert witnesses comments that "(plaintiff), in fact, is

[25]** These conclusions find support in numerous other cases which have rejected the notion that a natural monopoly in a case such as this can be converted into an illegal monopoly. See, e.g., *Carlo C. Gelardi Corp. v. Miller Brewing Co., 421 F. Supp. 237, 244 **[*1064]** n.11 (D.N.J.1976)*; V. & *L. Cicione, Inc. v. C. Schmidt & Sons, Inc., 403 F. Supp. 643, 651 (E.D.Pa.1975)*, *Aff'd, 565 F.2d 154 (3d Cir. 1977)*; *Allied Electric Supply Co. v. Motorola, Inc., 369 F. Supp. 133, 138 (W.D.Pa.1973)*; *A-1 Business Machine Co. v. Underwood Corp., 216 F. Supp. 36, 37 (E.D.Pa.1963)*. This issue was explicitly addressed by Judge Chestnut in *Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 828 (D.Md.1938)*:

> ***HN6***[] Every manufacturer has naturally a complete monopoly of his particular product especially when sold under his own private brands, and no private controversy with a distributor could legally tend to increase that type of a natural monopoly. The Sherman Act is, therefore, clearly not really involved.

See also *Mogul v. General Motors Corp., 391 F. Supp. 1305, 1314 (E.D.Pa.1975)*, *Aff'd, 527 F.2d 645 (3d Cir. 1976)*; *Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899, 906* (D.Md.), **[**26]** *Aff'd, 239 F.2d 176 (4th Cir. 1956)*, Cert. denied, *355 U.S. 823, 78 S. Ct. 30, 2 L. Ed. 2d 38 (1957)* (". . . a real monopoly in the commodity (is necessary) and not the natural monopoly which a manufacturer has in his own product").

A recent Fifth Circuit case, *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)*, also undercuts plaintiff's argument that the relevant product market is the Sunpapers alone. In H & B, a distributor sued a manufacturer who had commenced a direct distribution system of its own in competition with distributor-plaintiff's. Plaintiff alleged that the manufacturer wanted to drive him out of business in order to monopolize the hydraulic excavator market. Affirming the lower court's directed verdict for defendant, the Fifth Circuit held that "(t)he hydraulic excavator market . . . cannot be confined to International Harvester products alone." At 242. The Court required that other rival producers in the hydraulic excavator market also be considered. Having found that the relevant product market was at the retail level, the H & B court held that plaintiff had failed to prove the market share necessary to establish a monopoly: **[**27]**

> (H & B) introduced no statistics on the number and size of firms in the market, and every hint the record gives indicates International Harvester's market position fell far short of being dominant.

Id. at 243. See also *Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110, 121 (E.D.N.Y.1976)* (test of relevant product market in area of "effective competition in which the defendant operates").

Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D.Cal.1974), is persuasive authority for this Court's findings as to plaintiff's theories of antitrust liability and relevant product market. In Knutson, plaintiffs were independent dealers who purchased, distributed, and resold daily newspapers. As in the instant case, plaintiffs bought the papers at wholesale from the publisher. The defendant publisher established retail subscription charges which the independent dealers could then charge their customers. Although they had acquiesced in defendants' suggested pricing policies, the plaintiff dealers complained about the illegality of the price-fixing and other restraints and were terminated by the publisher which instituted its own in-house distribution facilities. **[**28]** Although plaintiffs were offered jobs as salaried district managers, they refused the offer and instead challenged the distribution practices under the antitrust laws.

Despite having found evidence of price-fixing under the independent dealership arrangement, the court held that there was no evidence of conspiracy or other ***antitrust law*** violations so as to make illegal the termination of the independent dealers. *383 F. Supp. at 1361*. The court held that:

> ***HN7***[] a manufacturer (is not) forever bound to use the same system of distribution when sound business considerations suggest that a different method be used. Thus, a manufacturer can lawfully terminate an independent distributor and therefore sell exclusively through its own outlets.

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paying the higher wholesale price. Now, we can't see directly what wholesale price the Sun charges itself; that is not something you can't (sic) document because the sale never takes place." Defendant has a natural monopoly at the wholesale level, and it is this fact, plus the fact that defendant also distributes at the retail level, which constitutes the basis of plaintiff's grievance.

383 F. Supp. at 1360-61. In pressing these section 1 claims, plaintiffs, like Neugebauer here, had to explain the scope of the relevant **[*1065]** product and geographic market; however, the court found their definition that the relevant product markets were community or suburban daily newspapers in specified areas of southern Alameda county was too narrow:

> While plaintiffs contend that the relevant product and geographic markets are community **[**29]** or suburban daily newspapers in specified areas of southern Alameda County where defendants publish the only community daily papers, the Court finds that this asserted market definition fails to take into account the cross-elasticities of demand among the community, satellite and metropolitan daily newspapers which circulate in southern Alameda County as well as the other media (television, radio, and free and controlled circulation papers) which competes for advertising in that area. See *United States v. duPont & Co., 351 U.S. 377, 393-400, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *United States v. Grinnell Corp., 384 U.S. 563, 571-576, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Plastic Packaging Materials, Inc. v. Dow Chemical Co., 327 F. Supp. 213, 229-230 (E.D.Pa.1971)*; *United States v. Chas. Pfizer & Co., 246 F. Supp. 464 (E.D.N.Y.1965)*.

383 F. Supp. at 1360 n.16. The Knutson court's reasoning is particularly relevant insofar as the instant case is concerned because in making its findings as to cross-elasticities and the presence of illegal restraints of trade, the court specifically based its findings on facts peculiar to the individual business involved. *383 F. Supp. at **[**30]** 1361*. Taking these factors into consideration, the Knutson court found substantial evidence of competition between Bay area newspapers and other forms of communications media in the vicinity. *383 F. Supp. at 1366*. [8] **[*1066]** In

[8] In making these factual findings, the Knutson court distinguished the holding in ***Bowen v. New York News, Inc., 366 F. Supp. 651, 675-76 (S.D.N.Y.1973)***, Aff'd in pertinent part, rev'd in part, *552 F.2d 1239 at 1242 (2d Cir. 1975)*. In Bowen, the trial court found that the daily paper in question there was a distinct line of commerce having no real substitute. The court specifically rejected the defendant's efforts to show that other media competed with the newspaper; however, it did recognize the existence of competition from numerous other newspapers. Yet the cases which the court relied on for this narrow definition of the relevant product market were premised upon factual determinations of the particular record. ***366 F. Supp. at 675 n.56***.

The issue presented in this case can be looked at in two ways: (1) whether defendants have shown the existence of the high cross-elasticity of demand which they claim is present, or (2) whether plaintiff has succeeded in showing the narrow relevant product market and low cross-elasticity needed to support his antitrust claims. This Court made it clear to plaintiff what his burdens were in its earlier ruling on the parties' cross-motions for summary judgment. Because plaintiff has failed to meet this initial burden, the Court does not have to reach a finding that defendants' description of their competition necessarily extends to other media. See *Knutson, 383 F. Supp. at 1366 n.24*.

Finally, Bowen undermines plaintiff's claim here that in his dealings with defendants he was functioning as a wholesaler. The trial court found that "franchise dealers also function as wholesalers in selling to their carrier boys," and that the News acted as a "wholesaler" in selling to various retail dealers and independent wholesalers. ***366 F. Supp. at 666***. The appeals court rejected the trial court's reasoning and went on to interpret "wholesaler" in terms of commercial realities: in determining whether a party to a Fair Trade Agreement is a "wholesaler," we must look to whether the franchisee buys for the purpose of reselling in gross and whether the persons to whom he sells actually resell at retail.

Judged by these standards, the franchise dealer here performs no true "wholesale" functions. Unlike the normal wholesaler, who buys in bulk and distributes to a broad spectrum of independent merchants who then resell for their own profits, here the Carrier Agreement clearly contemplates "sales" only to home subscribers. Although Paragraph (a)(5) of the McGuire Act prohibits Fair Trade agreements between wholesalers, its thrust is the prevention of price fixing between those in competition with sellers at the same functional level. *United States v. McKesson & Robbins, Inc., 351 U.S. 305, 313, 76 S. Ct. 937, 100 L. Ed. 1209*. Even accepting the characterization of the transactions involved here as "resales" by the franchise dealers to the delivery boys, the distribution was exclusively through the franchise dealers to the delivery boys, so that The News, however its function is described, would never be engaged in selling directly to delivery boys or to home subscribers and thus would not have any occasion to agree with competing sellers upon the resale price. It would therefore be anomalous to classify as "wholesalers" buyers whose resales are solely to a narrow group of this nature. 522 F.2d at 1251 (footnote omitted). Although the court's reasoning was framed with reference to the McGuire Act's prohibitions of unfair methods of competition, *15 U.S.C. § 45(a)*, its conclusions are generally applicable to the present case. While both Neugebauer and defendants sold directly to home subscribers there has been no evidence of any conspiracy, or unfair or anticompetitive practices insofar as defendants' light of these authorities, plaintiff has not demonstrated that the relevant product market should be narrowly defined so as to include only the Sunpapers.

[31]** In the instant case, not only is there no basis for concluding that the wholesale market is the relevant product market, but there is no evidence showing that Abell has a dominant share of the newspaper retail market in the PMA. [9.] At trial defendants demonstrated that they face effective competition in the PMA from the News American, the Annapolis Evening Capital, the Washington Post, the Washington Star, plus weekly papers, radio, and television, Transcript at 443, 449, and plaintiff himself admits the presence of such competition in paragraph nine of his Amended Complaint. [10.] Plaintiff has not shown that Abell does not face substantial competition in the market for which its product was intended, I. e., the newspaper retail market. Furthermore, plaintiff has not shown that the Sunpapers are so unique as to create a one-brand market, and plaintiff cannot meet this burden by showing either that Abell has a natural monopoly of its own product or that the particular distribution system employed somehow makes the Sunpapers unique. *Telex v. International Business Machines Corp., 510 F.2d 894, 917-19* (10th Cir.), Cert. dismissed, *423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)*; **[**32]** *Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974)* (Stevens, J.); *Bushie v. Stenocord Corp., supra* ; *Nelligan v. Ford Motor Co., 262 F.2d 556 (4th Cir. 1959)*; *Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S.App.D.C. 161, 243 F.2d 418*, Cert. denied, *355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 (1957)*; *H. L. Moore Drug Exchange v. Eli Lilly & Co., 457 F. Supp. 75 (S.D.N.Y.1978)*; *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 (1977)*, V. & *L. Cicione, Inc. v. C. Schmidt & Sons, Inc., 403 F. Supp. 643 (E.D.Pa.1975)*, *Aff'd, 565 F.2d 154 (3d Cir. 1977)*; *Mogul v. General Motors Corp., 391 F. Supp. 1305 (E.D.Pa.1975)*, *Aff'd, 527 F.2d 645 (3d Cir. 1976)*; *Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H.1974)*; *Allied Electric Supply Co. v. Motorola, Inc., 369 F. Supp. 133 (W.D.Pa.1973)*; *Cal. Distributing Co. v. Bay Distributors, Inc., 337 F. Supp. 1154 (M.D.Fla.1971)*; Brewer Sewing Supplies Co. v. Fritz Gegauf, Ltd., 1970 Trade Cas. P 73,139 (N.D.Ill.1970); *E. A. Weinel Construction Co. v. Mueller Co., 289 F. Supp. 293 (E.D.Ill.1968)*; *South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650 (N.D.Ill.1965)*; *A-1 Business Machine **[**33]** Co. v. Underwood Corp., 216 F. Supp. 36 (E.D.Pa.1963)*; *Johnny Maddox Motor Co. v. Ford Motors Co., 202 F. Supp. 103 (W.D.Tex.1960)*; *Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899* (D.Md.), *Aff'd, 239 F.2d 176 (4th Cir. 1956)*, Cert. denied, *355 U.S. 823, 78 S. Ct. 30, 2 L. Ed. 2d 38 (1957)*.

[34]** Having failed to show that defendants have exercised monopoly power in the relevant product market, plaintiff has obviously **[*1067]** failed to show that this power created a "dangerous probability" of success in controlling prices and excluding competition. *Swift & Co. v. United States, 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518 (1905)*. See also *E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305 (10th Cir. 1975)*, Cert. denied, *425 U.S. 907, 96 S. Ct. 1501, 47 L. Ed. 2d 758 (1976)*; *McElhenney Co. v. Western Auto Supply, 269 F.2d 332, 339 (4th Cir. 1959)*. The Supreme Court has held that ***HN8***[] proof of the relevant market is essential in an attempted monopolization case as well as a monopolization case. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*.

IV. A SQUEEZE WAS UNNECESSARY

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behavior has been concerned. The testimony at trial showed that defendants began their home delivery solicitations to increase circulation and not to deprive plaintiff of any customers.

9. Defendants note that in H & B, supra, plaintiff attempted to establish a submarket consisting solely of one particular International Harvester model. The court concluded that while the 3960 model was sold only by International Harvester, this fact was insufficient to create an issue for the jury. Accordingly, defendants note that there is no evidence that the Sunpapers is unique enough in the newspaper market to constitute a proper submarket. Defendants' Memorandum In Support of Motion for Directed Verdict at 16 n.13.

10. Paragraph 9 of the Amended Complaint refers to the News American as "another high quality newspaper of general circulation in the Baltimore area with a circulation almost as great as that of the Sun. . . ." Plaintiff continues, adding that "(o)ther papers from nearby cities such as the Washington Post do compete at retail with the Sun but account for a relatively small portion (5%-25%) of the job market sales in the area which constitutes defendant's marketing area."

Even more detrimental to plaintiff's cause than his mistaken theories about relevant market is the fact that defendant Abell could eliminate independent carries directly, without resorting to a squeeze tactic, and still be immune from antitrust liability. The fact that plaintiff and defendant may compete in their retail **[**35]** pricing in and of itself is not contrary to the antitrust laws, unless, of course, predatory tactics or other anticompetitive practices are employed to destroy competition in order to permit prices to rise in the long run. Yet, again, why would defendants want to wipe out plaintiff through costly and frequently wasteful predatory pricing when they could simply terminate his carrier position by fiat?

Because Abell has a natural monopoly over its own product, the extent of any retail competition is obviously dependent upon the will of Abell. See *United States v. Klearflax Linen Looms, 63 F. Supp. 32, 38 (D.Minn.1945)*, Citing *Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 456-57, 42 S. Ct. 150, 66 L. Ed. 307 (1922)* (Holmes, J., dissenting). At trial it was argued that since Abell depended on advertising revenue rather than subscription revenue for 80 to 85% Of its income it did not need to begin a direct delivery campaign and that consequently the only motive for direct delivery was Abell's intent to monopolize the newspaper retail market. Testimony showed, however, that Abell's solicitation program was simply intended to generate additional revenue to offset the **[**36]** effect of recent circulation losses. There was no evidence that Abell intended to monopolize the newspaper retail market or drive plaintiff out of business. See Transcript at 263-66.

As an integrated industry, Abell made and sold directly its own product. In doing so, it also made use of independent carriers such as plaintiff in a delivery or distribution system which also utilized street sales and direct home delivery. Although termination of a dealership, franchise or other type of distribution system might, in particular situations, give rise to actions sounding in contract law, the termination standing by itself is not necessarily an antitrust violation.

The Bushie court, Supra, not only faced a so-called natural monopoly situation but also dealt with a set of facts involving termination of plaintiff's retail dealership. Holding that such termination was proper absent evidence of conspiracy to eliminate competition in the relevant product market, the court reasoned as follows:

> ***HN9***[] It is well settled that a manufacturer may discontinue dealing with a particular distributor "for business reasons which are sufficient to the manufacturer, and adverse effect on the business of **[**37]** the distributor is immaterial in the absence of any arrangement restraining trade." *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*; *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)*, cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755*, reh. denied, *397 U.S. 1003, 90 S. Ct. 1113, 25 L. Ed. 2d 415*; *Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918 (9th Cir. 1968)*, cert. denied, *391 U.S. 916, 88 S. Ct. 1810, 20 L. Ed. 2d 654*.
>
> True, the effect of the agreement was to eliminate Bushie as a Stenocord dealer. **[*1068]** But this alone would not support a conclusion that Stenocord's motive was anticompetitive. A manufacturer is free to agree with a third party to give him an exclusive distributorship "even if this means cutting off another distributor," *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd., supra, 416 F.2d at 76*, so long as in doing so there would be no resulting restraint of trade. *Ricchetti v. Meister Brau, Inc., supra.* To hold otherwise would be to "saddle (defendant) with (plaintiff's) services forever." *Cartrade, Inc. v. Ford **[**38]** Dealers Advertising Ass'n, 446 F.2d 289, 294 (9th Cir. 1971)*. Bushie's proof shows, and Stenocord admits, an agreement; but it does not show that the agreement was for any purpose prohibited by Section One.

460 F.2d at 119-20. See also *Lorain Journal v. United States, 342 U.S. 143, 155, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*; *Associated Press v. United States, 326 U.S. 1, 15, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; *United States v. Bausch & Lomb Co., 321 U.S. 707, 721-23, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)*; *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*. The Fourth Circuit reached a similar conclusion in a franchise cancellation case where it held that:

> ***HN10***[] Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in

> damages for refusing to deal with one who is unwilling to enter into an unlawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege, **[**39]** the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

McElhenney Co. v. Western Auto Supply Company, 269 F.2d 332, 337 (4th Cir. 1959) (Sobeloff, C. J.). See also *Marquis v. Chrysler Corp., 577 F.2d 624, 640 (9th Cir. 1978)* (Citing *Bushie, supra*); *Call Carl, Inc. v. BP Oil Corporation, 403 F. Supp. 568, 574-76 (D.Md.1975)* (Young, J.), Aff'd in part, rev'd in part, *554 F.2d 623* (4th Cir.), Cert. denied, *434 U.S. 923, 98 S. Ct. 400, 54 L. Ed. 2d 280 (1977)*.

In *Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110 (E.D.N.Y.1976)*, a truck distributor and its subsidiary lessor brought an antitrust action against International Harvester Co. ("Harvester") claiming that the latter was conspiring to eliminate them as retailers of Harvester products. Holding that there was no conspiracy in restraint of trade and that the relevant market could not consist solely of the brand of vehicle produced only by Harvester, the court noted that "Harvester could unilaterally have driven Diehl out of the market for Harvester products, as it ultimately did on April 21, 1975." *426 **[**40]** F. Supp. at 117*. Insofar as any restraint of trade was concerned, the court reasoned as follows:

> Thus, even assuming that some conspiracy did exist between Harvester and someone else to eliminate Diehl and TRAC as retailers of Harvester products, such conduct is without antitrust significance. No antitrust objective would be served by holding that a manufacturer cannot terminate its independent distributors and replace them with its own distribution system, absent a showing that the termination was designed to further some collateral prohibited activity, such as, enforcing a tying arrangement, eliminating price-cutters, or creating or strengthening a monopoly position, see *Bushie v. Stenocord Corp., 460 F.2d 116, 119 (9th Cir. 1972)*; *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283, 287* (6th Cir.), cert. denied, *375 U.S. 922, 84 S. Ct. 267, 11 L. Ed. 2d 166 (1963)*, none of which are even arguably present here.

426 F. Supp. at 119 (footnote omitted). See also *Marquis, supra, 577 F.2d at 640*; *Knutsen v. Daily Review, 548 F.2d 795, 803 (9th Cir. 1976)*; *Chisholm Bros. Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1143* (9th Cir.), Cert. denied, **[**41]** **[*1069]** *419 U.S. 1023, 95 S. Ct. 500, 42 L. Ed. 2d 298 (1974)*; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969)*; Cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755* Reh. denied, *397 U.S. 1003, 90 S. Ct. 1113, 25 L. Ed. 2d 415 (1970)*.

Ace Beer Distributors, supra, involved a situation in which a brewer allegedly conspired to destroy one distributor's business by terminating its franchise and conducting its business through another distributor. As the court concluded,

> That, without the results proscribed by the Sherman Act, is not a violation of the Act. ***HN11***[] A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992*. A refusal to deal becomes illegal under the Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. *United States v. Parke, Davis & Co., 362 U.S. 29, 32, 80 S. Ct. 503, 4 L. Ed. 2d 505*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219*; *Lorain **[**42]** Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162*. The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.
>
> Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted "restraint of trade" within the meaning of *Section 1* of the Sherman Act, there is no violation of the Act.

318 F.2d at 286-87. Both Diehl and Ace Beer would seem to be dispositive authority for the outcome of the present case: while the impact of Abell's activities may have been detrimental to plaintiff, there has been no showing whatsoever that it was "designed to further some collateral prohibited activity." Diehl, supra, 426 F. Supp. at 119.

V. PLAINTIFF'S EXPERT WITNESSES

There is every good reason to believe that if plaintiff had sold Sunpapers at a price which maintained His prior profit spread and exceeded Abell's suggested retail price, he would have incurred circulation losses which would likewise, in turn, have hurt **[**43]** the Sunpapers. He obviously could not charge more than Abell's direct delivery service charged or he would have lost sales to Abell directly. Hence, the Sunpapers' suggested retail prices put an upper limit on plaintiff's ability to compensate for this declining profit margin due to the increase in wholesale prices to him. As his wholesale prices increased, his profit margin therefore decreased.

At trial, plaintiff called two expert witnesses to testify to the economic impact of Abell's activities upon his independent carrier business. One of the experts, Dr. Paul Gallagher explained that the problem which plaintiff faced was two-fold: (1) after May, 1968 his profit margin began to decline because (2) Abell would not raise its retail price so as to maintain the profit spread which existed before it raised its wholesale price to Neugebauer. Abell's refusal to raise its retail price similarly meant that plaintiff could not raise his retail price, and he found himself caught in a squeeze between a fixed upper retail price and a gradually escalating wholesale price. While Dr. Gallagher's explanation of the squeeze on Neugebauer made sense in terms of its overall effect, his testimony **[**44]** as to damages recoverable by plaintiff made very little sense at all. In moving to strike Dr. Gallagher's testimony, defendant explained that there was a "logical fallacy" in the expert's conclusion that plaintiff should recover damages including lost profits because plaintiff was prevented from raising his retail price to maintain his profit spread.

As defendant Abell correctly pointed out, Dr. Gallagher stated at trial that plaintiff would have no case at all against Abell if it **[*1070]** had continued to charge a retail price in its own direct delivery service which maintained its pre-May, 1968 profit spread. Presumably, doing this would enable plaintiff to continue to raise his prices whenever Abell increased its retail prices. Yet, defendant points out that the evidence shows that if Abell Had maintained this spread, its retail prices would have actually been Lower than the price Neugebauer actually charged. Transcript at 347-52. Consequently, plaintiff would have been forced to Lower not raise his prices to meet any effective competition from Abell. Defendant therefore concludes that plaintiff is not entitled to lost profits for his inability to Raise his price when **[**45]** Abell's hypothetically maintaining the pre-May, 1968 profit spread would have forced him to Lower his price. [11.] Transcript at 173-79, 201.

[46]** VI. THE REMAINING COUNTS

A. Territorial restriction

Plaintiff claims that his contract with Abell violates section 1 of the Sherman Act because of certain language therein which allegedly limits plaintiff's delivery activities to an "area of primary responsibility." Consequently,

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[11.] Although not explained clearly at trial, presumably Abell itself faced an upper limit on its own retail price, and this upper limit was set by competition from other newspapers selling or publishing in the PMA. Depending on the demand elasticity at the newspaper retail level, raising retail prices beyond a certain point might, given the slope of the demand curve, actually decrease overall revenues since the income lost from circulation decrease might well exceed that generated by the higher retail price. Looked at from a different perspective, "a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its "cost of distribution,' which it would prefer to minimize." Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56 n.24, 97 S. Ct. 2549, 2561, 53 L. Ed. 2d 568, citing Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum.L.Rev. 282, 283 (1975). See also Recent Cases, 88 Harv.L.Rev. 636, 641 (1975) ("generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues").

plaintiff alleges that he is effectively prevented from delivering newspapers outside the geographic area described in the contract. Nothing at trial indicated that plaintiff had either tried to deliver or had been prevented from delivering Sunpapers outside the area specified in the contract. Since ***HN12***[] a "primary responsibility" provision has been held not to be invalid unless it violates the rule of reason, *Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, plaintiff bore the burden of demonstrating the impropriety of such a restriction. Defendant, on the other hand, has argued that such a clause is reasonably related to its distribution goals such as customer referrals and servicing complaints. No anticompetitive effects have been demonstrated by plaintiff.

B. Exclusive dealing

Plaintiff's exclusive dealing arguments also submit allegations which **[**47]** are more hypothetical than real. Paragraphs 5(b) and 5(d) of plaintiff's contract with Abell require him to "devote substantially his full working time" to delivering Sunpapers in order to protect the newspaper's "good-will". The contract furthermore forbade him from "making simultaneous delivery of, or inserting in, attaching or placing with the newspapers any printed matter or material not supplied by Publisher. . . ." The latter restriction makes sense in terms of the defendant's wishes to retain its good-will and prohibits, therefore, Simultaneous delivery. Plaintiff is free, therefore, to make additional deliveries in any fashion other than simultaneously with his delivery of Sunpapers. Finally, testimony at trial showed that plaintiff and his family spend virtually all of their working time on the Sunpapers delivery route. Transcript at 12-18. Plaintiff has not alleged that he has endeavored to distribute other newspapers than the Sunpapers, that other newspapers are available for an independent adult carrier service, or that he **[*1071]** would have the time to make such distributions. Accordingly, these claims must fail.

C. Maryland ***antitrust law***

The Maryland Antitrust **[**48]** Act, Md.Com.L.Code Ann. §§ 11-201 through 11-213 is intended "to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest intrastate competition." Portions of the Maryland statute were "carefully and purposefully patterned after their counterparts in the federal law," General Revisor's Note to the Maryland Antitrust Act, and the specific section relied on by plaintiff, § 11-204(a) and (b), adds nothing new to his allegations brought under federal ***antitrust law***. Since plaintiff's federal cause of action must fail, his state claims which merely duplicate the federal ones must meet a similar fate.

VII. THE PROPRIETY OF A DIRECTED VERDICT

The Supreme Court has admonished that "***HN13***[] summary procedures should be used sparingly in complex antitrust litigation where motive and intent may play leading roles . . . ." *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. The standard for granting a judgment notwithstanding a verdict under *F.R.Civ.P. 50* is the same as that for granting a motion for a directed **[**49]** verdict. *Hawkins v. Sims, 137 F.2d 66, 67 (4th Cir. 1943)*. Accordingly, directed verdicts must be reviewed carefully in light of the standard which asks whether, viewing the evidence in the light most favorable to the non-moving party and without weighing the credibility of the witnesses, a reasonable jury could have reached but only one conclusion as to the verdict. *Brady v. Southern Ry., 320 U.S. 476, 479, 64 S. Ct. 232, 88 L. Ed. 239 (1943)*; *Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978)*; *Ralston Purina Co. v. Edmunds, 241 F.2d 164, 167* (4th Cir.), Cert. denied, *353 U.S. 974, 77 S. Ct. 1059, 1 L. Ed. 2d 1136 (1957)*; *Call Carl, Inc., supra, 403 F. Supp. at 576*. See also *Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 696, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*.

Plaintiff has brought this case under *sections 1* and *2* of the Sherman Act. To show an unreasonable market restraint under *section 1*, plaintiff must first isolate the relevant market which the alleged restraint affects. As already explained, plaintiff has failed to show that the relevant market is the newspaper wholesale market. Effective competition in terms of the commercial realities of the **[**50]** product involved in this case lies not in the area of natural monopoly but rather in the retail market.

Insofar as *section 2* is concerned, plaintiff claims that defendants monopolized or attempted to monopolize the relevant product market, that they did so with specific intent to monopolize, and that there was a dangerous probability of their succeeding. The definition of relevant market is, therefore, of immense relevance in examining an attempt to monopolize. *Walker, Inc. v. Food Machinery, 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*; *Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824, 844 (N.D.Ga.1976)*; *Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 379 (N.D.Ga.1975)*, *Aff'd, 535 F.2d 313 (5th Cir. 1976)*, Cert. denied, *429 U.S. 1096, 97 S. Ct. 1113, 51 L. Ed. 2d 543 (1977)*. Having failed in his claim as to the appropriate relevant market, plaintiff's *section 2* claim must meet a similar fate. Since the relevant market is the newspaper retail market and plaintiff has failed to show defendant's specific intent to drive out competitors, engage in unlawful predatory conduct, or have a dangerous probability of success, a directed verdict in **[**51]** defendants' favor is mandated. Additionally, there is no evidence in the record from which any of the relevant anticompetitive activities may be inferred. *Marquis, supra, 577 F.2d at 641*; *Knutson, supra, 383 F. Supp. at 1360*. While defendants may have harmed plaintiff by terminating his distributorship, this alone is insufficient to constitute a claim under the antitrust laws.

[*1072] Accordingly, it is this 25th day of June, 1979, by the United States District Court for the District of Maryland, ORDERED: That the defendants' motion for a verdict under *Rule 50(b) of the Federal Rules of Civil Procedure* dismissing the remaining counts of plaintiff's Amended Complaint be, and the same is, hereby GRANTED.

GRAMS v. BOSS

Court of Appeals of Wisconsin, District Iv

June 27, 1979

No. 78-567

Reporter

1979 Wisc. App. LEXIS 3472 *; 91 Wis. 2d 845; 282 N.W.2d 637

RICHARD GRAMS, RONALD GRAMS, and GRAMS INSURANCE SERVICES, INC., a domestic corporation, Plaintiffs-Petitioners, v. KENNETH J. BOSS, JACK A. KETTERHAGEN, FRANCIS E. BEGGS, KETTERHAGEN, BEGGS AND BOSS, INC., a domestic corporation, LaCROSSE GAROT-CHRISTMAN AGENCY, INC., a domestic corporation, and ASSOCIATED HOSPITAL SERVICES, INC., a domestic insurance corporation, Defendants-Respondents.

Notice: **[*1]** UNPUBLISHED LIMITED PRECEDENT OPINION

Prior History: APPEAL from orders of the circuit court for Dane County: P. CHARLES JONES, Circuit Judge. *Reversed.*

Disposition: *By the Court.* --Orders granting summary judgments reversed.

Core Terms

trial court, licenses, restraint of trade, hospital service, summary judgment motion, summary judgment, alleges, respondents'

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

Wis. Stat. § 133.01(1) provides in part: Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. *Wis. Stat. § 133.01* is an reenactment of the Sherman Antitrust Act with application to intrastate as distinguished from interstate transactions.

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

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

Wis. Stat. § 802.08(2) provides that summary judgment shall be rendered when no material facts are in dispute and only a question of law is presented.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

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

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

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

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

HN3[] Discovery, Methods of Discovery

Wis. Stat. § 802.08, entitled Summary Judgment, reads in part: (2) Motion . The motion shall be served at least 20 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

HN4[] Opposing Materials, Accompanying Documentation

The court first examines the moving papers and documents to determine whether the moving party had made a prima facie case for summary judgment under Wis. Stat. § 802.08(2).To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the plaintiff. If the defendant does not make out a prima facie case for summary judgment we need go no further. If the affidavit in support of the motion makes out a prima facie case for summary judgment we must then examine the affidavits in opposition to the motion. To defeat the motion the statute requires the opposing party to set forth facts showing that there is a genuine issue for trial.

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

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

HN5[] **Summary Judgment, Supporting Materials**

The supporting affidavits and documents, if any, of the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material must be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion must be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable men might differ as to its significance, it is improper to grant summary judgment.

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

HN6[] **Summary Judgment, Entitlement as Matter of Law**

Under the mandatory language of *Wis. Stat. § 802.08(2)*, an appellate court reviews the ruling of the trial court anew to determine if it erred and does not accord the trial court the wide discretion it had under the predecessor to *Wis. Stat. § 802.08*.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN7[] **Antitrust Actions, Facilities**

While a hospital service corporation may be subject to the ***antitrust law*** of *Wis. Stat. § 133.01*, the corporation is not subject to that law when acting within Wis. Stat. § 182.032, legislatively authorized acts and activities. In the latter event, the hospital service is held to automatically meet the "rule of reason" embodied in *Wis. Stat. § 133.01* through judicial interpretation.

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Insurance Law > ... > Company Representatives > Agents > General Overview

Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview

HN8[] **Healthcare Litigation, Antitrust Actions**

Wis. Stat. § 182.032(3)(d) (1973) provides that hospital service corporations are to be subject to Wis. Stat. § 200.26 (1973), which in turn provides that the corporations are to be subject to Wis. Stat. § 209.04(1) (1973). Wis. Stat. § 209.04(11), is the statute regulating insurance agents in the state.

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

HN9[] Regulated Practices, Trade Practices & Unfair Competition

Wis. Stat. § 133.01 declares that: Every contract or combination in restraint of trade or commerce is hereby declared illegal.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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

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

HN10[] Supporting Materials, Affidavits

Affidavits in a case alleging breach of contract, restraint of trade, and slander necessarily go to the intent of the parties, a question that ordinarily should not be determined on a motion for summary judgment.

Judges: Before Gartzke, P.J., Bablitch, J. and Dykman, J.

Opinion by: DYKMAN

Opinion

DYKMAN, J. The complaint in this action alleges three claims: breach of contract, conspiracy in restraint of trade, [1] and slander. This appeal concerns only the conspiracy in restraint of trade claim. The trial court granted the respondents' motions for summary judgment, and appeal is taken from the resulting orders.

The complaint alleges that the individual appellants are insurance agents and owners of appellant Grams Insurance Services, Inc., a Madison-based corporation engaged as a general agent in marketing **[*2]** hospital, health, and life insurance through its agents.

The individual respondents are agents and owners of respondent Ketterhagen, Beggs and Boss, Inc., a Madison-based corporation engaged as a general agent in marketing hospital, health, and life insurance through its agents.

The respondent Associated Hospital Services, Inc. (AHS) is a hospital service corporation organized under sec. 182.032, Stats. (1973), for the purpose of selling Blue Cross and Blue Shield hospital and medical insurance through general insurance agents and individual agents.

The individual appellants were at one time employed by respondent Ketterhagen, Beggs and Boss, Inc. In the spring of 1975, they opened their own business, Grams Insurance Services, Inc. AHS licensed Grams Services, Inc. to sell Blue Cross/Blue Shield, American Banker's Life, and HIC insurance. The complaint sets forth facts and

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[1] **HN1[]** *Section 133.01(1)*, Stats. provides in part:

Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal.

Section 133.01 is an reenactment of the Sherman Antitrust Act with application to intrastate as distinguished from interstate transactions. *Reese v. Associated Hospital Service, 45 Wis.2d 526, 532, 173 N.W.2d 661 (1970)*.

ultimately alleges that the respondents "agreed, combined and conspired" to cause the termination of the appellants' licenses to sell Blue Cross, American Banker's Life, or HIC insurance, and that the agreement among the respondents did result in the cancellation of appellants' licenses. The complaint **[*3]** alleges a conspiracy in restraint of trade in violation of *sec. 133.01*, Stats., and demands damages.

STANDARD OF REVIEW

The trial court granted AHS's motion for summary judgment because it was "persuaded that even if the allegations can be proved, recourse by the plaintiffs is pursuant to Ch. 207, *Stats.* and not Wisconsin's mini-Sherman Act *[sec. 133.01*, Stats.]." [2] The trial court stated that the appellants were alleging unfair competition or unfair practice and that this type of action was not contemplated under *sec. 133.01*, Stats.

The trial court granted the summary judgment motions of the other respondents because they were agents of AHS and subject to the same control of the Insurance Commissioner under **[*4]** ch. 207, Stats. (1973), and because the appellants' claim was in the nature of a ch. 207 unfair method of competition claim, not a *sec. 133.01*, Stats. (1973), restraint of trade claim.

HN2[] *Section 802.08(2)*, Stats., provides that summary judgment shall be rendered when no material facts are in dispute and only a question of law is presented. [3] The Wisconsin Supreme Court recently set forth the proper procedure in determining motions for summary judgments in *Kraemer Bros. v. United States Fire Insurance Co.,* Wis.2d , , N.W.2d (1979):

[*5] ***HN4***[] The court first examines the moving papers and documents to determine whether the moving party had made a *prima facie* case for summary judgment under *sec. 802.08(2)*.To make a *prima facie* case for summary judgment, a moving defendant must show a defense which would defeat the plaintiff. If the defendant does not make out a *prima facie* case for summary judgment we need go no further. If the affidavit in support of the motion makes out a *prima facie* case for summary judgment we must then examine the affidavits in opposition to the motion. To defeat the motion the statute requires the opposing party to set forth facts showing that there is a genuine issue for trial. *Leszczynski v. Surges, supra,* 30 Wis.2d at 538-540, 141 N.W.2d 261 (1966); *Marshall v. Miles, 54 Wis.2d 155, 194 N.W.2d 630 (1972)*.

HN5[] The supporting affidavits and documents, if any, of the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material must be viewed in the light most favorable to the party opposing the motion. *Adickes v. Kress & Co., 398 U.S. 144, 157-158* ***[*6]*** *(1970)*. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion must be denied. 6 Moore on Federal Practice, 56.15[3], p. 56-463 *et seq* (2d ed. 1976). If the material presented on the motion is subject to conflicting interpretations or reasonable men might differ as to its significance, it is improper to grant summary judgment. 10 Wright & Miller, *Federal Practice & Procedure: Civil* sec. 2725, p. 515 (1973); *United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)*; *Mogle v. Sevier County School Dist., 540 F.2d 478, 482 (10th Cir. 1976)*. (Footnote omitted.)

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[2] Chapter 207, Stats. (1973), provides for the regulation of "unfair insurance business methods." The chapter lists certain unfair methods of competition (sec. 207.04) and authorizes the insurance commissioner to hold hearings, and, if necessary, apply for cease and desist order in circuit court (sec. 207.09). Chapter 207 was replaced and recreated by ch. 371, sec. 25, Laws of 1975, effective June 17, 1976. The newer statute is not applicable to this case.

[3] *Section 802.08*, Stats., reads in part:

HN3[] 802.08 *Summary Judgment* .... (2) *Motion* . The motion shall be served at least 20 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

HN6[] Under the mandatory language of *sec. 802.08(2)*, Stats., this court reviews the ruling of the trial court anew to determine if it erred and does not accord the trial court the wide discretion it had under the predecessor to *sec. 802.08*. *Wright v. Hasley, 86 Wis.2d 572, 578, 273 N.W.2d 319 (1979)*.

In this case, it does not appear that the trial court followed the procedure set forth above. We proceed, nonetheless, to determine whether the trial court erred in granting **[*7]** respondents' motions for summary judgments.

The trial court impliedly ruled that the complaint did not state a claim under *sec. 133.01*, Stats., and that it was therefore unnecessary for the court to consider whether material facts were in dispute.

ASSOCIATED HOSPITAL SERVICES, INC.

Section 182.032, Stats. (1973), [4] under which AHS was organized, provides for the creation of hospital service corporations to ease the economic burden of the high costs of health care. Section 182.032(3)(d) and (5) reads:

(3) The articles of incorporation of any corporation organized under this section shall provide:

(d) *Such hospital service corporations,* heretofore or hereafter so formed and conducted, *shall be governed by the provisions* of this section and s. **[*8]** *200.26 and by no other law relating to insurance* unless such law is referred to in s.200.26 and no law hereinafter enacted shall apply to such plans unless they are expressly designated therein or refer to such corporations as are responsible for the operation of such plans.

(5) Such corporation shall be governed by ch. 181, and unless express reference is made in this section, or unless expressly designated therein, no law other than ch. 71 and ch. 73, shall apply to such corporation. Every such corporation, except for purposes of the franchise tax measured by net income, is hereby declared to be a charitable and benevolent corporation, and its property, real, personal and mixed, and the transfer of property to it by gift or inheritance, shall be exempt from taxation as provided in ss. 70.11, 72.15, and subch. IV of ch. 72, and its employees shall be excluded from the provisions of ch. 108 as provided in s.108.02. (Emphasis supplied.)

In *Reese v. Associated Hospital Service, 45 Wis.2d 526, 173 N.W.2d 661 (1970)*, the supreme court held that ***HN7***[] while a hospital service corporation may be subject to the ***antitrust law*** of *sec. 133.01*, Stats., the corporation **[*9]** is not subject to that law when acting "within sec. 182.032, legislatively authorized acts and activities." In the latter event, AHS is held to automatically meet the "rule of reason" embodied in *sec. 133.01* through judicial interpretation. *Reese, 45 Wis.2d 526, 532*.

It is apparent that if the actions alleged in appellant's complaint fall within the purview of "authorzed acts" under sec. 182.032, Stats. (1973), then a *sec. 133.01*, Stats., action against AHS cannot stand, and the only recourse of appellants is through a ch. 207, Stats. (1973), proceeding.

Appellants maintain that the activities alleged fall outside of the legislative authorization. The complaint in this matter alleges that AHS and the other respondents agreed, combined and conspired to cause the termination of appellants' licenses to sell Blue Cross, American Bankers Life or HIC insurance, that AHS entered into that conspiracy because of pressure from the other respondents, and that AHS did because of the pressure cancel plaintiffs' licenses and thereby restrained or prevented plaintiff insurance company from acting as a general agency for the sale of insurance. The complaint ultimately alleges a restraint **[*10]** of trade.

The licensing of agents is clearly within the authority of AHS. ***HN8***[] Section 182.032(3)(d), Stats. (1973), provides that hospital service corporations are to be subject to sec. 200.26, Stats. (1973), which in turn provides

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[4] In 1975, the legislature completely revised Wisconsin insurance law. Section 182.032, Stats., was repealed by ch. 223, sec. 4, Laws of 1975 effective May 5, 1976. Throughout this opinion, the citations to sec. 182.032, Stats. (1973), refers to the statute as it existed prior to May 5, 1976. out this opinion, the citation to sec. 182.032, Stats. (1973), refers to the statute as it existed prior to May 5, 1976.

that the corporations are to be subject to sec. 209.04(1), Stats. (1973). Section 209.04(11), is the statute regulating insurance agents in this state. The statutes, taken together with the purpose enunciated in sec. 182.032, show that AHS is authorzed to use independent agents in making contracts available to the public. Because the licensing or the refusal to license agents is within the authority of its enabling act, AHS is ordinarily not subject to suit under *sec. 133.01*, Stats., for activities related to licensing.

While licensing or the refusal to license is ordinarily protected under sec. 182.032, Stats. (1973), the complaint here does not merely challenge the termination of appellants' licenses. The complaint alleges that AHS conspired and combined to drive appellants out of the insurance business, in restraint of trade. In enacting sec. 182.032, Stats. (1973), the legislature did not authorize AHS to act in restraint of trade. The court **[*11]** in *Reese v. Associated Hospital Service, 45 Wis.2d 526*, recognized that when it held that only when AHS acts within legislatively authorized areas is it free from an antitrust claim. *Reese* rejects the view that sec. 182.032 "supersedes" any contrary policy of *sec. 133.01*, Stats., stating the argument uses "a meat cleaver to carve out a broad area of near-complete exemption from antitrust provisions where a scalpel can more effectively be used to permit a hospital service corporation to do exactly what the legislature has authorized, in fact required, it to do." *45 Wis.2d 526, 531-32*.

HN9[] *Section 133.01*, Stats., declares that "*Every* contract or combination in… restraint of trade or commerce is hereby declared illegal." (emphasis added). Because we believe that sec. 182.032, Stats. (1973), cannot be said to authorize AHS to intentionally drive general agents out of the insurance business, and because the complaint so alleges, we believe the complaint states a claim under *sec. 133.01*, Stats.

On the motion for summary judgment, both sides presented affidavits. ***HN10***[] Affidavits in this kind of case necessarily go to the intent of the parties, a question that **[*12]** ordinarily should not be determined on a motion for summary judgment. *Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183, 190, 260 N.W.2d 241 (1977)*. Because we conclude that appellants have stated a claim against AHS, and because the facts and inferences are disputed, we reverse the trial court's grant of AHS's motion for summary judgment.

OTHER RESPONDENTS

The trial court granted the remaining respondents' motions for summary judgment because they were agents of AHS, subject to the control of sec. 207, Stats. (1973), and because the appellants' claim was in the nature of a ch. 207 unfair method of competition claim, not a claim is restraint of trade. The trial court in effect granted respondents' motions because it had granted AHS's motion.

We reverse the trial court's grant of respondents' motions for summary judgment. The complaint alleges that the respondents conspired together in restraint of trade. Disposition of that claim rests in large part on the intent of the respondents, the determination of which is inappropriate on summary judgment.

We would reach this conclusion even if the trial court were correct in granting AHS's **[*13]** motion for summary judgment. In cases where sec. 182.032, Stats. (1973), does create certain "immunity" from *sec. 133.01*, Stats., for hospital service corporations, the question becomes whether that limited immunity extends to the agents of these corporations.

By enacting sec. 182.032, Stats. (1973), the legislature intended to put hospital service corporations in a position of competitive advantage as compared to commercial corporations providing hospitalization insurance. This "special category," referred to in *Reese v. American Hospital Service,* applies to the corporation, not to its agents.

There is no policy justification, much less a specific statutory provision, exempting general insurance agents from anti-trust law merely because they sell insurance policies written by AHS. The immunity accorded AHS in order to promote efficient, lower-cost insurance coverage does not logically extend to these general agents. [5]

The trial court concluded that because **[*14]** the respondents could be regulated under ch. 207, Stats. (1973), the appellants could not bring the private action under *sec. 133.01*, Stats. We do not view ch. 207 as providing an exclusive remedy, especially in light of the language of *sec. 133.01*: "*Every* contract or combination in the nature of a… restraint of trade or commerce is hereby declared illegal." (Emphasis added.) Chapter 207 does not limit the application of *sec. 133.01*.

Because we hold that appellants have stated a claim and that the inferences from the facts presented are disputed, we reverse the trial court's grant of summary judgment.The trial court on remand should enter orders denying the motions of the respondents.

By the Court.--Orders granting summary judgments reversed.

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[5] This is in accord with *Restatement (Second) of Agency sec. 347(1)* at 110 (1958): "An agent does not have the immunities of his principal although acting at the direction of the principal."

Fruehauf Corp. v. Federal Trade Com.

United States Court of Appeals for the Second Circuit

December 11, 1978, Argued ; June 28, 1979, Decided

No. 278, Docket 78-4053

Reporter

603 F.2d 345 *; 1979 U.S. App. LEXIS 13591 **; 1979-2 Trade Cas. (CCH) P62,733

FRUEHAUF CORPORATION, Petitioner, against FEDERAL TRADE COMMISSION, Respondent .

Prior History: [1]** Appeal by Fruehauf Corporation from a decision of the Federal Trade Commission holding that Fruehauf's acquisition of Kelsey-Hayes Company violated § 7 of the Clayton Act, *15 U.S.C. § 18*, and ordering Fruehauf to divest itself of all but a small portion of *Kelsey. 91 F.T.C. 132 (1978)*.

Disposition: Enforcement of the Commission's decision denied .

Core Terms

merger, wheels, trailer, manufacturers, spoke, truck, cast, competitors, sales, barriers, shortage, lessening, brake, firms, truck trailer, heavy duty, anticompetitive, producers, purchases, supplier, guidelines, antiskid, concentration, foreclosing, foreclosure, foundry, markets, top, vertical merger, products

LexisNexis® Headnotes

Administrative Law > Judicial Review > Reviewability > Factual Determinations

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

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1[] **Reviewability, Factual Determinations**

Upon review, the Federal Trade Commission's (Commission) findings of fact, if supported by substantial evidence, shall be conclusive, *15 U.S.C.S. § 21(c)*, and the reviewing court may not substitute its inferences for those drawn by the Commission simply because the court might have evaluated the facts differently as an original matter.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

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

The Clayton Act, *15 U.S.C.S. § 18* is intended to arrest a trade restraint or a substantial lessening of competition in its incipiency; it is not concerned with certainties. Requiring a plaintiff to prove that substantial lessening of competition is inevitable would thwart the express intent of Congress to nip anticompetitive practices in the bud before they blossom into a Sherman Act restraint of trade and would run counter to Congress' view that neither the Federal Trade Commission nor the courts should be charged with possession of powers of prevision that no one else has achieved. Yet there must be the reasonable probability of a substantial impairment of competition to render a merger illegal under *15 U.S.C.S. § 18*. A mere possibility will not suffice.

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

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

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN3[] **Vertical Restraints, Price Fixing**

A vertical merger, unlike a horizontal one, does not eliminate a competing buyer or seller from the market. It does not, therefore, automatically have an anticompetitive effect, or reduce competition. Accordingly, a vertical merger, as distinguished from price-fixing boycotts, or similar arrangements between competitors, does not amount to a per se substantial lessening of competition. Indeed, it may even operate to increase competition.

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

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN4[] **Antitrust Statutes, Clayton Act**

The fountainhead of Clayton Act, *15 U.S.C.S. § 18* analysis of vertical mergers, the competitive significance of a vertical merger results primarily from the degree, if any, to which it may increase barriers to entry into the market or reduce competition by (1) foreclosing competitors of the purchasing firm in the merger from access to a potential source of supply, or from access on competitive terms, (2) by foreclosing competitors of the selling firm from access to the market or a substantial portion of it, or (3) by forcing actual or potential competitors to enter or continue in the market only on a vertically integrated basis because of advantages unrelated to economies attributable solely to integration. The ultimate objective, however, is to determine whether and how the particular merger in issue may lessen competition, i. e., what its anticompetitive effect on the market, if any, is likely to be.

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN5[] **Antitrust & Trade Law, Clayton Act**

When a merger is challenged under the Clayton Act, *15 U.S.C.S. § 18*, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is the type Congress sought to proscribe.

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN6[] **Antitrust, Antitrust Statutes**

Most important among factors to be considered in predicting probable future conduct of parties and thus probable effects of merger are nature and economic purpose of the arrangement, likelihood and size of any market foreclosure, extent of concentration of sellers and buyers in industry, capital cost required to enter market, market share needed by buyer or seller to achieve profitable level of production (sometimes referred to as scale economy), existence of trend toward vertical concentration or oligopoly in industry, and whether merger will eliminate potential competition by one of merging parties. To these factors may be added degree of market power that would be possessed by merged enterprise and number and strength of competing suppliers and purchasers, which might indicate whether merger would increase risk that prices or terms would cease to be competitive. This list, with some variations, is the standard framework for analysis of legality of vertical merger.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN7[] **Public Enforcement, US Federal Trade Commission Actions**

The Federal Trade Commission bears the burden of showing the likelihood that the future effect of a merger may be substantially to lessen competition.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Agency Adjudication > Review of Initial Decisions

HN8[] **Judicial Review, Standards of Review**

The decision whether to reopen an administrative proceeding is within the complete discretion of the agency and will not be reversed except perhaps when an agency adheres to a decision in the face of an epochal change in conditions.

Counsel: John R. Ferguson, Washington, D. C. (William H. Wentz, Phillip A. Proger, Janine H. Coward, Timothy F. Bannon, Pettit & Martin, Washington, D. C., Walter, Conston, Schurtman & Gumpel, P. C., New York City, of counsel), for petitioner.

D. Barry Morris, Atty., F. T. C., Washington, D. C. (Michael N. Sohn, Gen. Counsel, Gerald P. Norton, Deputy Gen. Counsel, W. Dennis Cross, Asst. Gen. Counsel, F. T. C., Washington, D. C., of counsel), for respondent.

Judges: Before MANSFIELD and OAKES, Circuit Judges, and BARTELS, District Judge.[*]

Opinion by: MANSFIELD

Opinion

[*347] Pursuant to *15 U.S.C. § 21* Fruehauf Corporation ("Fruehauf"), the nation's largest manufacturer of truck trailers, petitions to review and set aside a decision and **[**2]** order of the Federal Trade Commission ("FTC") finding that Fruehauf's 1973 acquisition of Kelsey-Hayes Company ("Kelsey"), a manufacturer of components for the motor vehicle and related industries, violated § 7 of the Clayton Act, *15 U.S.C. § 18*, [1] **[**3]** and directing that Fruehauf divest itself of Kelsey's Auto Truck Group, the preponderant division of Kelsey, and that for 10 years Fruehauf not acquire, without prior FTC approval, any company engaged in manufacture, distribution, or sale of heavy duty wheels ("HDW"), truck trailers or heavy duty antiskid braking devices ("ASBD"). [2] **[*348]** *91 F.T.C. 132 (1978)*. For reasons set out below, we decline to enforce the divestiture order.

Both Fruehauf and Kelsey are based in Michigan, the former in Detroit and the latter in Romulus. In 1972 Fruehauf had truck trailer sales and rentals of $ 550 million and assets of $ 556 million. For the comparable period, Kelsey had net sales of its entire product line of $ 455 million and assets of $ 243 million. It is undisputed that the relevant geographic market is the United States and that the product markets in which it was found by the FTC that

[*] Of the United States District Court for the Eastern District of New York, sitting by designation.

[1] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ."

[2] Fruehauf also appeals the Commission's refusal to reopen consideration of its analysis of the impact of the merger on one of the relevant product markets in light of developments subsequent to the publication of its decision. *91 F.T.C. 1153 (1978)*. For reasons discussed within, see pp. 3489-3492, Infra, we need not decide whether this refusal to reopen was improper and, if so, whether we could order the Commission to reopen the proceedings.

competition may be substantially lessened as a result of the merger are those for (1) heavy duty wheels (HDW), (2) antiskid brake devices (ASBD), and (3) truck trailers. Kelsey manufactures heavy duty **[**4]** wheels and antiskid brake devices. Both of these products (HDWs and ASBDs) are sold to manufacturers of trucks and tractors (e. g., Ford, International Harvester, General Motors, Rockwell, Chrysler, Caterpillar), as well as to manufacturers of trailers (e. g., Fruehauf, Trailmobile). Fruehauf manufactures trailers for sale to truck fleets such as P.I.E. and United Parcel Service.

The Products

(1) HDW

A heavy duty wheel or HDW is the assembly connecting the tire to the axle of a vehicle. It consists of a center member, a rim, and a brake drum, which components can be bought as an assembled unit or separately from different manufacturers. There are two different wheel assemblies in use, which are not interchangeable. One is the cast spoke wheel, which consists of a "spider" or cast steel spoke center member with an integral hub, a brake drum, and a detachable rim or rims. The other is the disc wheel assembly, which consists of a steel center member or disc with rim permanently attached (by welding), a hub, and a brake drum. A spider with two rims performs essentially the same function as two disc wheels (with attached rims) and a hub.

(2) ASBD

The antiskid brake device or **[**5]** ASBD is a supplement to an air brake system which is designed to prevent wheel lock-up, and thereby possible skidding, during emergency braking. This sophisticated device consists of a sensor, a computer or logic module and a valve. The sensor (one at each end of the axle) determines the speed at which the wheel is actually rotating. The computer or logic module calculates the speed at which the wheel should be turning in order to achieve maximum braking efficiency. The logic can determine when a wheel lock-up is impending, and, on signal from the computer or logic, the valve regulates the air pressure to release the brakes momentarily and so prevents lock-up. These components are ordinarily, but not necessarily, produced by the same manufacturer.

The ASBD was developed as the result of a regulation issued by the National Highway Traffic Safety Administration of the Department of Transportation (NHTSA), which is known as Federal Motor Vehicle Standard No. 121 (Standard 121), *49 C.F.R. § 571.121*. Standard 121 sets forth performance standards for air-braked vehicles. It does not expressly require the use of ASBD, but experience proved that as applied to trucks Standard 121 could **[**6]** not be satisfied without the ASBD. See *Paccar, Inc. v. NHTSA, 573 F.2d 632, 639, n.26 (9th Cir. 1978)*, cert. denied, *439 U.S. 862, 99 S. Ct. 184, 58 L. Ed. 2d 172 (1979)*.

(3) Trailers

A truck trailer, of which thousands are seen on public highways, is a nonpowered vehicle, usually looking somewhat like a railroad box car on rubber-tired wheels, designed to be pulled by a power vehicle (truck tractor) and used for the purpose of transporting products over public highways. It consists essentially of a chassis or frame on wheels and a body attached to the frame. The principal purchasers of trailers are trucking fleets (such as United Parcel Service). Most fleets develop their own respective detailed specifications designating the components to be used in the manufacture **[*349]** of trailers to be used by them, which are then submitted to trailer manufacturers for bidding, rather than accept standardized designs or products made by any specific manufacturer.

The Markets

The ALJ and the Commission found that the Fruehauf-Kelsey merger might "substantially . . . lessen competition" in three product markets: the truck trailer market, the HDW market, and the ASBD market. In essence, **[**7]** they determined that the merger would impair competition in the trailer market by giving Fruehauf an advantage over other trailer manufacturers in obtaining a supply of HDWs, which have been subject to periodic shortages in the past. In the Commission's view the merger would also impair competition in the HDW and ASBD markets by foreclosing other competing manufacturers of these products from selling to Fruehauf and thus deterring expansion on the part of small existing competitors in these markets or the entry into these markets of new competitors. [3] See 91 F.T.C. at 228-29, 234-36. Fruehauf argues that the Commission's decision is factually erroneous, legally misguided, and economically groundless.

[8]** (1) Trailer Market

Before proceeding to Fruehauf's contentions, some pertinent information about the three relevant markets is essential. The total value of truck trailer shipments in the United States approximates $ 1 billion per year. In 1973 Fruehauf accounted for about 25% Of the sales, with the top four firms accounting for about 49% Of the truck trailer market and the top eight firms for 64%, respectively. Despite these figures there are scores of other firms engaged in trailer production. Moreover, these figures reflect a modest decline in the market shares of the leading firms in the period from 1968 to 1973, a period during which the dollar volume of sales steadily increased, due in part to inflation, and the quality of trailers improved. 91 F.T.C. at 153-54. HDWs are essential components in the construction of truck trailers, as are ASBDs if Standard 121 is to be in effect.

(2) ASBD Market

In 1975 and 1976 seven ASBD manufacturers competed in the ASBD market, which had total sales in 1975 of about $ 40 million. Kelsey, the leading firm in the ASBD market, accounted for 32.5% Of sales by unit, 28.6% By dollar volume. The two top firms accounted for over 50% Of total **[**9]** ASBD sales by unit in 1975, and the top four accounted for about 75%. In 1975 Fruehauf purchased 5.4% Of the ASBD market's unit volume, 4.7% Of the dollar volume. Id. at 207. There is evidence that prior to the 1973 Fruehauf-Kelsey merger, which took place before Standard 121 went into effect, Fruehauf was not expected to obtain its ASBD requirements from Kelsey because Kelsey lacked an in-axle sensor design. In 1975, however, Fruehauf purchased 42% Of its ASBD requirements from Kelsey. Id. at 150, 207.

The most critical information concerning the ASBD market, however, is not market shares or the costs of entry but the status of the government regulation which is the Raison d'etre of this market. Standard 121 was first proposed in 1967 and, after several postponements and revisions, went into effect in early 1975. [4] The record evidence leaves little doubt that truck tractor and trailer buyers will not order ASBDs unless required to do so by the government. Representatives of the trucking industry have protested that available antiskid devices **[*350]** used in order to comply with Standard 121 are so prone to malfunction that they create a greater hazard than the one they **[**10]** are intended to eliminate. See Paccar, supra, 573 F.2d at 637, 641-42.

In March 1978 NHTSA, bowing to this pressure, proposed a suspension of the "no lockup" requirement for truck trailers, *43 Fed.Reg. 9626* (March 9, 1978). If put into effect this suspension would remove the need for ASBDs. In the following month the Ninth Circuit enjoined enforcement of those parts of Standard 121 requiring installation of antilock devices (i. e., the stopping distance requirements for a vehicle traveling at 60 m.p.h.) until NHTSA had more persuasive evidence that the devices were reliable and effective. The court found that in light of the available evidence the standards necessitating installation of the devices were not "reasonable" and "practicable" as required by the enabling legislation. See 573 F.2d at 643; National Traffic and Motor Vehicle Safety Act of 1966, § 103(f), 15

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3 The Commission reversed the finding of the ALJ that the merger violated § 7 by removing Fruehauf as a potential entrant in the HDW market. The Commission found insufficient evidence that Fruehauf was likely to enter this market. 91 F.T.C. at 238. The ALJ also ruled that the merger was illegal because it would entrench Fruehauf in the truck trailer market. The Commission determined that this theory overlapped with the "captive supply" theory, and saw no reason to inquire into entrenchment as a separate basis for condemning the merger. 91 F.T.C. at 240.

4 The history of Standard 121 through April 1978 is recounted in considerable detail in Paccar, Inc., supra, 573 F.2d at 634-39.

*U.S.C. § **[**11]** 1392(f)*. Following the decision in Paccar, NHTSA amended Standard 121 to exempt heavy-hauler trailers from the stopping distance requirements, *43 Fed.Reg. 58820, 58823* (Dec. 18, 1978). [5]

Neither the judicial nor the administrative action lifting the antilock requirements for truck trailers precludes the possibility that antiskid devices will be required in the future or that advancing technology will so lower the cost and improve the reliability of these devices that truck, tractor and trailer buyers will voluntarily instal them. At the present time, however, the evidence indicates that neither the ASBD market nor Fruehauf's **[**12]** purchases in that market are likely to be significant.

(3) The HDW Market

The HDW market presents a different picture. Combined sales of cast spoke and disc wheels to manufacturers of trucks, tractors and trailers averaged about $ 210 million from 1970 through 1972. Kelsey was the fourth largest supplier during this period, accounting for about 15% Of the market sales. The top four HDW producers together accounted for between 65% And 71% Of the market during this period, while the top eight firms were responsible for 93% To 95% Of the market. *91 F.T.C. at 202-203, 208*. During this same period, Fruehauf purchased an average of 5.8% Of total HDW production (3.3% As cast spokes). [6]

There is no significant difference between heavy duty wheels for trucks and trailers. Discs for these two vehicular units are **[**13]** identical. Cast spoke wheels differ only slightly, and they can be and are cast in the same foundry, with no more than an hour needed to change castings, and machined on the same lines.

Manufacture of disc and cast wheels does involve substantially different processes, however, and most firms which produce a center member specialize in one type or the other, i. e., cast spoke or disc. The center member of a cast spoke wheel is produced by pouring molten steel into a mold, allowing it to harden, and, after removal of the mold, treating and machining the spoke. [7] **[**14]** A disc center member is produced by cutting a disc from a steel sheet, spinning or stamping it into shape, and punching holes for the hub and for screws and bolts. [8] The rims for cast spoke and disc wheels are **[*351]** similar and can be produced in the same facility with only a minor effort needed to shift from production of one to another. The brake drums for cast spoke and disc wheels are also substantially the same except for machining.

DISCUSSION

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[5] The release containing these amendments to the regulation states that the exclusion for trailers is "temporary," although no termination date is provided. *43 Fed.Reg. at 58821*. Recently, NHTSA announced its intent to study further the question of braking standards for trucks and trailers and solicited comments on a standard to replace Standard 121. 44 Fed.Reg. 9786 (Feb. 15, 1979).

[6] The Commission's opinion uses the figure 3.9% For Fruehauf's share of cast wheel production, but this figure is in error, as the brief for the Commission tacitly concedes. See FTC Br. at 18, n.10.

[7] One firm, Erie Malleable Iron Co., produces cast iron spoke wheels, but in light of Erie's small share of the market, it is safe to assume that case iron wheels have limited appeal. See text at note 18, Infra.

[8] For the period 1970-72, the top eight firms (in descending order) in the HDW market, measured in dollar sales, and the type of wheel they produce were: Firestone (disc), Dayton-Walther (cast), Kelsey-Hayes (principally cast), Budd (disc), Motor Wheel Division of Goodyear (disc), Rockwell, Webb Wheel Division of Marmon Industries (cast), and Reyco. Rockwell and Reyco do not produce center members.

Usually the purchaser of the truck or trailer specifies the type of wheel to be used, spoke or disc. Fleet operators generally standardize their fleets by adopting one or the other for exclusive use. For reasons not fully made clear, truckers operating primarily west of the Mississippi, and particularly those operating on the West Coast, tend to use disc wheels, whereas cast spoke wheels predominate east of the Mississippi. Each type of wheel enjoys a number of relative advantages over the other, and cast spoke and disc producers compete vigorously with each other to convince fleet operators of the superiority of their respective products.

A few general principles deserve mention **[**15]** at the outset. ***HN1***[] Upon review, the Commission's findings of fact, "if supported by substantial evidence, shall be conclusive," *15 U.S.C. § 21(c)*, and we may not substitute our inferences for those drawn by the Commission simply because we might have evaluated the facts differently as an original matter. See *FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 63, 47 S. Ct. 255, 71 L. Ed. 534 (1927)*; *Simeon Management Corp. v. FTC, 579 F.2d 1137, 1142 (9th Cir. 1978)*. However, the Commission's findings must be supported by substantial evidence and there must also be a rational connection between those findings and its conclusions.

It is our function, therefore, to determine whether the Commission's findings are supported by substantial evidence, and, if so, whether its conclusions are rationally based and consistent with governing statutory norms. Here, appellant maintains that the Commission's evidence falls short of showing that the risk of anticompetitive effect posed by the merger satisfies the criteria for a § 7 violation.

HN2[] Section 7 of the Clayton Act was intended to arrest a trade restraint or a substantial lessening of competition in its incipiency; it is not concerned with **[**16]** "certainties." *Brown Shoe Co. v. United States, 370 U.S. 294, 317-18, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586, 589, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*. Requiring a plaintiff to prove that substantial lessening of competition is inevitable would thwart the express intent of Congress to nip anticompetitive practices in the bud before they blossom into a Sherman Act restraint of trade, see *Brown Shoe, supra, 370 U.S. at 323, n.39, 82 S. Ct. 1502*, and would run counter to Congress' view that neither the Commission nor the courts should be charged with possession of powers of prevision that no one else has achieved. Yet there must be "the reasonable probability" of a substantial impairment of competition to render a merger illegal under § 7. A "mere possibility" will not suffice. *Brown Shoe, supra, 370 U.S. at 323, 82 S. Ct. 1502*; *BOC International Ltd. v. FTC, 557 F.2d 24, 28 (2d Cir. 1977)*; *Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 824-25 (9th Cir. 1961)*, Cert. denied, *370 U.S. 937, 82 S. Ct. 1581, 8 L. Ed. 2d 807 (1962)*; *United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1066 (S.D.N.Y.1969)*, Aff'd **[**17]** sub nom. *Bartlett v. United States, 401 U.S. 986, 91 S. Ct. 1233, 28 L. Ed. 2d 527 (1971)*.

HN3[] A vertical merger, unlike a horizontal one, does not eliminate a competing buyer or seller from the market, 2 P. Areeda & D. Turner, ***Antitrust Law*** P 527a, p. 376 (1978). It does not, therefore, automatically have an anticompetitive effect, R. Posner, ***Antitrust Law***, An Economic Perspective 200 (1976), or reduce competition. Accordingly, a vertical merger, as distinguished from price-fixing boycotts, or similar arrangements between competitors, does not amount to a Per se substantial lessening of competition, *Ash Grove Cement Co., 85 F.T.C. 1123, 1165 (1975)*, affd., *577 F.2d 1368* ***[*352]*** *(9th Cir. 1978)*; *Marquette Cement Mfg. Co., 75 F.T.C. 32, 103-04 (1969)*. Indeed, it may even operate to increase competition, see Areeda, Antitrust Analysis P 619, pp. 536-37 (1967).

As the Supreme Court recognized in *Brown Shoe, supra*, ***HN4***[] the fountainhead of § 7 analysis of vertical mergers, the competitive significance of a vertical merger results primarily from the degree, if any, to which it may increase barriers to entry into the market or reduce competition by (1) foreclosing competitors of the purchasing **[**18]** firm in the merger from access to a potential source of supply, or from access on competitive terms, (2) by foreclosing competitors of the selling firm (in this case other HDW or ASBD manufacturers) from access to the market or a substantial portion of it, or (3) by forcing actual or potential competitors to enter or continue in the market only on a vertically integrated basis because of advantages unrelated to economies attributable solely to integration. See *370 U.S. at 328, 82 S. Ct. 1502*. The ultimate objective, however, is to determine whether and how the particular merger in issue may lessen competition, i. e., what its anticompetitive effect on the market, if any, is likely to be.

Although it has been suggested that a significant percentage of market foreclosure, standing alone, might constitute a sufficient "clog on competition" to amount to a violation of § 7 without more, *Standard Oil Co. of Calif. v. United States, 337 U.S. 293, 314, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*, no such Per se rule has been adopted, except where the share of the market foreclosed reaches monopoly proportions. [9] **[**21]** See *Brown Shoe, supra, 370 U.S. at 328, 82 S. Ct. 1502*. The Supreme Court's insistence **[**19]** that each merger challenged under § 7 be "viewed . . . in the context of its particular industry," *Brown Shoe, supra, 370 U.S. at 321-22, 82 S. Ct. at 1522*; *United States v. General Dynamics Corp., 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)*, and that the Clayton Act protects "Competition, not Competitors," *370 U.S. at 320, 82 S. Ct. 1502* (emphasis in original), contravenes the notion that a significant level of foreclosure is itself the proscribed effect. See *FTC v.* ***[*353]*** *Procter & Gamble Co., 386 U.S. 568, 577, 87 S. Ct. 1224, 1229, 18 L. Ed. 2d 303 (1967)* ("Section 7 of the Clayton Act was intended to arrest the anticompetitive Effects of market power in their incipiency") (emphasis added). A showing of some probable anticompetitive impact is still essential (e. g., promotion of a trend toward integration; reduction in number of potential market competitors; entrenchment of a large supplier or purchaser; increase in barriers to entry). [10] Instead of a Per se approach, Brown Shoe mandates that ***HN5***[] when a merger is challenged under § 7 it "becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the **[**20]** arrangement under review is the type Congress sought to proscribe." *370 U.S. at 329, 82 S. Ct. at 1526*.

In Brown Shoe the Court described some of the factors to be considered in "predicting the probable future conduct of the parties and thus the probable effects of the merger." ***HN6***[] Most important among the factors are the nature and economic purpose of the arrangement, the likelihood and size of any market foreclosure, the extent of concentration of sellers and buyers in the industry, the capital cost required to enter the market, the market share needed by a buyer or seller to achieve a profitable level of production (sometimes referred to as "scale economy"), the existence of a trend toward vertical concentration or oligopoly in the industry, and whether the merger will eliminate potential competition by one of the merging parties. To these factors may be added the degree of market power that would be possessed by the merged enterprise and the number and strength of competing suppliers and purchasers, which might indicate whether the merger would increase the risk that prices or terms would cease to be competitive. This list, with **[**22]** some variations, has been the standard framework for analysis of the legality of a vertical merger. See, e. g., *Mississippi River Corp. v. FTC, 454 F.2d 1083, 1091-93 (8th Cir. 1972)*; *ITT v. GTE, 449*

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[9] In a literal sense, any vertical foreclosure represents a lessening of competition inasmuch as the foreclosed transactions are removed from the arena of competition. A "substantial" lessening of competition might then be a foreclosure of a numerically significant percentage of the market. At times Brown Shoe appears to encourage this simplified analysis. See 370 U.S. at 323-24, 82 S. Ct. 1523: "The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition,' *Standard Oil Co. of California v. United States, 337 U.S. 293, 314, 69 S. Ct. 1051, 1062, 93 L. Ed. 1371 (1949)*, which "deprive(s) . . . rivals of a fair opportunity to compete.' H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8" (footnote omitted). *Du Pont, supra*, also lends support to this view where both the market affected and the degree of foreclosure are substantial. *353 U.S. at 595, 77 S. Ct. 872*; see also *Id. at 607, 77 S. Ct. at 884* ("The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute.") Of course, in Du Pont the size of the companies and of the percentage of foreclosure in the market as defined by the Court left no doubt that the vertical tie conferred market power upon Du Pont.

But we are unwilling to assume that any vertical foreclosure lessens competition. Absent very high market concentration or some other factor threatening a tangible anticompetitive effect, a vertical merger may simply realign sales patterns, for insofar as the merger forecloses some of the market from the merging firms' competitors, it may simply free up that much of the market, in which the merging firm's competitors and the merged firm formerly transacted, for new transactions between the merged firm's competitors and the merging firm's competitors. See 2 P. Areeda & D. Turner, ***Antitrust Law*** P 527a (1978).

A similar issue arises under § 3 of the Clayton Act, *15 U.S.C. § 14*, governing exclusive dealing contracts, including requirements contracts, which present much the same evil as a vertical merger foreclosing a portion of the supplying firm's market. See *Standard Oil, supra*, where the Court found that a requirements contract violated § 3 because of the percentage of the market foreclosed, *337 U.S. at 314, 69 S. Ct. 1051*. The Court observed that use of such exclusive dealing arrangements by Standard and its major competitors enabled them to maintain oligopolistic control of the market. *Id. at 295, 309, 69 S. Ct. 1051*.

[10] See text at notes 23 to 27, Infra, and cases cited therein.

F. Supp. 1158, 1177-78 (D.Hawaii 1978). Application of these factors may reveal that a vertical merger poses no threat to competition at all, resulting merely in a realignment of sales as a result of "in-house" transactions within the merged enterprise but leaving the number of competing sellers and their market shares unchanged, or that it poses a threatened lessening of competition that may be De minimis, may be of monopoly proportions, or may lie somewhere in between the two, 370 U.S. at 328-29, 82 S. Ct. 1502.

As the Supreme Court made clear in Brown Shoe, there are no precise formulas for determining whether a vertical merger may probably lessen competition. Rather, the objective of discerning what, if any, anticompetitive effects the merger may have can be achieved only by examining the foregoing market factors as they exist for the particular merger in issue. It is true that the Department of Justice has for many years issued "Merger Guidelines" for the purpose of indicating **[**23]** to the business community, legal profession and the public generally when the Department may question the legality of a merger. See U.S. Dept. of Justice Merger Guidelines, 1Trade Reg. Rep. (CCH) P 4510. [11] But just as these guidelines do not preclude governmental challenge to a merger which does not fall within all the terms of the guidelines, see Atlantic Richfield, supra, 297 F. Supp. at 1073, so the guidelines do not establish the illegality of a merger which does fit the criteria used by the Justice Department in deciding whether to challenge a merger. The guidelines, therefore, simply reflect the **[*354]** considered view of the Justice Department as to which mergers are most likely to create a reasonable probability of substantially lessening competition and which may therefore warrant the institution of legal action. See Guidelines P 1, Supra, at 6882. Accordingly, whether or not the degree of market concentration, the height of entry barriers, the size of the merging firms, and the extent of foreclosure match or exceed the benchmarks incorporated into the Justice Department's guidelines, ***HN7***[] the Commission still bears the burden of showing the likelihood that the future **[**24]** effect of "That merger (of Kelsey and Fruehauf) may be substantially to lessen competition." Brown Shoe, supra, 370 U.S. at 332, 82 S. Ct. at 1527-1528 (emphasis in original).

With these basic principles in mind we proceed to review the Commission's findings and conclusions with respect to the Fruehauf-Kelsey merger.

I. The Truck Trailer Market

The Commission concluded that the merger violated § 7 with respect to the truck trailer market solely on the theory that in the event of a shortage of HDWs Kelsey would give Fruehauf a substantial **[**25]** competitive advantage over other trailer manufacturers by diverting to Fruehauf wheels that would otherwise go to Kelsey's other customers, some of which are trailer manufacturers. [12] 91 F.T.C. at 235-36. This conclusion rests upon several assumptions, having no appreciable evidentiary support. One assumption is that Kelsey is a significant and substantial supplier of HDWs to Fruehauf's competitors. The record reveals that, on the contrary, trailer manufacturers have in the past purchased almost all of their HDWs from other suppliers, with Kelsey's sales of wheels to trailer manufacturers other than Fruehauf amounting to approximately.$ 1.4 million per year out of total average annual HDW market sales amounting to $ 200 million per year during the three-year period prior to the merger. In the years 1970-72, sales to trailer manufacturers, including Fruehauf, accounted for only about 7% Of Kelsey's HDW output. Thus Kelsey, while a large manufacturer of HDWs, has hardly been a substantial supplier of HDWs to trailer manufacturers.

[26]** The second unsupported assumption is that Kelsey would, in the event of an HDW shortage, divert to Fruehauf HDW sales that would otherwise be made to other customers. There is no evidence, and it is not alleged, that Fruehauf contemplated such a stratagem when it entered the merger with Kelsey. [13] **[**27]** More important,

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[11] The Guidelines state that the Department may be expected to challenge "a merger or series of mergers between a supplying firm, accounting for approximately 10% Or more of the sales in its market, and one or more purchasing firms, accounting In toto for approximately 6% Or more of the total purchases in that market, unless it clearly appears that there are no significant barriers to entry into the business of the purchasing firm or firms." Guidelines P 12, Supra, p. 6886.

[12] Fruehauf would enjoy an unfair advantage over its competitors if Kelsey diverted sales to Fruehauf from customers who do not build trailers, but the relative advantage would not be as great. Moreover, Kelsey's non-trailer customers, including Ford and General Motors, exercise the greatest leverage over Kelsey with the threat of retaliatory withdrawal of patronage.

there is no credible evidence that another shortage is reasonably foreseeable. Even if it were, the evidence that Kelsey would give priority to Fruehauf's needs is insubstantial. As to the likelihood of a shortage, the record indicates that the combined capacity of wheel producers was considerably expanded after the 1973-74 shortage and that, even when conservatively estimated, this capacity exceeds a liberal estimate of anticipated demand during the next five or ten years. [14]

During past shortages Kelsey, like other wheel producers, has allocated its production Pro rata among its customers in accordance **[*355]** with their regular volume of purchases. Appellant insists that Kelsey will follow this precedent in the future, notwithstanding Fruehauf's ownership of the company. The Commission cites no evidence shedding doubt upon this representation. On the contrary a spokesman from Trailmobile Corp., Fruehauf's largest competitor, testified that his company believed that the merger would not affect Kelsey's policy in favor of Pro rata distribution in the event of a shortage.

One might reasonably question the weight to be given to appellant's self-serving assurances that Kelsey would allocate Pro rata if the need arose, as well as the significance of Kelsey's Pro rata distribution of wheels during the 1973-74 shortage, **[**28]** which took place after the merger but at a time when appellant could have anticipated a challenge to its legality. However Kelsey's policy in favor of Pro rata allocation need not rest upon some philosophical commitment to egalitarianism since it could also make sound business sense. If Kelsey deprived its regular customers of a proportionate share of HDWs in times of shortage it would risk their retaliating by shifting to competing suppliers not only their purchases of HDWs but of other products presently bought from Kelsey, which could cause it greater economic harm. In addition, by granting priority to Fruehauf over other trailer manufacturers who purchase wheels from Kelsey, Kelsey would invite antitrust damage actions against it by these trailer firms. Under the circumstances, it appears highly unlikely that Kelsey would take such risks.

Thus the Commission's finding that the merger violates § 7 with respect to the truck trailer market is based on speculation rather than fact. It assumes in the face of contrary evidence that a shortage will recur in the reasonably proximate future. Upon this unsupported basis it infers that in the event of a shortage Kelsey would give **[**29]** priority to Fruehauf to the detriment of its competitors. Although neither of these assumptions is by any means beyond the realm of the possible, here they run counter to the actual evidence in the record. We cannot therefore say that they add up to a reasonable probability that the merger will substantially lessen competition. Accordingly, the finding of a § 7 violation based upon the effect of the merger on the truck trailer market must be set aside as unsupported by substantial evidence.

II. The ASBD Market

We need not consider appellant's contention that the Commission's conclusions regarding the barriers to entry into the ASBD market are erroneous, or that the uncertain status of the market at the time when the Commission issued its decision precluded a finding that the merger would have a substantial anticompetitive effect on the ASBD market. [15] Intervening events, specifically the Ninth Circuit's decision in *Paccar, Inc., supra*, on April 17, 1978,

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[13] Appellant contends that the merger came about through the initiative of Kelsey, which turned to Fruehauf in order to forestall a takeover by a less desired suitor. A witness for appellant who participated in the merger negotiations testified that the subject of vertical dealings was never broached in the meetings between Kelsey and Fruehauf. Whatever specific topics were discussed by the negotiators, we tend to doubt that the parties, in concluding that they would be compatible merger-partners, failed to take into account possible vertical transactions between them, even though nothing may have been said on the subject.

[14] The last shortage, in 1973-74, was not foreseen. A witness from Dayton-Walther suggested that this shortage was due in part to a heavier than expected stampede of truckers rushing to buy trucks and trailers before Standard 121 went into effect.

[15] The Commission issued the final order on February 22, 1978, and denied the petition to reopen the order on June 22, 1978. *Paccar, supra*, was decided on April 17, 1978, and certiorari was denied on October 2, 1978. The Commission denied Fruehauf's motion to reopen the order on the grounds that the possibility remained that NHTSA would reimpose the same or similar performance standards for air-braked vehicles, or that Fruehauf would remain a substantial purchaser of ASBD even if it had no legal obligation to instal the device, and that reversal of the finding of a violation with respect to the ASBD market would not in any event alter the scope of the divestiture order. *91 F.T.C. at 1153-55*.

invalidating Standard 121, the Supreme Court's denial of certiorari on October 2, 1978, and the NHTSA's decision on December 18, 1978, to modify the Standard, render unsupportable the Commission's earlier conclusions with respect **[**30]** to the ASBD market.

The record unmistakably reveals that truck operators will not equip their vehicles with antiskid devices in the absence of a legal obligation to do so. Since trailers are now officially excluded from the antiskid requirements, Fruehauf is unlikely to purchase a significant volume of antiskid devices **[**31]** and we see little logic in affirming an order holding that the merger creates a reasonable probability of a substantial lessening of competition in the market if not **[*356]** only Fruehauf's share but the market itself appears to have been stripped of any significance. The burden is now on the Commission to demonstrate that notwithstanding these basic decisions the merger may have a significant effect on the market. In the meantime the Commission's conclusions with respect to the ASBD market must be set aside, without prejudice to its right to renew its proceeding if future developments should prove that the predicted demise of the ASBD market is greatly exaggerated.

We are aware of the need for repose in administrative adjudications and, more to the point, of the Supreme Court's repeated declarations that ***HN8***[] the decision whether to reopen an administrative proceeding is within the complete discretion of the agency and will not be reversed except perhaps when an agency adheres to a decision in the face of an epochal change in conditions. [16] **[**33]** The necessarily protracted nature of most agency proceedings makes it inevitable that some of the evidence taken will be obsolete by the time **[**32]** a decision is rendered. Here, however, appellant is not merely claiming that the record is inadequate to support the agency's conclusions. Rather, it is claimed that the record affirmatively demonstrates that these conclusions are erroneous. [17]

Although the NHTSA has not yet definitely proposed to reimpose the ASBD requirement, see *44 Fed.Reg. 9783* (Feb. 15, 1979), the Commission maintains that there is a possibility of a substantial ASBD market in the future. But this possibility is not enough to sustain a conclusion that there is at present a reasonable probability that the merger will substantially restrain competition in this market. Accordingly, we need **[**34]** not determine whether the Commission abused its discretion in denying the petition to reopen the proceeding and, if so, whether it would be appropriate for this court to reverse that denial.

III. The HDW Market

In determining whether Fruehauf's acquisition of Kelsey may substantially lessen competition in the HDW market the Commission stated:

> "In sum, no matter what the extent of barriers to entry into a highly concentrated industry, a merger between a major customer and a major supplier may restrain competition in the market for the Supplier's product (in the

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[16] See *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 294-96, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974)*; *ICC v. Jersey City, 322 U.S. 503, 514-15, 64 S. Ct. 1129, 88 L. Ed. 1420 (1944)*. In the one case in which the Supreme Court reversed an agency's refusal to reopen a hearing to consider changed economic circumstances, *Atchison, T. & S. F. Ry. Co. v. United States, 284 U.S. 248, 52 S. Ct. 146, 76 L. Ed. 273 (1932)*, the Court observed that a record closed in September, 1928, was not "representative" of conditions prevailing in 1931, when the Commission's order went into effect. *Id. at 260-61, 52 S. Ct. 146*. A recent decision of this court, ***Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1233 (2d Cir. 1976)***, Cert. denied, ***434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)***, follows the Jersey City standard although it phrases it differently.

[17] See *United States v. Aluminum Co. of America, 148 F.2d 416, 445-46 (2d Cir. 1945)* ("There is no reason why an appellate court . . . should not advise itself from outside the record of such facts as appear to admit of no genuine dispute," although evidence taken from outside the record cannot be regarded as conclusive). The instant case could be distinguished from those in which the rule of complete agency discretion is usually invoked inasmuch as this case does not involve a rate-making or permit-application procedure, where the agency is solely responsible for the substantive decision, but the application of a statute jointly administered by the Commission and the courts.

case before us ASBD and heavy-duty wheels) by foreclosing competitors of the supplier from the possible patronage of the customer. . . ." *91 F.T.C. at 221* (emphasis in original).

Appellant contends that this statement amounted to the adoption by the Commission of a Per se rule for economic analysis of a vertical merger in lieu of the more flexible standard adopted by the Supreme Court in Brown Shoe and that the Commission thereby ran afoul of the Supreme Court's disapproval of Per se rules with respect to the legality of mergers, see, e. g., *United States v. Marine Bancorporation,* ***[*357]*** *Inc., 418 U.S. 602 at* ***[**35]*** *623, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*. We disagree.

Although the Commission's quoted statement could conceivably be construed as automatically condemning a merger of the type described by it, we view it as merely expressing the Commission's view that the absence of a high entry barrier does not necessarily insulate a merger from challenge under § 7. High entry barriers may be a signal that a particular merger carries a potential for impairing competition but we agree with the Commission that barriers need not reach some predetermined level before an anticompetitive effect becomes possible. The issue, therefore, is whether the Commission's conclusions are consistent with a rational analysis and appraisal of the relevant market facts before it.

Appellant next contends that the Commission's conclusion that the merger will probably have an anticompetitive impact lacks economic or factual support, and is based on rank speculation. This again necessitates a study of whether the Commission's conclusions are consistent with a rational analysis and appraisal of the relevant facts before it, viewed in the light most favorable to the Commission.

We accept at the outset the Commission's **[**36]** findings that the HDW market is significantly concentrated, based on evidence that the top four producers account for 65-71% Of the market, the top eight for 93-95%, and Kelsey, the third largest producer, 15%. Moreover, the Commission's determination that barriers to entry into HDW production are substantial is supported by evidence that the initial capital outlay required to enter production at an efficient level is $ 10-$ 20 million. 91 F.T.C. at 233. Appellant insists that barriers are "low" to "moderate," according to Professor Bain's celebrated scale, and that firms in the market cannot therefore have appreciable market power. We agree with the Commission that the matter should not turn on labels given to capital outlay requirements. We also reject appellant's contention that in measuring the size of entry barriers the Commission ignored a class of industrial titans already possessing highly automated foundry equipment that would require relatively little additional capital investment to achieve production capability (e. g., General Motors, Ford, International Harvester, Rockwell and Chrysler). The record reveals that these organizations could not enter the market as easily **[**37]** as appellant argues and thus deter those in it from pursuing anticompetitive practice because they (General Motors, Ford, et al.) are equipped only to cast ductile iron, whereas all but a small proportion of cast spoke wheels sold in the market are composed of steel, which requires a different type of foundry facility than that possessed by them. [18] The Commission adopted the ALJ's finding that steel spokes are preferred to iron spokes, see *91 F.T.C. at 183, 233, n.26*. Although the record apparently does not contain direct evidence corroborating this finding, the existence of this preference is inferable from the facts that iron spokes now command only a minor share of the market and that a number of iron foundries producing HDW components cast in ductile iron (e.g., hubs and drums), including International Harvester, have not expanded into production of spokes.

The Commission further determined **[**38]** that an HDW manufacturer could not achieve full scale economy unless its production volume was no less than about 8.9% Of the total HDW market and assumed that a new entrant in this market could not pose effective competition unless it produced at this level and achieved scale efficiencies. We agree with Fruehauf's contention that the figure used and the assumption are at least partially in error. The Commission derived the 8.9% Figure from testimony of Fruehauf's engineering expert, Mr. Joseph Greenberg, whose calculations showed that per unit cost of production declined as annual production increased to about 300,000 **[*358]** units of center members and drums [19] (300,000 is about 8.9% Of the HDW market). In making

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[18] One firm, Erie, produces cast iron spiders, but its sales account for less than 3% Of the market for cast wheels.

these calculations, however, Greenberg presupposed that the wheel components were the Only items produced on the hypothesized foundry and machining lines. Appellant points out that this engineering estimate did not provide a correct basis for determining scale economies, since a foundry and machine shop can with little difficulty shift production from one article to another, within certain weight and size limitations, so that the facilities could be operating at **[**39]** the most efficient level without necessarily producing a full complement of wheels.

Notwithstanding these errors in the Commission's analysis, evidence marshalled by the ALJ indicates that initial capital costs would exceed 10 million even for a production level substantially below 300,000 units. There is, therefore, substantial evidence, albeit not uncontroverted, supporting the Commission's conclusion that the capital cost barrier is substantial and significant, whatever the minimum level of efficient production might be. [20] **[**40]** For this reason we do not reject the Commission's decision on this issue. [21]

The Commission further concluded that the amount of market foreclosure likely to result from the merger would range from "a weak 3.9" (actually 3.3%) to a "strong 5.8" of the market production of HDWs, depending upon whether one limits the calculation of Fruehauf's purchases of cast spoke HDWs, which are made by Kelsey and accounted for 3.3% Of the market during the three-year premerger period, or also includes Fruehauf's purchases of heavy duty disc wheels, not presently manufactured by Kelsey, which accounted for 2.5% Of the total HDW market during the same period. Since Kelsey does make discs for light-weight trucks and could produce heavy duty discs, the Commission was entitled to infer that **[**41]** Fruehauf, with its tradition of in-house purchasing, could expand Kelsey's disc wheel facilities to furnish at least the major part of Fruehauf's disc needs except possibly for nonintegral hubs. [22] However, there is no evidence that competing purchasers of these products would be foreclosed from continuing to obtain **[*359]** all or part of their cast spoke needs from Kelsey or its competitors at competitive prices. Nor was there proof that removal from the market of up to 5.8% Of its HDW sales would preclude any existing competitor from continuing to operate economically or any potential competitor from entering the market.

[42]** The Commission further found that there had been periodic HDW shortages within the 12 years prior to the merger (i.e., in 1966, 1968-69, 1973-74) and that, although Fruehauf was not itself a potential competitor in the

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[19] The ALJ did not establish a precise figure for the volume associated with maximum scale efficiencies, but suggested that the figure would be about 5-10% Of the market. *91 F.T.C. at 187*.

[20] Evidently, the ALJ did not consider the feasibility of entry into the HDW market with production only of center members, which could be sold as an individual component or as an assembled unit with components purchased from other manufacturers. Greenberg's study indicates that under the most likely circumstances of entry, a firm could launch into production of cast spokes at a volume of 200,000-300,000 at an initial cost of about $ 8-10 million.

[21] The evidence on the barriers to entry into the HDW market via production of steel discs is meager in comparison to that for cast spokes. See *91 F.T.C. at 185* (P 222). What evidence there is suggests that the cost is less for discs. On the other hand, appellant does not argue that because of the relative ease of entry via disc production the HDW producers are wide open to potential competition.

[22] The ALJ and the Commission found that Fruehauf traditionally purchases in-house whenever possible, even when the immediate commercial interest would seem to dictate obtaining supplies aliunde. *91 F.T.C. at 204, 235*. Prior to the merger Fruehauf's principal supplier of cast spoke wheels was the Dayton-Walther Co. Shortly after the merger took place Fruehauf granted Dayton a five-year, renewable contract for the purchase of wheels in response to Dayton's inquiries about the impact of the merger on its relationship with Fruehauf. A spokesman from Dayton testified that the contract gives it the option of continuing to supply Fruehauf as long as it offers wheels at a competitive price, although the witness was not unreservedly confident that the contract could be enforced. This witness also testified that loss of Fruehauf's business would not have a "drastic" effect on the company.

At least through the trial, Fruehauf continued to purchase wheels from Dayton but, subject to Dayton's rights under the contract, we agree with the Commission's observation that conduct while litigation is predictable or pending is no sure guide to a merging company's ultimate intentions. 91 F.T.C. at 236, n.29. Fruehauf does not contend that it does not expect to have Kelsey supply all the cast spoke wheels it needs.

production of HDWs prior to the merger, it had engaged in certain pro-competitive activities, consisting of experiments with new types of fabricated aluminum and steel wheels and encouragement of one foundry, McConway and Torley, to produce cast spoke wheels.

From the foregoing the Commission concluded that the merger

> "runs afoul of Section 7 by foreclosing Fruehauf as a source of patronage of heavy duty wheels in a market setting in which such foreclosure is likely to increase barriers to entry, make new entry more difficult and less likely, and thereby enhance the market power conferred by a highly concentrated market structure into which entry was previously difficult to begin with. Additionally we believe that the merger is likely to lessen competition substantially by foreclosing Kelsey-Hayes as a source of supply to truck trailer manufacturers should shortages of supply recur." 91 F.T.C. at 236.

With due respect for the Commission's expertise, we **[**43]** fail to find any logical basis in the evidence for this conclusion, even when the record is viewed most favorably to the Commission. Not only is the conclusion a Non sequitur but it flies in the face of undisputed contrary evidence.

There is no evidence in the record that existing barriers to entry into the HDW market or the existing concentration of producers in it, both admittedly substantial, have been or would be increased by the merger. There is no reason to believe that the merger will adversely affect scale economies for HDW production, thereby increasing the cost of entry. Nor does the Commission suggest that as a result of the merger a firm could successfully enter the HDW or the trailer market only by simultaneously entering at both levels. As to the effect of the merger on the concentration of the HDW industry, since Fruehauf's principal supplier of spoke wheels has been Dayton-Walther, the largest producers of spokes and second largest wheel producer, any shifting of patronage from Dayton to Kelsey will tend to even out the market shares of the three largest sellers of HDWs, but not increase their aggregate market share. The ALJ expressly refused to find that the **[**44]** merger would entrench Kelsey as a producer, stating "I cannot conclude that Kelsey-Hayes has been "entrenched' as that term has heretofore been used in Section 7 cases."

Moreover, there is no allegation that the merger of Fruehauf and Kelsey is part of an existing or prospective trend toward vertical integration, such as existed in *Brown Shoe, supra*, and in other cases. [23] There is no suggestion, much less evidence, that the merger was motivated by a desire to restrain competition. [24] On the contrary, the evidence is undisputed that Kelsey, whose stock was selling substantially below book value, sought out Fruehauf in order to avoid takeover efforts on the part of others. Nor is there any evidence that the merger might impair competition by conferring upon one of the merging partners a "deep pocket" or financial clout not enjoyed by its **[*360]** rivals. [25] It is true that some market foreclosure may ensue from the merger, but not one that deprives rivals from major channels of distribution, [26] much less one that excludes them from the market altogether. [27] Even if Fruehauf were to switch its purchase of its entire HDW wheel needs, amounting to 5.8% Of the market, from

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[23] See *Brown Shoe, supra, 370 U.S. at 332-33, 334, 82 S. Ct. 1502*; *United States Steel Corp. v. FTC, 426 F.2d 592, 603 (6th Cir. 1970)*; *United States v. Ford Motor Co., 315 F. Supp. 372, 375 (E.D.Mich.1970)*, *Aff'd, 405 U.S. 562, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)*; *United States v. Kennecott Copper Corp., 231 F. Supp. 95, 103-05 (S.D.N.Y.1964)*, Aff'd per curiam, *381 U.S. 414, 85 S. Ct. 1575, 14 L. Ed. 2d 692 (1965)*; *Ash Grove Cement Co., 85 F.T.C. 1123, 1165-66 (1975)*, aff'd, *577 F.2d 1368 (9th Cir. 1978)*.

[24] See text at note 12, Supra.

[25] See *United States Steel Corp., supra, 426 F.2d at 603-04*; *Reynolds Metals Co. v. FTC, 114 U.S.App.D.C. 2, 8-9, 309 F.2d 223, 229-30 (1962)*; *United States v. Kimberly-Clark Corp., 264 F. Supp. 439, 461 (N.D.Calif.1967)*; *Kennecott Copper, supra, 231 F. Supp. at 104*.

[26] See *Kimberly-Clark, supra, 264 F. Supp. at 461*.

[27] See *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 982 (5th Cir. 1977)*, Cert. denied, ***434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978)***; *ITT, supra, 449 F. Supp. at 1181-82*.

others **[**45]** to Kelsey (which would require Kelsey to enter heavy duty disc production), there would merely be a realignment of existing market sales without any likelihood of a diminution in competition.

[46]** The only theory suggested by the Commission as to how the merger might impair competition in the HDW market is that, assuming Kelsey supplied all of Fruehauf's HDW needs, amounting to 5.8% Of the market or slightly less than the minimum Department of Justice Guideline figure, this foreclosure would be sufficient alone in such a setting to significantly lessen the likelihood that a new firm would enter this market or, what amounts to the same thing for our purposes, [28] to lessen the chance that an existing small competitor would substantially increase its capacity and compete on a wider scale. According to the Commission, although it found that Fruehauf itself was not a potential entrant into the HDW market, [29] **[**47]** Fruehauf had a pro-competitive effect on the market through its collaborative efforts to develop new types of heavy duty wheels and by virtue of its ability to draw new entrants into production of conventional wheels by offering to deliver its patronage. [30]

[48]** In light of the record evidence, this theory is too ephemeral to sustain the Commission's decision. [31] **[**49]** Although Fruehauf did **[*361]** experiment in the development of new kinds of wheels and assisted one foundry in temporary production of HDWs, both adventures proved to be complete failures and there is no evidence that, if the merger were disapproved, Fruehauf would engage in similar activities. Moreover, the Commission has presented no evidence suggesting that Fruehauf was unique in its ability to elicit new competition, and there is no reason to believe that other firms patronizing the HDW market, particularly the automotive and trucking giants, will not

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[28] See *United States v. Falstaff Brewing Corp., 410 U.S. 526, 530, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973)*.

[29] See *Ford, supra, 315 F. Supp. at 375*; *United States v. Standard Oil Co. (New Jersey), 253 F. Supp. 196, 227 (D.N.J.1966)*.

[30] In the late 1960's and early 1970's Fruehauf experimented with a fabricated aluminum wheel and a fabricated steel wheel for production in Fruehauf's own facilities. Fruehauf abandoned the steel wheel project in early 1970 in order to concentrate its efforts on the aluminum wheel, which seemed more promising. This project was abandoned in 1971 when Fruehauf determined that under existing market conditions production of fabricated aluminum wheels was not economically feasible. Following the termination of these efforts to develop a wheel for in-house production, Fruehauf explored with U.S. Steel the development of a fabricated steel wheel to be designed by an outside engineering firm and produced by U.S. Steel. The prototype turned out to be unacceptable for commercial use, and the project ended in September 1973.

In 1967-68, when a strike halted wheel production at Dayton-Walther, the leading producer of cast spoke wheels and Fruehauf's traditional principal supplier, Fruehauf favorably responded to an inquiry from McConway and Torley, a leading producer of cast steel components used by the railroad industry, about the possibility of it producing wheels for Fruehauf. Eager to cultivate an alternate source of supply, Fruehauf provided McConway with necessary drawings and helped finance the purchase of patterns and equipment. For a few years, McConway sold cast spokes to Fruehauf. Fruehauf stopped buying from McConway in late 1973, and shortly thereafter McConway, which had experienced greater than anticipated production problems, exited from the market. According to testimony of a spokesman from McConway, when the demand for the company's railroad products revived, and when Dayton resumed production of wheels, McConway figured that it had overestimated the need for a new wheel producer and so decided to concentrate on its traditional product lines.

In the late 1960's Fruehauf, at the initiative of Webb Wheel, held preliminary discussions about an arrangement whereby Webb would supply Fruehauf's cast spoke requirements. These discussions terminated at an early stage, however, because of a lack of interest on the part of Webb's senior executives.

[31] The Commission has recognized that the "test for finding injury due to elimination of a potential competitor is not simple." It cannot rest on concentration ratios alone. "Additional factors enter into any analysis of the loss of a potential competitor. Among these are: trends toward concentration in the market; extensive entry barriers; high probability that the lost potential competitor would have actually entered the market; whether the lost potential competitor was one of only a few such potential competitors and whether, if he had entered the market, his new competition would have had a significant impact on price and quality." *Beatrice Foods Co., 81 F.T.C. 481, 526-27 (1972)*.

encourage firms in the wings to enter that market, should they be dissatisfied with the quality of the existing competition. [32]

[50]** For the foregoing reasons enforcement of the Commission's order with respect to the truck trailer and HDW markets is denied. As for the alleged probability of a substantial lessening of competition in the ASBD market, we would ordinarily remand the proceeding to the Commission for reopening and reconsideration in light of the Ninth Circuit's decision in *Paccar, Inc., supra*, invalidating Standard 121, the Supreme Court's denial of certiorari in that case, and the NHTSA's later decision to modify the Standard. However, since the Commission, with these developments before it, on June 22, 1978, denied Fruehauf's petition to reopen the order, *91 F.T.C. at 1153-55*, we feel compelled also to deny enforcement with respect to the ASBD market, without prejudice to the Commission's right either to seek modification of our order to permit reopening or to institute a new proceeding upon a showing that ASBD market conditions have changed in a way that provide a basis for concluding that the merger would threaten a substantial lessening of competition in that market.

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[32] The Commission does not specify whether it proceeded under the theory that Fruehauf, at the time of the merger, exerted a present pro-competitive effect because HDW producers knew that Fruehauf was seeking to attract new sources of supply or would do so if prices rose to an unacceptable level, and conducted themselves accordingly, or under the theory that Fruehauf represented a potential pro-competitive effect through its ability to draw a new competitor into the market at some future time, and thereby strengthen competition at some future time.

The theory of perceived potential competition received the Supreme Court's imprimatur in *FTC v. Procter & Gamble Co., 386 U.S. 568, 581, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)*. The validity of the theory of actual potential competition is a question that has been reserved twice by the Supreme Court, *United States v. Marine Bancorporation, 418 U.S. 602, 639, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*; *United States v. Falstaff Brewing Corp., 410 U.S. 526, 537, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973)*, once by this court, *BOC International Ltd. v. FTC, 557 F.2d 24, 25 (2d Cir. 1977)*, and by at least one other circuit court, *FTC v. Atlantic Richfield Co., 549 F.2d 289, 294 (4th Cir. 1977)*. Here the evidence is inadequate to sustain either of these theories. Ordinarily, these theories are applied when one of the merging firm is the potential entrant, but they conceivably could apply, assuming the necessary factual predicates, when the merging firms is not itself a potential competitor but a potential promotor of a third-party entrant.

McNulty v. Borden, Inc.

United States District Court for the Eastern District of Pennsylvania

July 3, 1979

Civ. A. No. 76-3952

Reporter

474 F. Supp. 1111 *; 1979 U.S. Dist. LEXIS 11269 **; 115 L.R.R.M. 4563; 1979-2 Trade Cas. (CCH) P62,847

John J. McNULTY v. BORDEN, INC.

Subsequent History: [1]** On Motion for Reconsideration August 7, 1979.

Core Terms

antitrust violation, alleges, pricing, anti trust law, Clayton Act, discharged, plaintiff's claim, termination, discovery, courts, Food, manufacturer, maliciously, sales, refuse to participate, defense motion, territory, retail, cases

LexisNexis® Headnotes

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

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

For the purpose of a motion to dismiss, the material allegations of a complaint must be accepted as true and considered in a light most favorable to the plaintiff; a complaint should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief.

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

Torts > Business Torts > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

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

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

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

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

HN2[] **Costs & Attorney Fees, Clayton Act**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15* provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Section 2 of the Robinson-Patman Act, *15 U.S.C.S. § 13* provides: (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality 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.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN3[] **Clayton Act, Claims**

To withstand a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a plaintiff who brings an action pursuant to § 4 of the Clayton Act must allege an injury to business or property by reason of an antitrust violation.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

Each case in which a violation of the Clayton Act, *15 U.S.C.S. § 15* is alleged must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a trial court must decide whether the plaintiff is one whose protection is the fundamental purpose of the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Clayton Act, Claims**

Standing under § 4 of the Clayton Act, *15 U.S.C.S. § 15* analysis is essentially a balancing test comprised of many constant and variable factors and there is no talismanic test capable of resolving all § 4 standing problems. To determine whether a plaintiff has standing to bring an action under § 4 of the Act, trial courts should examine and weigh all of the plaintiff's allegations to determine whether the plaintiff has standing in accordance with § 4 of the Act which confers standing on any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN6[] **Clayton Act, Claims**

An employee who suffers the loss of his job has been injured in his business or property. The loss of bonus compensation is an additional factor that the trial court considers in making a determination as to whether a plaintiff has standing under § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] **Clayton Act, Claims**

In the process of analyzing a case in which a violation of § 4 of the Clayton Act, *15 U.S.C.S. § 15*, is alleged, the trial court considers whether a plaintiff's alleged injuries to his business or property resulted by reason of anything forbidden in the antitrust laws. This requirement for standing under § 4 of the Act has been given a variety of labels by courts. Some courts have enunciated these limitations on § 4 standing under the rubric of "direct injury," others have used the expression "target area," and more recently one court has used the term "zone of interest." In the third circuit, this factor is referred to as the "directness of the injury" claimed to have resulted from the alleged antitrust violation.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8[] **Remedies, Damages**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, which superseded section 7 of the Sherman Act, was intended to open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws.

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

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

Labor & Employment Law > Wrongful Termination > Breach of Contract > General Overview

HN9[] **At Will Employment, Duration of Employment**

Under Pennsylvania law, an employment contract which contains no specific provision respecting duration or termination is presumed to be terminable at will by either party for any or no reason, unless the party asserting a contrary construction can offer evidence to rebut the presumption. The plaintiff may overcome this presumption by showing the intent of the parties that the contract last for some definite period of time or for a reasonable time, or by showing that the plaintiff-employee gave the defendant-employer consideration in addition to the employee's normal services, such as sacrificing other employment opportunities.

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > Wrongful Termination > Public Policy

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

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

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

Labor & Employment Law > Wrongful Termination > General Overview

Labor & Employment Law > Wrongful Termination > Breach of Contract > Employment Contract Formation

HN10[] **Defenses, Public Policy Violations**

An employee at will generally has no right of action against his employer for wrongful discharge. However, a discharge might plausibly give rise to a cause of action where the employer is motivated by a specific intent to cause harm to the employee or where a clear mandate of public policy is violated by the discharge.

Torts > ... > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN11[] **Defamation, Elements**

To state a cause of action for defamation, generally a plaintiff must allege the defamatory character of the communication, publication, that the communication refers to the plaintiff, the third-party's understanding of the communication's defamatory character and its reference to the plaintiff, and injury; malice is essential to an action for defamation in Pennsylvania.

Counsel: Peter A. McGonigle, Clary, Mimnaugh & McGonigle, P.C., Philadelphia, Pa., for plaintiff.

Benjamin M. Quigg, Jr., James J. Rodgers, Morgan, Lewis & Bockius, Philadelphia, Pa., for defendant.

Opinion by: BRODERICK

Opinion

[*1113] MEMORANDUM

Plaintiff has alleged antitrust violations and breach of contract and defamation claims in connection with the termination of his employment by the defendant. Before the Court is defendant's motion to dismiss plaintiff's second amended complaint pursuant to *Fed.R.Civ.P. 12(b)(6)*. For the reasons hereinafter set forth, defendant's motion will be denied with respect to each of plaintiff's claims.

HN1[] For the purpose of a motion to dismiss, the material allegations of the complaint must be accepted as true and considered in a light most favorable to the plaintiff; a complaint should not be dismissed unless it appears to a certainty that the plaintiff is entitled to no relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; 2A Moore, Federal Practice P 12.08, at 2271-74.

Plaintiff's allegations in his second amended complaint may be summarized as follows: Plaintiff was **[**2]** employed by Borden Foods, a division of Borden, Inc., from November 1961 until his discharge, as a retail salesman for one year and then as a Unit Manager of a territory encompassing parts of Delaware, Pennsylvania and New Jersey. As Unit Manager, plaintiff supervised several retail salesmen and was responsible for all sales in his territory of grocery and perishable items, including cheese. In addition to receiving a salary, plaintiff also received additional compensation in the form of bonuses by meeting quotas and winning sales contests. In the course of administering and handling certain accounts, plaintiff became aware that Eugene Matthews, District Manager for Borden Foods, personally, **[*1114]** or through other Unit Managers, offered special pricing arrangements, which included the granting of free goods and certain price reductions to certain accounts, such as Food Fair, but not to others, such as Acme Markets. Plaintiff refused to take part in the granting of these special pricing arrangements and, as a result, came into severe conflict with Mr. Matthews, who compiled a file designed to justify the dismissal of the plaintiff. Part of this file included the accusation **[**3]** of Mr. Matthews that plaintiff's negligence was responsible for the spoilage of $ 80,000 worth of cheese ordered by Acme Markets and that the plaintiff filed false reports in connection with this incident. In addition, the plaintiff claims that Mr. Matthews knowingly and maliciously spread false stories concerning the plaintiff's job performance in an effort to have the plaintiff dismissed and to prevent discovery of the special pricing arrangements. At a September 20, 1976 meeting in a hotel with Matthews and Walter Dyer, the Regional Manager, Eastern Region for Borden Foods, plaintiff was dismissed without first being placed on probation for 30 days and notified that his job performance was not satisfactory. At this meeting, plaintiff refused to accept 8 weeks severance pay in return for his release of all claims against the defendant and his agreement not to disclose any information concerning the special pricing arrangements.

In addition, the complaint alleges that the defendant's report in connection with plaintiff's termination states that plaintiff was negligent in performing his duties, and that plaintiff claimed he checked the warehouse which contained the cheese when **[**4]** he had not actually been there for three months. This version of the plaintiff's termination was communicated by the defendant's representatives to the Pennsylvania Unemployment Compensation Board as well as to several employees at Food Fair and Acme Markets. In addition, it is claimed that the defendant furnished a report to prospective employers of the plaintiff stating that plaintiff was dismissed because his job performance did not meet the defendant's standards.

Plaintiff further claims that he received many offers of employment while he was employed by the defendant, but rejected them in reliance on assurances that he would continue to be employed by the defendant and would probably advance to the position of District Manager or even higher.

In Count I of his complaint, plaintiff alleges that the special pricing arrangements adversely affected competition in the market for certain goods in violation of the antitrust laws and that his discharge and the accompanying untrue statements constitute acts performed in furtherance of the antitrust violations. In particular, plaintiff alleges that his discharge and the statements were designed to prevent discovery and prosecution **[**5]** of the illegal pricing scheme and to destroy plaintiff's credibility concerning such matters.

Count II of the complaint alleges that plaintiff's termination constituted wrongful breach of a contractual relationship.

Count III alleges that the defendant intentionally and maliciously libeled and slandered plaintiff by disseminating untrue accusations concerning him.

Plaintiff bases Count I of his complaint on section 4 of the Clayton Act, *15 U.S.C. § 15*, and alleges that he was injured by reason of the defendant's violation of section 2 of the Clayton Act as amended by the Robinson-Patman Act, *15 U.S.C. § 13* (the Robinson-Patman Act). ***HN2***[] Section 4 of the Clayton Act provides:

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

Section 2 of the Robinson-Patman Act, which is the statute that plaintiff claims forbids the conduct of the defendant, provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either **[**6]** directly or indirectly, to discriminate in price between **[*1115]** different purchasers of commodities of like grade and quality . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Plaintiff claims that the special pricing arrangements offered by Mr. Matthews to certain accounts discriminated between different purchasers and lessened competition, thereby violating section 2. Plaintiff further contends that he was injured in his business or property by reason of the special pricing arrangements and that therefore he is entitled to recover treble damages pursuant to section 4 of the Clayton Act.

In its motion to dismiss, the defendant contends that plaintiff lacks standing to raise the antitrust claims inasmuch as plaintiff has not been injured "in his business or property" nor did the alleged injury occur "by reason of" the alleged antitrust violations. We disagree with the contentions of the defendant for **[**7]** the reasons hereinafter set forth. Defendant's motion to dismiss Count I of the complaint will therefore be denied.

HN3[] To withstand a *Rule 12(b)(6)* motion to dismiss, a plaintiff who brings an action pursuant to section 4 of the Clayton Act must allege an injury to business or property by reason of an antitrust violation. The plaintiff's complaint, read in a light most favorable to him, alleges that the defendant violated the antitrust laws, in that the defendant engaged in offering special pricing arrangements which were discriminatory and lessened competition, and that plaintiff was discharged from his position of supervising retail salesmen to prevent discovery and prosecution of the antitrust violations and because plaintiff refused to participate in and objected to such antitrust violations, all of which resulted in the loss of bonus compensation as a result of diminished sales and in the loss of his job.

In analyzing whether plaintiff has standing to bring his antitrust action pursuant to section 4 of the Clayton Act, we are guided by recent decisions of our Third Circuit in cases such as *Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90 (3d Cir. 1977)*; *Cromar Co. v.* ***[**8]*** *Nuclear Materials & Equipment Corp., 543 F.2d 501 (3d Cir. 1976)*, and *Int'l Ass'n, etc. v. United Contractors Ass'n, Inc., 483 F.2d 384 (3d Cir. 1973)*, amended, *494 F.2d 1353 (1974)*. See also *Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277 (3d Cir. 1978)*. In Bravman, Judge Gibbons reviewed the prior decisions in this circuit concerning section 4 standing; he specifically rejected a per se rule that would deny standing to an employee or that would limit standing to competitors, and adopted the following balancing test enunciated by Judge Garth in *Cromar, supra, 543 F.2d at 506*:

> *HN4*[] Each case, therefore, must be carefully analyzed in terms of the particular factual matrix presented. In making this factual determination courts must look to, among other factors, the nature of the industry in which the alleged antitrust violation exists, the relationship of the plaintiff to the alleged violator, and the alleged effect of the antitrust violation upon the plaintiff. Then, while recognizing that breaches of the antitrust laws have effects throughout society, a court must decide whether this plaintiff is one "whose protection is the fundamental purpose of the antitrust laws." *In re [**9] Multidistrict Vehicle Air Pollution, (481 F.2d 122*) at 125 ((9th Cir.), Cert. denied, *414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973))*.

In adopting this test, Judge Gibbons in Bravman stated that *HN5*[] "§ 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and . . . there is no talismanic test capable of resolving all § 4 standing problems." *552 F.2d at 99*. In Bravman, the Court found section 4 standing in an action brought by a manufacturer's sales representative against the manufacturer which he represented, where it was alleged that the manufacturer had committed antitrust **[*1116]** violations by restraining the plaintiff from dealing with other manufacturers and by limiting him to sales in a specified territory. On the basis of his examination of Bravman's relationship to the manufacturer, Bravman's position in the area affected by the alleged anticompetitive acts and the directness of the injury to plaintiff, as well as the Congressional policies underlying section 4, Judge Gibbons concluded that Bravman had section 4 standing.

To determine whether plaintiff has standing to bring this action, we shall, therefore, **[**10]** examine the plaintiff's allegations in accordance with the test enunciated by Judge Garth in Cromar and applied by Judge Gibbons in Bravman. We shall proceed, therefore, to examine and weigh all of the plaintiff's allegations to determine whether the plaintiff has standing in accordance with section 4 of the Clayton Act, which confers standing on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

As a first step in our analysis, we have considered the recent decision of the United States Supreme Court in *Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*. In Reiter, in discussing the meaning of the phrase "business or property" as used in section 4 of the Clayton Act, the Court reasoned that the word "or" in section 4 makes it clear that the word "business" was not intended to modify the word "property," nor was "property" intended to modify "business." In rejecting an interpretation of section 4 which would require an injury to "business activity or property related to one's business," Chief Justice Burger [1.] stated:

[11]**

> That strained construction would have us ignore the disjunctive "or" and rob the term "property" of its independent and ordinary significance; moreover, it would convert the noun "business" into an adjective. In construing a statute we are obliged to give effect, if possible, to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not. Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business." Id. at -- , *99 S. Ct. at 2331* (citations omitted).

In Reiter, the Court held that consumers who were forced to pay illegally fixed higher prices for hearing aids and related services which they purchased from retail dealers of the manufacturers of the hearing aids had standing under section 4 in that a consumer whose money has been diminished has been injured "in his property." Id. at -- , *99 S. Ct. 2326*. It should therefore follow that *HN6*[] an employee who suffers the loss of his job has been injured in his property. Furthermore, prior to Reiter, Judge Forman, **[**12]** in *Int'l Ass'n, Etc. v. United Contractors Ass'n, Inc., 483 F.2d 384 (3d Cir. 1973)*, amended, *494 F.2d 1353 (1974)*, had little difficulty in determining that the loss of employment is an injury to a person's "business or property," citing with approval *Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 334 (7th Cir. 1967)*, wherein the Seventh Circuit stated that "the interest invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to

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1. All members of the Court joined in the opinion of Chief Justice Burger except Justice Brennan who took no part in the decision of the case. Justice Rehnquist filed a concurring opinion.

be indistinguishable in this context." That the loss of employment constitutes an injury to one's business or property is also supported by other cases within and without this circuit. See *Quinonez v. Nat'l Ass'n of Securities Dealers, Inc., 540 F.2d 824, 829-30 (5th Cir. 1976)*; *Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176 (5th Cir. 1976)*; *Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967)*; *Roseland v. Phister Manufacturing Co., 125 F.2d 417 (7th Cir. 1942)*; *DeGregorio v. Segal, 443 F. Supp. 1257, 1261 (E.D.Pa.1978)*; Broyer v. B. F. Goodrich Co., 1977-1 Trade Cases P 61,346 (E.D.Pa.1977); *Drysdale v. Florida **[*1117]** Team Tennis, Inc., 410 F. **[**13]** Supp. 843 (W.D.Pa.1976)*. In addition to alleging the loss of his employment, the plaintiff claims the loss of bonus compensation while employed as a result of diminished sales in his territory. The loss of such bonus compensation is an additional factor which the Court has considered in making a determination as to whether the plaintiff has section 4 standing. As stated by Judge Bell in *Dailey v. Quality School Plan, Inc., supra, 380 F.2d at 487*:

> (T)he loss of employment by a sales supervisor is injury to business or property within the meaning of § 4. (citations)
>
> These commission sales agent cases where a territory has been developed and where the courts treat the relationship as the business of the salesman or sales manager are to be distinguished from those cases where the business or property is that of the corporation and the claim asserted by stockholders or creditors or employees is derivative. (citations)

See also P. Areeda & D. Turner, ***Antitrust Law***, vol. 2, § 338, at 198 (1978).

HN7[] In the process of analyzing this case in terms of the factual matrix presented by the allegations of the complaint, we next consider whether the plaintiff's alleged injuries **[**14]** to his "business or property" resulted "by reason of anything forbidden in the antitrust laws." This requirement for section 4 standing has been given a variety of labels by the courts. As Judge Gibbons states in Bravman, "Some courts have enunciated these limitations on § 4 standing under the rubric of "direct injury,' others have used the expression "target area,' and more recently one court has used the term "zone of interest.' " *552 F.2d at 96-97* (footnotes omitted). In Bravman and Cromar this factor is referred to as the "directness of the injury" claimed to have resulted from the alleged antitrust violation. The plaintiff claims that as a direct result of the antitrust violation he was discharged from his position of supervising retail salesmen for the purpose of preventing discovery and prosecution of the antitrust violations and because he refused to participate in and objected to the antitrust violations. Plaintiff has also alleged that on the day his employment was terminated he was asked to sign papers which sought to prohibit him from disclosing the alleged antitrust violation. There is no question, therefore, that in our consideration of the "directness of the injury" **[**15]** factor the plaintiff has clearly alleged that the loss of his employment was a direct result of the antitrust violations. Additionally, we have taken into consideration the fact that the plaintiff claims that as a result of the alleged antitrust violations he also lost certain bonus compensation. See, e.g., *Dailey v. Quality School Plan, Inc., supra.*

Finally, in applying the Cromar-Bravman analysis, we must consider the Congressional policies underlying section 4 and determine whether the plaintiff is "one whose protection is the fundamental purpose of the antitrust laws." *Bravman, supra, 552 F.2d at 99*; *Cromar, supra, 543 F.2d at 506* (quoting *In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125* (9th Cir.), Cert. denied, *414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973))*. As heretofore pointed out, the plaintiff claims that the defendant violated the antitrust laws by offering discriminatory pricing arrangements and that the defendant fired him in order to prevent discovery and prosecution in connection with the alleged antitrust violations and because the plaintiff refused to participate in and objected to the illegal activity. We must determine whether Congress, in **[**16]** enacting section 4, intended to grant standing to a person such as the plaintiff. Although neither party to this action has called this Court's attention to anything in the legislative history of section 4 which is dispositive of whether Congress intended to confer standing on, and thereby protect, an employee who refused to participate in an illegal pricing arrangement or any other type of antitrust violation, it would be difficult for this Court to conclude that Congress intended to exclude from the remedies provided by section 4 an employee discharged by a defendant for the purpose of preventing discovery and prosecution of antitrust violations and because that employee refused to participate in the illegal activity. **[*1118]** Congress created the treble damage remedy of section 4 for the obvious purpose of encouraging individuals to challenge antitrust violations. The treble damage remedy, originally enacted in 1890 as section 7 of the Sherman Act, was intended by Congress as an antitrust weapon "available to the people." 21 Cong.Rec. 3146 (1890). ***HN8***[] Section 4 of the Clayton Act, which superseded section 7 of the Sherman Act, was intended to "open the door of justice to every **[**17]** man, whenever he may be injured by those who violate the antitrust laws." 51 Cong.Rec. 9073 (1914). The importance of the deterrence policy of section 4 has been stressed repeatedly by the courts. The Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, after examining the legislative history of section 4 of the Clayton Act, stated that it was "conceived primarily as open(ing) the door of justice to every man . . . and giving the injured party ample damages for the wrong suffered." *Id. at 486 n. 10, 97 S. Ct. at 696* (quoting 51 Cong.Rec. 9073 (1914)). In answer to the defendant's contention that a determination that the plaintiff has section 4 standing will significantly burden crowded court dockets, we again refer to the recent decision of the United States Supreme Court in *Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*, where the Court responded to such a contention by stating:

> That may well be true but cannot be a controlling consideration here. We must take the statute as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging **[**18]** Private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. . . . To be sure, these private suits impose a heavy burden on the federal courts; it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates. Id. at -- - --, *99 S. Ct. at 2333-34* (emphasis in original).

Further, one cannot ignore the broad scope of the "any person" wording of section 4, particularly in light of the absence of any language of limitation in that section. As the Supreme Court declared in *Radovich v. National Football League, 352 U.S. 445, 454, 77 S. Ct. 390, 395, 1 L. Ed. 2d 456 (1957)*, courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those (antitrust) laws." We conclude, therefore, that the plaintiff's complaint sufficiently portrays "one whose protection is the fundamental purpose of the antitrust laws."

Having completed the analysis of plaintiff's allegations and having weighed the factors delineated in Cromar **[**19]** and Bravman, we conclude that the plaintiff has standing pursuant to section 4 of the Clayton Act.

In Count II of his complaint, plaintiff alleges that his discharge from employment with the defendant constituted a wrongful breach of a contractual relationship. Specifically, plaintiff alleges that his discharge "was effectuated in a manner in violation of the standard corporate policy and procedure on employee termination, without opportunity for the Plaintiff to offer any defense, without proper hearing, contrary to oral assurances made to him by Borden and relied upon by him. . . ." Complaint P 36.

HN9[] Under Pennsylvania law [2.] an employment contract which contains no specific provision respecting duration or termination is presumed to be terminable at will by either party for any or no reason, unless the party asserting a contrary construction can offer evidence to rebut the presumption. *Bravman v. Bassett Furniture Industries, Inc., supra, 552 F.2d at 92*; *Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 176 (1974)*; *Lubrecht v. Laurel Stripping Co., 387 Pa. 393, 396, 127 A.2d 687, 689 **[*1119]** (1956)*. The plaintiff may overcome this presumption by showing the **[**20]** intent of the parties that the contract last for some definite period of time or for a reasonable time, or by showing that the plaintiff-employee gave the defendant-employer consideration in addition to the employee's normal services, such as sacrificing other employment opportunities. See, e.g., *Marder v. Conwed Corp., 75 F.R.D. 48, 55-57 (E.D.Pa.1977)*. Plaintiff's complaint clearly alleges that plaintiff, during his period of employment with the defendant, rejected many other offers of employment, both within and outside the food industry, in reliance upon representations made to him by his superiors that he would eventually be promoted to at least the position of District Manager and possibly higher. Complaint P 32. If these allegations were established at trial, it would not be unreasonable for a trier of fact to conclude that the parties intended plaintiff's employment to extend for a reasonable time or that plaintiff's sacrifice of other employment opportunities constituted additional consideration rendered by the plaintiff, thereby extending the duration of the employment contract for a reasonable period of time. See *Bravman v. Bassett Furniture Industries, Inc., supra, **[**21]** 552 F.2d*

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2. There is no dispute that Pennsylvania law applies to the wrongful breach of contractual relationship claim alleged in Count II of the complaint. The Court has diversity jurisdiction of this claim.

at 93; O'Neill v. ARA Services, Inc., 457 F. Supp. 182, 185 (E.D.Pa.1978). Thus, Count II of the complaint states a claim for wrongful breach of a contractual relationship upon which relief can be granted and should not be dismissed.

Even if the plaintiff has not sufficiently alleged either that the parties intended that the contract last for a reasonable period of time or that he gave additional consideration, thereby extending the contract, Count II should not be dismissed for another reason. Although the Pennsylvania Supreme Court in Geary v. United States Steel Corp., supra, held narrowly that **HN10**[] an employee at will generally has no right of action against his employer for wrongful discharge, it suggested that a discharge might plausibly give rise to a cause of action where the employer is motivated **[**22]** by a specific intent to cause harm to the employee or where a clear mandate of public policy is violated by the discharge. Id. 456 Pa. at 178, 319 A.2d 174; See O'Neill v. ARA Services, Inc., supra, 457 F. Supp. at 186; Reuther v. Fowler & Williams, Inc., 255 Pa.Super. 28, 386 A.2d 119, 120 (1978). Plaintiff in the instant case alleges that defendant discharged plaintiff because of his refusal to cooperate in the special pricing arrangements and in order to prevent discovery of and interference with the pricing scheme. This allegation, together with the allegation that defendant made false statements to others which were designed maliciously to injure plaintiff's ability to obtain new employment, if proved at trial, could support a conclusion by the trier of fact that defendant's discharge of plaintiff was motivated by a specific intent to cause harm to the plaintiff. Furthermore, plaintiff has alleged that a clear mandate of public policy has been violated by the discharge for two reasons. Plaintiff contends first that he was discharged because of his refusal to commit a crime, and, second, that his discharge was an act in furtherance of the allegedly illegal pricing scheme. [3] **[**23]** See Broyer v. B. F. Goodrich Co., C.A. No. 75-2288 (E.D.Pa. Jan. 11, 1978) (Bench Memorandum); Reuther v. Fowler & Williams, Inc., supra, 386 A.2d at 120 (employee discharged for serving jury duty); Petermann v. Int'l Brotherhood of Teamsters, 174 Cal.App.2d 184, 344 P.2d 25 (1959) (employee discharged for refusal to commit perjury); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (employee discharged for filing claim against employer under workmen's compensation statute); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (employee discharged for refusal to accept social invitations of foreman).

[*1120] Defendant's motion to dismiss Count II of the complaint for failure to **[**24]** state a claim upon which relief can be granted must, therefore, be denied.

In Count III of his complaint, plaintiff alleges that "by virtue of the knowing and malicious dissemination of untrue accusations concerning the Plaintiff . . . Defendant has intentionally and maliciously libeled and slandered Plaintiff. . . ." Complaint P 38. Plaintiff specifically alleges that Borden's version of plaintiff's discharge, which included representations that plaintiff was negligent in performing his duties and was responsible for, and made false statements in connection with, the spoiling of $ 80,000 worth of cheese, was communicated by Mr. Matthews and other Borden representatives to the Pennsylvania Unemployment Compensation Board, to prospective employers, and to identified employees of Food Fair and Acme Markets. Complaint PP 28-30. Plaintiff also alleges that these false statements were communicated maliciously and were intended to injure plaintiff's ability to obtain new employment, and that these statements have in fact injured his good name and business reputation and prevented him from obtaining employment.

HN11[] To state a cause of action for defamation, generally the plaintiff must **[**25]** allege the defamatory character of the communication, publication, that the communication refers to the plaintiff, the third-party's understanding of the communication's defamatory character and its reference to the plaintiff, and injury; malice is essential to an action for defamation in Pennsylvania. [4] Quinones v. United States, 492 F.2d 1269, 1274 (3d Cir. 1974); Keddie v. Pennsylvania State University, 412 F. Supp. 1264, 1276 (E.D.Pa.1976); Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (Pa.1971); See 12 P.S. § 1584a. Plaintiff's allegations include each of

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[3] The Court notes that failure to adhere to certain stated guidelines or policies by an employer in discharging an employee does not create a cause of action for breach of an employment contract. See Beidler v. W. R. Grace, Inc., 461 F. Supp. 1013, 1015 (E.D.Pa.1978) and cases cited therein.

[4] There is no dispute that Pennsylvania law applies to the defamation claim alleged in Count III of the complaint.

these elements which he will have the burden of proving at trial. Furthermore, the statements complained of are clearly capable of defamatory meaning. See *Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1326-27 (W.D.Pa.1974)*; *Vitteck v. Washington Broadcasting Co., Inc., 256 Pa. Super. 427, 389 A.2d 1197, 1199 (1978)*. Therefore, defendant's motion to dismiss Count III of the complaint must be denied. [5.]

[26]** Accordingly, an order will be entered denying defendant, Borden, Inc.'s, motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

End of Document

[5.] Despite defendant's contention that communications to the Unemployment Compensation Board and to prospective employers are privileged, See, e.g., *Underwood v. Maloney, 152 F. Supp. 648, 682 (E.D.Pa.1957)* (citing *Wagner v. Bell, 70 D&C 411 (C.P.Lehigh 1949))*, the motion to dismiss the defamation claim must nevertheless be denied because plaintiff has alleged communication of the alleged defamatory statements to employees of Food Fair and Acme Markets.

Central Iowa Power Cooperative v. Federal Energy Regulatory Com.

United States Court of Appeals for the District of Columbia Circuit

November 30, 1978, Argued ; July 9, 1979, Decided

Nos. 77-1914, 77-1916, 77-1924

Reporter

606 F.2d 1156 *; 1979 U.S. App. LEXIS 13363 **; 196 U.S. App. D.C. 249; 1979-2 Trade Cas. (CCH) P62,779

CENTRAL IOWA POWER COOPERATIVE, ET AL., PETITIONERS v. FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT; ALEXANDRIA BOARD OF PUBLIC WORKS, MINNESOTA, ET AL., PETITIONERS v. FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT, CENTRAL IOWA POWER COOPERATIVE, ET AL., INTERVENORS; PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, PETITIONER v. FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT, CENTRAL IOWA POWER COOPERATIVE, ET AL., INTERVENORS

Prior History: **[**1]** Petitions for Review of Order of the Federal Energy Regulatory commission.

Core Terms

pool, generation, provisions, membership, coordination, anticompetitive, interconnected, public interest, facilities, antitrust, electric, capability, schedules, planning, regional, distribution system, electric system, discriminatory, mid-continent, nongenerating, cooperative, accredited, pooling agreement, Federal Power Act, argues, energy, pooling arrangement, transmission, reliable, wheeling

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

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

Transportation Law > Interstate Commerce > Federal Powers

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

Energy & Utilities Law > Antitrust Issues > Administrative Considerations

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

HN1[] **Energy & Utilities, US Federal Energy Regulatory Commission**

Although the Federal Energy Regulation Commission lacks authority to adjudicate violations of the antitrust laws, it must consider competitive factors when acting under the public interest mandate of the Federal Power Act (Act). FERC has responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203 of the Act, *16 U.S.C.S. §§ 824a-824b*, and under like directives contained in §§ 205, 206, and 207 of the Act, *16 U.S.C.S. §§ 824d-824f*.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

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

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

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

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Cogeneration & Independent Companies > Utility Interconnection

Energy & Utilities Law > Energy Conservation > General Overview

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

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

HN2[] **Pipelines & Transportation, Electricity Transmission**

Power pooling arrangements, rather than unrestrained competition between electric facilities, are in the public interest. For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Federal Energy Regulation Commission (FERC) is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy. It shall be the duty of FERC to promote and encourage such interconnection and coordination within each such district and between such districts.*16 U.S.C.S. § 824a(a)*.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

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

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

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Energy & Utilities Law > Pooling & Unitization > Compulsory Pooling

HN3[] **Energy & Utilities, US Federal Energy Regulatory Commission**

When the Federal Energy Regulatory Commission (FERC) determines the lawfulness of a power pooling arrangement challenged on antitrust grounds, it is to be guided by the clear congressional policy of § 202(a) of the Federal Power Act, *16 U.S.C.S. §824a(a)*. Specifically, FERC must consider whether the arrangement imposes negative restrictions on competition, whether such restrictions are reasonably related to valid purposes of the power pool, and whether the arrangement is, on the whole, in the public interest.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

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

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

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

HN4[] **Pipelines & Transportation, Electricity Transmission**

Under § 202(b) of the Federal Power Act, *16 U.S.C.S. § 824a(b)*, the Federal Energy Regulatory Commission (FERC), upon application of a state commission or a person engaged in the sale or transmission of electrical energy, may order a public utility to establish physical connection of its transmission facilities with another electric system and sell or exchange energy. FERC may not compel the enlargement of generating facilities for such purpose or impose undue burden upon such public utility.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

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

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

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > Retail Wheeling

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

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

HN5[] **Pipelines & Transportation, Electricity Transmission**

Wheeling is broadly defined as the transfer by direct transmission or displacement of electric power from one utility to another over the facilities of an intermediate utility.

Counsel: James F. Fairman, Jr., Washington, D. C., with whom John C. Scott and Susan M. Jenkins, Washington, D. C., were on the brief, for petitioners in No. 77-1916.

Alan J. Roth, Washington, D. C., with whom Robert C. McDiarmid, George Spiegel, Sandra J. Strebel, and Frances E. Francis, Washington, D. C., were on the brief, for petitioners in No. 77-1924.

William J. Madden, Jr., Washington, D. C., with whom Donald K. Dankner, Washington, D. C., was on the brief, for petitioners in No. 77-1914 and intervenors in Nos. 77-1916 and 77-1924.

James E. Rogers, Jr., Atty., Federal Energy Regulatory Commission, Washington, D. C., with whom Howard E. Shapiro, Solicitor, Federal Energy Regulatory Commission, Washington, D. C., was on the brief, for respondent.

Philip R. Telleen, Atty., Federal Energy Regulatory Commission, Washington, D. C., also entered an appearance for respondent.

Judges: Before TAMM and ROBINSON, Circuit Judges, and JOHN H. PRATT, * United States District Judge for the District of Columbia. **[**2]**

Opinion by: TAMM

Opinion

[*1160] This case involves challenges to provisions of the Mid-Continent Area Power Pool (MAPP) Agreement. The Federal Power Commission (Commission) found that the membership criteria of the Agreement were discriminatory and ordered modifications. [1] The Commission approved the Agreement in all other respects. For the reasons that follow, we affirm the Commission's decision.

BACKGROUND

In 1972, thirty-one electric power systems signed the MAPP Agreement. [2] The original parties to the Agreement were twelve investor-owned utilities, [3] **[**4]** eight cooperative corporations, [4] eight municipal systems, two **[**3]** state public power districts, and the Federal Bureau of Reclamation. [5] The Agreement covers the mid-continent area of Minnesota, Iowa, North and South Dakota, Nebraska, eastern Montana, western Illinois, and Wisconsin. [6]

The Agreement is designed to promote reliable and economical operation of the interconnected electric network in the mid-continent area, primarily through reserve sharing to back up large generating units. [7] **[**6]** **[*1161]**

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the court filed by TAMM, Circuit Judge.

1 The Commission functions involved in this case were transferred to the Federal Energy Regulatory Commission (FERC) on October 1, 1977, pursuant to section 402 of the Department of Energy Organization Act, *42 U.S.C.A. § 7172(a) (1978)*. See Exec. Order No. 12,009, *42 Fed.Reg. 46267 (1977)*. FERC was substituted as respondent in this case in accordance with *42 U.S.C.A. § 7295(e) (1978)*.

2 Joint Appendix (J.A.) II at 345 (Initial Decision on a Power Pool Agreement). The Commission adopted the findings of the administrative law judge (ALJ) with respect to the procedural background of the case, the nature of the electric utility industry in the mid-continent area, the history of coordination leading to the Agreement, and the Agreement itself. Id. at 403.

3 The investor-owned utilities are "public utilities" within the meaning of section 201 of the Act, *16 U.S.C.A. § 824 (Supp.1979)*. Neither the Department of Energy Organization Act, Pub.L.No. 95-91, 91 Stat. 565 (1977), nor Title I of the Public Utility Regulatory Policies Act of 1978, Pub.L.No. 95-617, 92 Stat. 3117, applies to this proceeding. See *42 U.S.C.A. § 7295(c) (1978)*; *16 U.S.C.A. § 824* note (Supp. 1979). In citing to pertinent statutes, we therefore refer to those in force at the time of the Commission's decision.

4 The operations of the cooperative corporations are financed, in whole or in part, by the Rural Electrification Administration. See *7 U.S.C. § 904 (1976)*.

5 The MAPP Agreement is applicable to a specific electric system operated by the Bureau of Reclamation in the Eastern Division of the Pick-Sloan Missouri Basin Program. J.A. II at 255.

The power marketing functions of the Bureau of Reclamation have been transferred to the Secretary of the Department of Energy and are exercised by a separate administration within that department. *42 U.S.C.A. § 7152(a) (1978)*; See *43 U.S.C. § 485h(c) (1976)* (authority to sell electric power in connection with federal reclamation projects). In marketing electric power, the Bureau of Reclamation is required to give preferences to municipalities and other public corporations or agencies. Id.

6 J.A. II at 349.

7 Id. at 356. The ALJ described the Agreement as follows:

Although the Agreement **[**5]** does not establish a fully integrated electric system with central dispatch of generating units, it provides a mechanism for coordinated daily operation of generation facilities and seeks to promote the staggered construction of new generation units. [8] **[**7]** Each participant retains responsibility for serving its customers' demands. [9] Exchanges of power under the Agreement are on a short-term basis and may not be used to fulfill long-term needs. The Agreement does not preclude participants from entering into other joint arrangements for power pooling, nor does it compel or restrict installation of new facilities. [10]

The MAPP participants filed the Agreement with the Commission as required under section 205 of the Federal Power Act (Act), *16 U.S.C. § 824d (1976)*. After hearings, [11] an administrative law judge (ALJ) approved the Agreement in its entirety. Joint Appendix (J.A.) II at 345. On review of the ALJ's decision, the Commission held that, with the exception of the membership provisions, the Agreement was just, reasonable, and nondiscriminatory and did not violate ***antitrust law*** or policy. Id. at 403.

Three sets of petitioners seek review of the **[**8]** Commission's decision in this court. Petitioners Alexandria Board of Public Works, et al. (Alexandria) consist primarily of municipal electric utility systems, rural electric cooperatives, farm organizations, and state power-planning agencies in the mid-continent area. [12] **[**9]** Petitioner Public Utilities

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The MAPP Agreement itself is 72 pages long. It covers objectives, conditions of membership, relationships to other agreements, committees, committee organization, obligations of the parties (such as maintenance of adequate capabilities and operating reserves, service obligations, and services to be rendered), and participation by the United States Bureau of Reclamation and by the Manitoba Hydro-Electric Board. In addition, the Agreement contains a number of service schedules dealing with wheeling services and interchange services for participation power, emergency and scheduled outages, operating reserves, economy energy, operational control energy, and peaking, short-term and firm power. Exhibit A to the Agreement contains a list of the points of interconnection through which power and energy may be interchanged between the Participants (Exh. No. 935).

Id. at 355.

8 Id. at 243, 358. In The 1970 National Power Survey, the Commission discussed the advantages of staggered construction:

Staggered construction is a technique which involves construction of excess capacity by one utility for the use of one or more other utilities with the supplier-buyer arrangement being reversed or modified with each succeeding unit. Several variations of this practice are widely used. Sometimes adjacent systems informally coordinate their capacity additions over a period of several years so that the total installed capacity reserve approximates the amount required by the entire geographic area. Each individual system's reserve in percent of peak-hour load may vary widely from year to year, but the total peak-hour reserves for the group are maintained at approximately a constant level.

A refinement of this coordinating technique includes short-term capacity transactions which permit a system to install a larger unit than its own immediate needs require and to sell firm capacity to neighboring systems for one or more years. Later this utility purchases firm capacity from neighboring systems for a period of time and then repeats the cycle by installing an even larger generating unit. This arrangement has found general acceptance by some power pools and other coordinating groups since each member can achieve benefits from economy of scale and maintain most economically the installed capacity reserves required by the coordinating group.

Another form of staggered construction which has gained widespread acceptance in recent years is the unit-sale concept. This entails arrangements whereby a system installs a larger unit than it otherwise normally would, and sells a specified amount of excess capacity from that unit to one or more neighboring systems. The purchaser's entitlement is limited to the availability of capacity from the specific unit. In the event of an outage of such unit, the buyer is not entitled to any portion of the supplier's other capacity resources. Rates for unit sale transactions usually reflect actual capacity and energy costs from the specific unit involved.

Federal Power Commission, The 1970 National Power Survey at I-17-23 (1971).

9 J.A. II at 238, 356.

10 Id. at 356.

11 The Commission conducted a hearing on the Agreement under, Inter alia, section 206 of the Act, *16 U.S.C. § 824e (1976)*. The burden of showing that an initial rate filing is unlawful under section 206 rests on those attacking the filing. See *Municipalities of Groton v. FERC, 190 U.S.App.D.C. 399, 403 n.3, 587 F.2d 1296, 1300 n.3 (1978)*.

[*1162] Commission of the State of South Dakota (South Dakota) is authorized under the laws of South Dakota to determine rates for private electric companies, define service territories for cooperative, municipal and private electric systems, rule on some securities matters and license certain plant facilities. [13] Petitioners Central Iowa Power Cooperative, et al. (Central Iowa) are the original full membership nonfederal participants in the Agreement. [14]

ANTITRUST CONTENTIONS

Alexandria attacks the Commission's approval of the MAPP Agreement primarily on antitrust grounds. ***HN1***[] Although the Commission lacks authority to adjudicate violations of the antitrust laws, it must consider competitive factors when acting under the public interest mandate of the Act. *Central Power & Light Co. v. FERC, 188 U.S.App.D.C. 56, 57, 575 F.2d 937, 938* (per curiam), Cert. denied, *439 U.S. 981, 99 S. Ct. 568, 58 L. Ed. 2d 652 (1978)*. **[**10]** In *Gulf States Utilities Co. v. FPC, 411 U.S. 747, 93 S. Ct. 1870, 36 L. Ed. 2d 635 (1973)*, the Supreme Court stated that the Commission has "responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207" of the Act. [15] *Id. at 758-59, 93 S. Ct. at 1878*; See *FPC v. Conway Corp., 426 U.S. 271, 278-79, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*.

Congress has decided, as a matter of general policy, that ***HN2***[] power pooling arrangements, rather than unrestrained competition between electric facilities, are in the public interest. Section 202(a) of the Act, *16 U.S.C. § 824a(a) (1976)*, provides:

> For the purpose of assuring an abundant supply of electric energy **[**11]** throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy . . . . It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.

In enacting this section, Congress was "confident that enlightened self-interest will lead the utilities to cooperate . . . in bringing about the economies which can alone be secured through . . . planned coordination." S.Rep.No.621, 74th Cong., 1st Sess. 49 (1935). [16]

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[12] Brief for Petitioners Alexandria Board of Public Works, et al. (Alexandria) at 11-12. Alexandria describes itself as

forty municipalities operating electric utility systems, forty rural electric cooperatives, four major farm organizations, two Kansas power-planning agencies, Kansas Municipal Utilities (a state-wide association of municipal electric systems), Montana Associated Utilities, Inc. (a state-wide association of rural cooperatives), the Burt County Public Power District (Nebraska), Mid-West Electric Consumers Association, Missouri Basin Municipal Power Agency, and the Mayor of Sioux Center, Iowa.

Mid-West Electric Consumers Association is a trade association of consumer-owned utilities scattered throughout Colorado, Kansas, Wyoming, Montana, Nebraska, North Dakota, South Dakota, Minnesota and Iowa. The Missouri Basin Municipal Power Agency ("MBMPA") is a nonprofit organization of 64 municipal electric utilities serving a population base of approximately 220,000 in the states of Iowa, Minnesota, and South Dakota.

Id.

[13] Brief of the Public Utilities Commission of the State of South Dakota (South Dakota) at 4-5. Four of the six private, investor-owned utilities that provide service in South Dakota are participants in the MAPP Agreement. Most of the rural electric cooperatives and municipal electric systems in the state depend on other suppliers for generation. Id. at 5.

[14] Brief for Petitioners Central Iowa Power Cooperative, et al. (Central Iowa) at 6. MAPP membership was of two types: full membership participants who enjoyed all the benefits of the Agreement and associate participants who had limited privileges. See text at 1170-1172 Infra.

[15] These sections of the Federal Power Act appear at *16 U.S.C. §§ 824a*, *824b*, *824d*, *824e*, and *824f (1976)* respectively. The Commission acted in this case under sections 202, 205, and 206 of the Act.

[12]** **[*1163]** Thus, ***HN3***[] when the Commission determines the lawfulness of a power pooling arrangement challenged on antitrust grounds, it is to be guided by the clear congressional policy of section 202(a). Specifically, the Commission must consider whether the arrangement imposes negative restrictions on competition, whether such restrictions are reasonably related to valid purposes of the power pool, and whether the arrangement is, on the whole, in the public interest. See generally *City of Huntingburg v. FPC, 162 U.S.App.D.C. 236, 238, 498 F.2d 778, 788 (1974)*. See also *Northern Natural Gas Co. v. FPC, 130 U.S.App.D.C. 220, 226-28, 399 F.2d 953, 959-61 (1968)*.

Alexandria presents several antitrust arguments. First, it alleges that the MAPP Agreement represents unlawful price-fixing under *section 1* of the Sherman Act, *15 U.S.C. § 1 (1976)*, and *section 10(h)* of the Federal Power Act, *16 U.S.C. § 803(h) (1976)*. The Agreement contains a series of service schedules [17] that set forth rates for the furnishing of power thereunder. Alexandria presented no evidence directly related to these schedules, but contended that the schedules represented per se violations of the antitrust laws. The **[**13]** ALJ ruled, and the Commission agreed, that the rate schedules did not constitute unlawful price-fixing. The ALJ explained:

> This is not a combination of sellers conspiring to fix a uniform price in which they will sell goods to outside parties. It is a group of participants who expect over the course of time to be buyers as often as they are sellers. This concept is basic to the equitable utilization of the MAPP service schedules. [18]

[14]**

We hold that establishing a price for the short-term power services available under the Agreement is reasonably necessary to the functioning of the cooperative arrangement undertaken pursuant to section 202. Although the pricing provisions restrict competition in transactions between pool members, they insure that costs and benefits of

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[16] A noted commentator has explained the advantages of coordination:

There are two major benefits that can be achieved through pooling: (1) pools, properly planned and operated, can substantially improve the systems' reliability at considerably reduced cost; (2) pooling can result in large cost savings in the production and the transmission of power.

Pooling arrangements are basically of two types. The first is designed primarily to accomplish a high degree of operational reliability on a day-to-day basis, but it will usually also reduce the relative cost of providing reliability. . . . The second type is designed to achieve these goals, plus the economies of joint planning and construction of generation and transmission facilities.

Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Colum.L.Rev. 64, 101 (1972); See note 8 Supra.

[17] The service schedules are:

Schedule A Participation Power Interchange Service

Schedule B Seasonal Participation Power Interchange Service

Schedule C Emergency and Scheduled Outage Energy Interchange Service

Schedule D Operating Reserve Interchange Service

Schedule E Economy Energy Interchange Service

Schedule F Wheeling Services and Losses

Schedule G Operational Control Energy Interchange Service

Schedule H Peaking Power Interchange Service

Schedule I Short Term Power Interchange Service

Schedule J Firm Power Interchange Service

J.A. II at 269-84.

[18] Id. at 380.

the power pool will be shared fairly and predictably. Moreover, some exchanges of power between the participants may take place so rapidly that price negotiations at the time of exchange would be difficult. [19] Since the schedules are reasonably necessary to the pooling arrangement, we affirm the Commission's judgment that the rate provisions of the various schedules do not render the Agreement inconsistent with the public interest. See *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*.

Alexandria criticizes the Commission's failure to discuss possible anticompetitive consequences of provisions for "allocation **[**15]** of sales and for boycott of outside systems until MAPP's surpluses are exhausted. **[*1164]** " Brief for Alexandria at 41. Apparently, Alexandria is referring to provisions of the Agreement that permit participants to purchase power from each other on a short-term basis to cover deficiencies in accredited generation capability. [20] Accredited generation capability is essentially the amount of generation capacity a participant must maintain to satisfy its own system demand and meet its reserve obligation to the pool. [21]

Under the Agreement, deficiencies in accredited generation capability may be covered by installation of new generation facilities or by the purchase of power from other suppliers. [22] Participants may purchase power from MAPP members as well as from nonmembers. If a participant elects to purchase outside the pool, the Pool **[**16]** Administrative Committee must determine that the source of supply is reliable. Transactions between pool members are governed by the terms of the Agreement's service schedules. See note 17 Supra.

If a participant fails to make voluntary arrangements for maintaining accredited generation capability, the Pool Administrative Committee will require the deficient member to purchase the necessary power within the pool. The Pool Administrative Committee selects the participant or participants who will supply that power. If surplus power is not available within the pool, the Committee may recommend purchase from nonparticipants.

Central Iowa asserts that Alexandria's claims of sales allocation and boycott are based on a "complete misunderstanding of the way the pool operates." Brief for Central Iowa at 25. It argues that pool members are free under the Agreement to decide whether they will fulfill their accredited generation capability requirement by purchase within or without the **[**17]** pool. *Id. at 25-26*. The ALJ agreed, concluding that the Agreement does not restrict purchases or sales of bulk power. J.A. II at 372.

We hold that the challenged provisions represent the essence of a voluntary agreement for the coordination of facilities to achieve increased reliability and economies in operation. See generally Federal Power Commission, The 1970 National Power Survey at I-17-1 (1971). [23] As we have explained, MAPP seeks to promote reliable operation of the interconnected regional network, primarily through reserve sharing to back up large generating units. To achieve this goal, MAPP members must be able to insure that each party maintains accredited generation capability that can be called upon for reserve energy. If a member decides to maintain accredited generation

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[19] See Meeks, Supra note 16, at 111-12.

[20] Alexandria does not elaborate its argument in this court and was equally vague before the Commission. See, e. g., J.A. II at 448.

[21] See *id. at 238 (P 15.01)*.

[22] See *id. at 238-40 (Article XV)*.

[23] In The 1970 National Power Survey, Supra note 8, the Commission stated:

Financial benefits are often realized from staggered construction of large generating units, short-term capacity transactions, and interchanges of economy energy. Reduction of installed reserve capacity is made possible by mutual emergency assistance arrangements and associated coordinated transmission planning. Bulk power supply reliability is enhanced by interconnection agreements covering spinning reserves, reactive kilovol-tampere requirements, emergency service, coordination of day-to-day operations, and coordination of maintenance schedules. Also, operating costs may be reduced through coordinated operation of interconnected systems.

Id. at I-17-1.

capability by purchasing outside the pool, MAPP members must be assured that the outside source is reliable. Otherwise, there is no guarantee that reserve energy will actually be available when needed. If a member fails to make voluntary arrangements to cover deficiencies in accredited generation capability, the pool, if it is to maintain overall reserve assurance, must be able to require the deficient **[**18]** member to purchase power. The pool, which lacks authority to compel sales from outside sources, must depend on members with surplus energy to sell power to deficient members. Selection of the selling member or members in accordance with the valid interests **[*1165]** of the pool reasonably furthers the pool's objectives. The challenged provisions of the Agreement clearly do not represent an illegal group boycott or sales allocation scheme, and the Commission did not err in failing to discuss them as such.
[19]**

Alexandria further contends that the Agreement effectively destroys potential competition from nongenerating distribution systems by denying them services essential to their entry into the generating business. According to Alexandria, newcomers may be unable to obtain financing or may be unwilling to make the necessary investment to enter the generation business without commitments for the back-up of any proposed generation unit. Alexandria concludes that the Agreement is unlawful because it limits reserve sharing to participants who own and use generation.

Alexandria relies on *Associated Press v. United States, 326 U.S. 1, 13-14, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*, to support its argument that the Agreement's failure to include nongenerating distribution systems is anticompetitive. In that case, the bylaws of a cooperative association engaged in gathering and distributing news prohibited members from selling to nonmembers. The bylaws were designed to destroy competition and effectively did so. In those circumstances, the Supreme Court held that the bylaws violated the antitrust laws.

Alexandria's argument misconceives the thrust of the MAPP Agreement. First, the Agreement does **[**20]** not prohibit or restrict participants from entering into reserve arrangements with nonmember distribution companies. Indeed, the Agreement explicitly recognizes the possibility of such arrangements. [24] Second, nongenerating distribution systems that desire to enter the generating business may submit construction plans to MAPP for consideration and may attend MAPP meetings at which long-range plans are discussed. [25] Under the modified membership provisions, See text at 1170-1172 Infra, any distribution company interconnected with a MAPP participant that wishes to construct generation facilities is assured of eligibility for pool membership, and the consequent benefits of reserve sharing, when the facilities are operational.

The pooling arrangement before us is thus fundamentally different from that presented in *Associated Press v. United States, 326 U.S. at 13-15, 65 S. Ct. 1416*. Cf. *City of Huntingburg v. FPC, 162 U.S.App.D.C. **[**21]** at 239-40, 498 F.2d at 781-82* (case remanded for consideration of anticompetitive effects of pool agreement limiting participant's wholesale power sales to nonmembers). Moreover, the Commission has stated that it will monitor access to the planning functions of MAPP and, if necessary, institute improvements. [26] We affirm the Commission's decision that the failure to include nongenerating distribution systems in MAPP is not anticompetitive and does not render the Agreement inconsistent with the public interest. [27] See *Municipalities of Groton v. FERC, 190 U.S.App.D.C. 399, 401-403, 587 F.2d 1296, 1298-1300 (1978)*. See also *Municipal Electric Association v. FPC, 134 U.S.App.D.C. 310, 313-14, 414 F.2d 1206, 1209-10 (1969)*.

Alexandria also asserts that past conduct by MAPP participants demonstrates the anticompetitive ends of the Agreement. It argues that the Agreement is designed to formalize and perpetuate a set of anticompetitive **[**22]**

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[24] J.A. II at 243 (P 19.01); See id. at 374-75.

[25] *Id. at 231*; See id. at 377.

[26] *Id at 418*.

[27] See *id. at 410, 417*. See also *id. at 373-74, 385-88*.

practices developed by the participants over several years. The ALJ ruled, and the Commission agreed, that Alexandria failed to produce evidence to support its allegations. [28] **[**23]** We have reviewed **[*1166]** the record in this case and find that there is substantial evidence underlying the Commission's decision. See *Gainesville Utilities Department v. Florida Power Corp., 402 U.S. 515, 526-27, 91 S. Ct. 1592, 29 L. Ed. 2d 74 (1971)* (citing *16 U.S.C. § 825L (b)*). [29]

Alexandria finally interprets the Commission's decision as holding that the Agreement is acceptable as long as it is not more anticompetitive than prior pooling agreements. This is an inaccurate reading of the Commission's decision. In affirming the ALJ's conclusion that MAPP would improve power pooling in the mid-continent area, the Commission stated:

> We do, however, wish to clarify one point. While the Administrative Law Judge is correct that the pooling agreement under consideration need not necessarily advance pooling beyond prior agreements it supersedes, in the event that the new pooling agreement under review reduces competition in contrast to the prior agreements the Commission would have to find in the new pool public interest advancements outweighing the reduction in competition. Since, we find Infra, no reduction in competition resulting from MAPP when properly modified, such a balance is not required.

[24]**

J.A. II at 406 (footnote omitted). [30] The Commission then agreed with the ALJ that Alexandria "(had) not shown that the MAPP Agreement, with the exception of its membership provisions . . . is anticompetitive." *Id. at 408*. In so ruling, the Commission correctly described the role of anticompetitive considerations:

> "(B)ecause competitive considerations are important elements of the public interest, we believe that in a case such as this the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."

Id. at 409 (footnote omitted) (quoting *Northern Natural Gas v. FPC, 130 U.S.App.D.C. **[**25]** at 228, 399 F.2d at 961*). The Commission's analysis of Alexandria's allegations was not based on a comparison of the possible anticompetitive effects of the Agreement with the effects of prior power pools. The Commission considered Alexandria's various antitrust contentions without regard to prior pooling arrangements and held that the Agreement was in the public interest. We are satisfied that the Commission engaged in the appropriate legal analysis.

SCOPE OF MAPP SERVICES

South Dakota argues that the scope of MAPP services is too limited and that the Commission failed fully to consider expanding MAPP services. Specifically, South Dakota asks this court to remand the case to the Commission with

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[28] *Id. at 382-83, 412-13*. Alexandria also suggests that particular pricing and power exchange procedures within the Agreement are "designed to protect inefficiency." Brief for Alexandria at 49. It refers to rate schedules not based exclusively on cost factors. Alexandria is not contesting the general reasonableness of price levels, See *id. at 449*, but contends that the rate-setting procedures are indicative of MAPP's anticompetitive nature. In upholding the schedules, the ALJ and the Commission relied on the need to stimulate short-term purchases of excess capacity in lieu of adding new capacity and to discourage reliance on emergency energy when units are less efficient. See *id. at 381-82, 411-12* & n.14. We conclude that the Commission's decision that such procedures were not anticompetitive is reasonable.

[29] Thus, we need not consider the Commission's alternate conclusion that even if such conduct has occurred, it is irrelevant to determining the lawfulness of the Agreement.

[30] The Commission apparently was clarifying statements by the ALJ that participation in MAPP did not hamper the competition that does exist, *Id. at 378*, and that the systems not eligible to participate in MAPP were not eligible to participate in prior power pools, *Id. at 387*.

directions to consider whether MAPP participants should be required to construct larger generation units [31] **[**26]** and engage in single system planning with central dispatch. South Dakota bases its arguments on several theories. [32] **[*1167]** Petitioner Alexandria makes substantially the same arguments in its brief.

In responding to the argument that the scope of the MAPP Agreement was too limited, the Commission stated:

> We reject the position of (Alexandria) and South Dakota that MAPP must be transformed from its **[**27]** present limited scope to one offering all conceivable pooling services. While Section 202(a) of the Federal Power Act speaks in terms of "voluntary interconnection and coordination" and to "promote and encourage" the same, the pooling agreement is an FPC tariff which must pass muster under Sections 205 and 206 of the Federal Power Act. For example, we have already found the membership provisions unacceptable. Nevertheless, the scope of a power pool is in the first instance a matter for the utilities involved. The mere fact that a particular pool does not offer the same range of services as another pool does not permit the Commission to direct expansion of the narrower pools' scope. Unless the limited scope of the MAPP Agreement is for some other reason unjust, unreasonable or unduly discriminatory, we are not authorized under Part II of the Federal Power Act to direct the pool to offer more services. While we can and do "encourage and promote" greater use of pooling, the peculiarities of each region necessitate that the member utilities determine the services to be offered. One cannot automatically apply the broader scope of NEPOOL, based upon very different geography, industry history **[**28]** and make-up in New England, to the mid-continent region with its tremendous area, sparse load and different industry make-up.

J.A. II at 420.

We are satisfied that the Commission reached an informed and reasoned decision consistent with congressional purposes. See *Municipalities of Groton v. FERC, 190 U.S.App.D.C. at 402, 587 F.2d at 1299*. [33] **[**30]** Congress has concluded that regional coordination of electric power systems by means of regional power pools is in the public interest. See text at 1162-1163 Supra. Section 202(a) recognizes that power pooling can yield benefits of efficiency and economy. [34] Notwithstanding the desirability of coordination of electric systems, however, Congress

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[31] Under 202(b) of the Act, *16 U.S.C. § 824a(b) (1976)*, the Commission is expressly prohibited from compelling the enlargement of generation facilities in connection with an order issued under that section.

[32] South Dakota argues that the Commission should have held the Agreement unreasonable under section 206(a) of the Act, *16 U.S.C. § 824e(a) (1976)*, because pool services were limited; that the Commission did not engage in reasoned decisionmaking; that the Commission failed to fulfill its duty under section 202(a) of the Act, *16 U.S.C. § 824a(a) (1976)*, to promote and encourage interconnection and coordination of facilities; and that the Commission erred in holding it has no authority to order increased pool services.

South Dakota also suggests that the Commission failed to carry out its responsibilities under section 207 of the Act, *16 U.S.C. § 824f (1976)*. We do not consider this argument because South Dakota failed to comply with that section's procedural provisions, which require, Inter alia, filing a complaint with the Commission and sending notice to all affected state commissions.

[33] South Dakota suggests that the Commission gave inadequate attention to "national energy policy." Brief for South Dakota at 31-34. Specifically, South Dakota asserts that the Commission failed to act with the requisite urgency to conserve energy and failed to give due regard to coordination with the states. We disagree. The Commission had specific responsibility in this proceeding to decide whether a particular voluntary pool agreement was unjust, unreasonable, or unduly discriminatory. We have no reason to believe that its decision was inconsistent with "national energy policy." However, even if it could be so construed, we recall this court's recent decision in *Richmond Power & Light v. FERC, 187 U.S.App.D.C. 399, 405-06, 574 F.2d 610, 616-17 (1978)* (footnotes omitted):

While an administrative agency must remain faithful to public policies directly related to its regulatory authority, surely at any given moment of history it may rationally decline to affirmatively foster other policies in weighing the specific interests that it is required by statute to consider.

[34] See notes 8, 16, 23 Supra. See also *Municipalities of Groton v. FERC, 190 U.S.App.D.C. at 401, 587 F.2d at 1298*.

decided to make such coordination voluntary, with limited exceptions. [35] See **[*1168]** S.Rep.No.621, 74th Cong., 1st Sess. 19, 49 (1935); H.Rep.No.1318, 74th Cong., 1st Sess. 8, 27-28 (1935). Congress was convinced that "enlightened self-interest" would lead utilities to engage voluntarily in power planning arrangements, and it was not willing to mandate that they do so. S.Rep.No.621, 74th Cong., 1st Sess. 49; See *Otter Tail Power Co. v. United States, 410 U.S. 366, 374, 93 S. Ct. 1022,* ***[**29]*** *35 L. Ed. 2d 359 (1973)*. Given the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the Agreement, and failure of the MAPP participants to establish a fully integrated electric system [36] could not justify rejection of the Agreement filed.

[31]**

The Commission had authority, however, under section 206 of the Act, *16 U.S.C. § 824e (1976)*, to order changes in the limited scope of the Agreement, including the addition of pool services, if, in the absence of such modifications, the Agreement presented "any rule, regulation, practice or contract (that was) unjust, unreasonable, unduly discriminatory or preferential." See *Municipalities of Groton v. FERC, 190 U.S.App.D.C. at 404-06, 587 F.2d at 1301-03*. We agree with South Dakota that the Commission should consider the policies of the Federal Power Act in making a determination under this section. This does not mean, however, that a pooling plan is unlawful under section 206 merely because a more comprehensive arrangement might better achieve the purposes of section 202(a). To so conclude would undermine Congress's determination that coordination under section 202(a) be voluntary. Moreover, we cannot agree with South Dakota that in approving the Agreement the Commission abdicated its duty under section 202(a) to promote and encourage regional interconnection and coordination of electric facilities.

South Dakota also argues that the Commission "erred as a matter of law" in concluding **[**32]** that it could not direct the pool to offer more services even if the pool arrangement were unreasonable. We find the assertion spurious. [37] The Commission **[*1169]** ruled only that Unless the MAPP Agreement was unjust, unreasonable or unduly discriminatory, it lacked statutory authority to compel additional services.

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[35] ***HN4***[] Under section 202(b), *16 U.S.C. § 824a(b) (1976)*, the Commission, upon application of a state commission or a person engaged in the sale or transmission of electrical energy, may order a public utility to establish physical connection of its transmission facilities with another electric system and sell or exchange energy. The Commission may not compel the enlargement of generating facilities for such purpose or impose undue burden upon such public utility. See also § 202(c), *16 U.S.C. § 824a(c) (1976)* (emergency powers).

[36] The Commission explained the different degrees of power pooling in The 1970 National Power Survey, Supra note 8, at I-17-1 to I-17-2:

There are thousands of arrangements among systems from all segments of the industry providing for various degrees and methods of electrical coordination. These variations reflect differences in load density, characteristics of generating resources, geography, and climate. They are also a product of managerial views with respect to planning, marketing, competition, and retention of prerogatives. Because of these differences, no single definition of coordination has been established by the electric utility industry. As used in this chapter, Coordination is joint planning and operation of bulk power facilities by two or more electric systems for improved reliability and increased efficiency which would not be attainable if each system acted independently. Full coordination involves coordination of all systems within an area, to the extent technologically and economically feasible to permit the serving of their combined loads with a minimum of resources and to exploit opportunities for coordination with adjacent areas.

The highest degree of coordinated planning results when a group of utilities jointly plan, design, and construct their generation and transmission facilities as a single system. However, such coordinating groups must be large enough to take full advantage of the efficient generating units and EHV transmission made available by modern technology, yet be of manageable size with all members capable of sharing the responsibilities of the coordinated effort. Similarly, the highest degree of coordinated operation is achieved when a group of utilities operate all of their bulk power facilities as a single system.

[37] See Brief for South Dakota at 21. We also reject South Dakota's assertion that the Commission's decision should be reversed because the Commission did not reopen the evidentiary proceedings to receive a report prepared by South Dakota in 1977

[33]**

Finally, South Dakota contends that the Commission should have considered ordering MAPP participants to wheel [38] electric power to nongenerating electric systems. This court has previously rejected a similar argument. In *Richmond Power & Light v. FERC, 187 U.S.App.D.C. 399, 574 F.2d 610*, (1978), the court recounted the Supreme Court's decision in Otter Tail Power Co. v. United States:

> "As originally conceived, Part II (of the Federal Power Act) would have included a "common carrier' provision making it "the duty of every public utility to . . . transmit energy for any person upon reasonable request . . . .' In addition, it would have **[**34]** empowered the Federal Power Commission to order wheeling if it found such action to be "necessary or desirable in the public interest.' H.R.5423, 74th Cong., 1st Sess.; S.1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve "the voluntary action of the utilities.' S.Rep.No.621, 74th Cong., 1st Sess. 19.
>
> It is clear, then that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."

187 U.S.App.D.C. at 408, 574 F.2d at 619 (quoting *Otter Tail Power Co. v. United States, 410 U.S. at 374, 93 S. Ct. at 1028*). This court concluded that arguments advocating mandatory wheeling in lieu of relying on voluntary wheeling should be addressed to Congress. Id. Although Congress has recently taken action permitting the Commission to order wheeling in certain circumstances, [39] **[**35]** this legislation is inapplicable to the case before us. [40] Given the voluntary nature of power pooling under section 202(a), and Congress's particular determinations with respect to wheeling, we uphold the Commission.

Alexandria argues that the Agreement should have been rejected because it did not offer services beyond those of pools which previously operated in the mid-continent area. The ALJ found, and the Commission agreed, that MAPP is an improvement over earlier pools. [41] In addition, the ALJ and the Commission held that a pool agreement that

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entitled An Evaluation of Power Supply Planning by the Six-Investor Owned Electric Utilities in South Dakota. Basically, the report concludes that MAPP participants continue to plan and construct "sub-optional" facilities. Brief for South Dakota at 24. The report apparently underlies South Dakota's arguments that the Commission should have ordered pool operations to result in enlargement of generation facilities. See text at -- - U.S.App.D.C. -- , *606 F.2d 1166* Supra. South Dakota first referred to its ongoing "study of the power supply alternatives available to South Dakota" in its brief of exceptions to the ALJ's initial decision. J.A. II at 398. At that time, however, South Dakota specifically indicated that the present proceeding could be concluded without consideration of the report. South Dakota recommended reopening the record only "if the Commission believe(d) additional information would be useful." *Id. at 399*. In its petition for rehearing of the Commission's decision, South Dakota indicated it was prepared to present evidence that the Agreement "fails to establish reasonable mechanisms for more efficient regional planning and construction." *Id. at 439*. South Dakota then suggested that it join with the Commission in further investigation "if the . . . Commission finds the present record inadequate to evaluate the pool agreement and order necessary improvements." Id.

In view of the lack of a firm request for reopening of the record, and our decision with respect to the Commission's authority to mandate enlarged pool services, we cannot say that the Commission abused its discretion in failing to reopen the evidentiary record. See generally *Willis Shaw Frozen Express, Inc. v. ICC, 191 U.S.App.D.C. 1, 7, 587 F.2d 1333, 1339 (1978)*.

[38] ***HN5***[] "Wheeling is broadly defined as "the transfer by direct transmission or displacement (of) electric power from one utility to another over the facilities of an intermediate utility.' " *Richmond Power & Light v. FERC, 187 U.S.App.D.C. at 403 n. 9, 574 F.2d at 614 n. 9* (quoting *Otter Tail Power Co. v. United States, 410 U.S. 366, 368, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973))*.

[39] Under section 203 of the Public Utility Regulatory Policies Act of 1978, Pub.L.No.95-617, 92 Stat. 3136, *16 U.S.C.A. § 824j (Supp.1979)*, the Commission can order wheeling to an applicant electric utility or federal power marketing agency if certain criteria are met relating to conservation, efficiency, reliability, competitive impact, and burdens.

[40] See note 3 Supra.

supersedes a prior arrangement is not unlawful merely because **[*1170]** it does not offer new services. [42] We agree with the Commission on both counts.

The most obvious improvement of the Agreement is enhanced reserve assurance. By combining the pool operations of the Bureau of Reclamation with the various other power pools existing in the mid-continent region, MAPP has increased the number of generating units committed to back up other units in the pool. See generally *Gainesville Utilities Department v. Florida Power Corp.,* ***[**36]*** *402 U.S. at 518-20* & n. 3, *91 S. Ct. 1592*. However, even if a newly filed pool agreement merely streamlined or updated prior agreements without initiating substantive changes in pool services, nothing in sections 202(a), 205, or 206 of the Act suggests that this alone would be sufficient to hold it unlawful. Such a conclusion would be inconsistent with Congress's intent to promote planned coordination of electric systems.

MEMBERSHIP PROVISIONS

Article IV of the Agreement establishes pool membership requirements. Under the Agreement, any "entity engaged in the electric utility business which owns or leases, and controls the operation of, one or more generating units, and which entity is electrically interconnected with one or more Parties to this Agreement" [43] may become a MAPP party. Parties are divided into two classes: participants, who are entitled to representation on all pool committees and participation in the full range of pool services; and associate participants, who are entitled to representation on certain pool committees and participation in pool planning functions. To become a participant, a party is required to meet certain requirements. It must be a party:

[37]**

> a. Whose system is normally operated directly interconnected with two or more electric systems; and
>
> b. Which owns or controls transmission facilities operated at 115 kilovolts or higher forming an integral part of the regional transmission network; and
>
> c. Whose system contributes significantly as determined by the Management Committee to the reliability of the interconnected systems operation; and
>
> d. Which operates or participates in the operation of a 24-hour dispatch center with a terminal on the communication network connecting the Participants.

J.A. II at 221-22. Parties not meeting these criteria are associate participants.

The Commission staff contended before the ALJ that the Agreement created an unreasonable distinction between participants and associate participants. The ALJ nonetheless held the provisions were just, reasonable, and not unduly discriminatory or preferential. [44] On review of the ALJ's decision, the Commission agreed with the staff. It found the distinction between participants and associate participants discriminatory on its face under sections 205 and 206 of the Act. [45] It reversed the ALJ's decision with respect to **[**38]** membership criteria, and held that "as

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[41] J.A. II at 365, 406.

[42] Id.

[43] *Id. at 221*.

[44] *Id. at 384-85*.

[45] The MAPP Management Committee submitted a filing with the Commission on March 6, 1979, which contains new membership provisions. This filing is the subject of ongoing Commission proceedings and we express no view on its merits.

far as access to the operational functions of MAPP, Staff is correct that ownership and use of generation and at least one interconnection is the minimum criterion." *Id. at 417*. [46]

[39]**

[*1171] Both Alexandria and Central Iowa attack the Commission's decision. Alexandria argues that the Commission did not go far enough in ordering modification of the membership provisions and that it should have opened MAPP services to nongenerating distribution systems. Central Iowa argues that there was no evidence to support the Commission's conclusion that the membership provisions were discriminatory and that the Commission unlawfully changed the purposes of the MAPP Agreement.

We are satisfied that the Commission, in modifying the membership provisions, reached a reasoned decision based on substantial evidence. See *16 U.S.C. § 825L (b) (1976)*. See generally *Gainesville Utilities Department v. Florida Power Corp., 402 U.S. at 527, 91 S. Ct. 1592*; *Municipalities of Groton v. FERC, 190 U.S.App.D.C. at 402, 406, 587 F.2d at 1299, 1303*. Insofar as Alexandria attacks the revised membership provisions on specific antitrust grounds, we have previously discussed why that argument is without merit. See text at --, *606 F.2d 1165* Supra. Nongenerating distribution systems are not excluded from participation in MAPP planning functions; nor are MAPP participants prohibited from **[**40]** making reserve generation commitments to distribution systems that desire to enter the generation business. Id. Alexandria implies in its brief that the Agreement will result in the denial of wholesale power to small nongenerating distribution systems. We have no reason to believe, on the record before us, that such conduct will occur. The MAPP Agreement does not apply to long-term wholesale power arrangements and specifically recognizes that participants may freely enter into outside contracts for the sale of electric power. [47]

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[46] In ordering the modification of the membership provisions, the Commission stated:

We agree with Staff that the membership criteria of Article IV of MAPP are not reasonably related to the MAPP objectives. Those objectives are the effectuation of reserve sharing so as to best develop through coordination reliable and economic generating capacity. As far as access to the operational functions of MAPP, Staff is correct that ownership and use of generation and at least one interconnection is the minimum criterion. The criteria now employed to differentiate Participants from Associate Participants all distill down to size of the system. While the smaller systems could conceivably benefit from MAPP membership, they do not have the transmission facilities to reciprocate in kind for the short-term transmission services included in the MAPP services schedules. Because of the significant advantages flowing from MAPP membership and the corresponding impact of denied access, we do not feel that this size criterion is reasonable. So long as the small utility can provide compensation for the true value of this transmission service, whether in kind or money, the pool should not be injured.

Although the complexities involved in establishing some standard for monetary compensation do not deter the ultimate result that Article IV must be modified, they do cause us to proceed cautiously. Accordingly, we shall hereby direct Commission Staff to initiate dialogue with the MAPP Management Committee to develop a fair and equitable measure of compensation to be paid by those Participants which do not have the transmission wherewithal to reciprocate in kind. This process of modifying the membership provisions should be open so that any electric system in the mid-continent area can observe. Access to the MAPP planning function should also be improved as a part of this modification process. . . .

In making this decision that the membership criteria must be modified, we do not deny the benefits which any utility, including those too small to presently become MAPP Participants, can glean from purely bilateral, non-pool reserve sharing arrangements; however, that fact does not mollify the discrimination inherent in Article IV which we must, under Sections 205 and 206 of the Federal Power Act, remedy. While there is no obligation for utilities in the first instance to have a pooling agreement, if one does exist it must be nondiscriminatory. Within the dynamics of the electric utility industry, the oftentimes subtle and yet significant long-term impact of power pooling demands our close scrutiny of provisions which deny access to the benefits of the pool. Thus the presence of such bilateral arrangements and the absence of denials of membership do not vindicate discrimination inherent in the membership provisions. In this regard, apart from the inherent discrimination Article 4.02(b) and (c) contain standards (forming an integral part of the regional transmission network and contributing significantly to the reliability of the interconnected systems operations) which are not sufficiently quantitative to assure objective and nondiscriminatory interpretation. This problem must be cured when the membership provisions are reformed.

Id. at 417-18.

[47] See, e. g., *id. at 243 (P 19.01), 245 (P 19.09)*.

Further, the current successor to the Bureau of Reclamation is statutorily required to prefer municipal systems and public cooperative corporations in the sale of electric power. [48] The Commission has warned that if **[*1172]** MAPP participants engage in anticompetitive conduct, the conduct will be subject to commission scrutiny. [49]

We also disagree with Central Iowa's contention **[**41]** that the Commission's finding that the membership provisions are unduly discriminatory is unsupported. The MAPP Agreement excludes generating electric systems with only one interconnection and with less than the specified level of transmission capability from participation in MAPP's service schedules, including the reserve energy schedule. These systems could clearly benefit through use of MAPP's services, particularly reserve sharing. [50] See generally *Gainesville Utilities Department v. Florida Power Corp., 402 U.S. at 518-20* & n.3, *91 S. Ct. 1592*. The Commission held that exclusion of the smaller generating systems was not reasonably related to MAPP's objectives and that the pool would not be injured by inclusion of such systems as long as they provide compensation for the true value of transmission services, whether in kind or in money. The Commission directed the MAPP participants and the Commission staff to develop a formula for fair compensation to be paid by those participants unable to reciprocate for transmission in kind. [51] This is a matter well within the Commission's expertise, and we are convinced that its decision is reasonable and supported by substantial evidence. **[**42]** [52] See *Municipalities of Groton v. FERC, 190 U.S.App.D.C. at 406, 587 F.2d at 1303*.

CONCLUSION

The petitioners in this case attack the Commission's decision both for going too far in modifying the MAPP Agreement, and for not going far enough. We have considered all of the arguments raised, and we conclude that the Commission has struck a proper balance in accepting, with modified membership provisions, the Agreement. Therefore, **[**43]** the Commission's decision is

Affirmed.

End of Document

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[48] See note 5 Supra.

[49] J.A. II at 378.

[50] See *id. at 417-18*. See also *id. at 365, 406*.

[51] The filing submitted to the Commission by the MAPP Management Committee on March 6, 1979, See note 45 Supra, contains provisions covering payment for transmission services.

[52] J.A. II at 417-18. We cannot agree with Central Iowa that the Commission changed the purpose and intent of MAPP by allowing some generating electric systems to compensate MAPP members monetarily for transmission service. This feature will not relieve such systems from reserve obligations and should not have a detrimental impact on planning functions.

Security Tire & Rubber Co. v. Gates Rubber Co.

United States Court of Appeals for the Fifth Circuit

July 12, 1979

No. 77-1943

Reporter

598 F.2d 962 *; 1979 U.S. App. LEXIS 13239 **; 1979-2 Trade Cas. (CCH) P62,773; 1979 WL 504883

SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Plaintiffs-Appellees, v. The GATES RUBBER COMPANY, a Colorado Corporation, Defendant-Appellant; The GATES RUBBER COMPANY, a Colorado Corporation, Plaintiff-Appellant, v. SECURITY TIRE & RUBBER COMPANY, a Texas Corporation, and Security Tire & Rubber Company, a Virginia Corporation, Defendants-Appellees

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

Core Terms

tires, customer, Robinson-Patman Act, subsidiary, antitrust, wholly-owned, transfers, price discrimination, sales, favored, purchaser, manufacturing, parent corporation, station, cancellation, Rubber, notice, seller, costs

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN1[] **Robinson-Patman Act, Claims**

§ 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)* states that it shall be unlawful for any person to discriminate in price between different purchasers of commodities where such commodities are sold for use, consumption, or resale within the United States.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN2[] **Robinson-Patman Act, Claims**

Courts have interpreted the § 2(a) language of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, to require that a plaintiff establish two separate and contemporaneous sales transactions made by the same seller to two distinct purchasers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN3[] **Robinson-Patman Act, Claims**

Transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, discrimination suit.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN4[] **Robinson-Patman Act, Claims**

If there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary's sales are attributable to the parent.

Counsel: Thomas L. Case, Louis P. Bickel, Dallas, Tex., for defendant-appellant.

David B. Kultgen, Waco, Tex., for plaintiffs-appellees.

Judges: Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

Opinion by: HILL

Opinion

[*962] This is primarily a price discrimination case brought under Section 2(a) of the Robinson-Patman Act. *15 U.S.C.A. § 13*. We hold that Plaintiffs have failed to allege or prove a discriminatory sale to a favored customer.

I.

The factual background and the course of proceedings relevant to our decision today may be briefly summarized.

In 1964, Plaintiffs, Security Tire & Rubber Company, a Texas Corporation (Security-Texas), **[*963]** and Security Tire & Rubber Company, a Virginia Corporation (Security-Virginia), embarked on a course of dealing with the Defendant, The Gates Rubber Company, a Colorado Corporation (Gates). This course of dealing eventually led to the present litigation.

Defendant Gates is in the rubber manufacturing business. Gates' product line included tires for motor vehicles until the Fall of 1973, when it sold its Nashville, Tennessee tire manufacturing **[**2]** facility to Armstrong Rubber Company. Gates completely ceased tire manufacturing by the Spring of 1974. Plaintiffs, Security-Texas and

Security-Virginia were "private brand" sellers of tires, although Security-Texas was not actively selling tires after early 1970. A "private brand" is a line of tires produced for a customer with a brand name, imprinted on the tires, which is owned by and identified with that customer. The Plaintiffs commenced in their venture in 1964, and from then until the Fall of 1973 they purchased most of their tires from Gates. The Plaintiffs marketed tires under the label of "Security" and did business predominantly in the Southeast United States.

At the outset, the parties operated under a verbal understanding. Subsequently, they reduced certain terms of their dealing to a written contract on July 17, 1969. The written contract did not set the prices of the tires to be manufactured by Gates and bought by Plaintiffs, nor did it require Plaintiffs to purchase any given number of tires. It merely provided that Plaintiffs were to purchase eighty percent of their requirements from Gates, if Gates produced the type of tire required by Plaintiffs. The written **[**3]** contract also provided for cancellation by any party upon one-hundred and eighty days notice.

During the period relevant to this lawsuit, 1969-73, there also existed a wholly-owned subsidiary of Gates, National Tires, Inc. (National). In effect, Gates marketed tires under the National label.

The somewhat complicated procedural history of this suit began on February 8, 1974, when Plaintiffs, Security-Texas and Security-Virginia, instituted a lawsuit in the Western District of Texas against Defendant Gates, filed as No. W-74-CA-9. The complaint alleged several different causes of action, including a treble damage action under the Robinson-Patman Act alleging a secondary line discrimination, a claim for a breach of warranty for an alleged failure to manufacture tires properly and a claim for a breach of contract for Gates' alleged failure to give timely notice of the cancellation of the July 17, 1969, contract. The complaint also alleged, and thus admitted, that Plaintiffs were indebted to Gates for tires and demanded that the debt be offset against their damages and that recovery be allowed for damages in excess of the debt. On February 22, 1974, Gates instituted a suit on an account **[**4]** against Security-Virginia in the Chancery Court of Davidson County, Tennessee which was removed to the federal court for the Middle District of Tennessee. By court order, Gates' action was transferred from the Middle District of Tennessee to the Western District of Texas on June 4, 1974, and it was assigned No. W-74-CA-41. The answer in No. W-74-CA-41 incorporated the complaint filed in No. W-74-CA-9 and demanded an offset of damages against the debt owed Gates. The Plaintiffs' cause, No. W-74-CA-9, and Gates' cause, No. W-74-CA-41, were consolidated for purposes of pretrial proceedings and trial.

By way of an Amended Complaint in No. W-74-CA-9, which was filed on January 18, 1977, the Plaintiffs abandoned all but three of their claims. The claims contained in the Amended Complaint and tried in the District Court were: (1) the Robinson-Patman treble damage claim; (2) the breach of contract claim for the alleged failure of Gates to manufacture tires in accordance with the warranty and standards of the Federal Department of Transportation; and (3) the breach of contract claim for the alleged failure of Gates to provide Plaintiffs with six months notice of cancellation of the July **[**5]** 17, 1969 contract. Gates' claim on the account against Security-Virginia was asserted in No. W-74-CA-41 and also **[*964]** as a counterclaim in No. W-74-CA-9, but was tried as a companion or consolidated case along with No. W-74-CA-9.

Both of the above cases were tried to a jury commencing on March 8, 1977. Gates' claim on the account against Security-Virginia, No. W-74-CA-41, was not submitted to the jury inasmuch as Security-Virginia admitted the account and stipulated that Gates had proven all the elements of its claim on the account. Upon Gates' motion, the District Court entered a judgment on the account. Plaintiffs' claims, No. W-74-CA-9, were submitted to the jury on a general charge, and the jury rendered a general verdict. The jury found for the Plaintiffs on the antitrust claim in the amount of $ 100,000 and for the Plaintiffs on the claim of breach of contract for failure to give timely notice on the cancellation of the contract in the amount of $ 3,667. The jury rendered a general verdict for Gates on the Plaintiffs' claim for breach of warranty.

On March 23, 1977, the District Court entered a single judgment under both cause numbers. The judgment awarded the **[**6]** Plaintiffs the sum of $ 303,667, representing the $ 100,000 on the antitrust claim trebled plus $ 3,667 on the breach of contract claim for failure to give notice of cancellation. The judgment also awarded Plaintiffs their costs and attorneys' fees, with the proviso that the amount of attorneys' fees would be determined at the conclusion of any appeal which might be taken from the judgment or at such time as the judgment became final.

The judgment further awarded Gates $ 458,235.69, together with interest at the legal rate until paid, on the account against Security-Virginia. The judgment failed to award Gates prejudgment interest, attorneys' fees or costs. An amended judgment was entered on April 20, 1977, which deleted Security-Texas as a prevailing party in No. W-74-CA-9, pursuant to a postjudgment motion made by Gates. However, the amended judgment failed to make any disposition of Security-Texas. To that end, a second amended judgment was entered on May 27, 1977, which provided that Security-Texas take nothing for its causes of action.

II.

HN1[] Section 2(a), in pertinent part, reads: "It shall be unlawful for any person . . . to discriminate in price between Different purchasers **[**7]** of commodities . . . where Such commodities are sold for use, consumption, or resale within the United States." *15 U.S.C.A. § 13(a)* (emphasis added). ***HN2***[] Courts have interpreted the Section 2(a) language to require that a plaintiff establish two separate and contemporaneous sales transactions made by the same seller to two distinct purchasers. "No single sale can violate the Robinson-Patman Act." *Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755, 67 S. Ct. 1015, 1021, 91 L. Ed. 1219 (1947)*. Besides being suggested by the very language of the statute, the requirement of two transactions is implicit in the purpose of the Robinson-Patman Act. Anticompetitive price discrimination among competing buyers is the evil the statute prohibits. For price discrimination to occur, it is axiomatic that one purchaser must pay more than another purchaser; there must be two or more transactions at different prices. See generally Areeda, Antitrust Analysis PP 701-740 (2d ed. 1974); Kitner, A Robinson Patman Primer 77-78 (1970); Rowe, Price Discrimination under the Robinson Patman Act (1964); Sullivan, Antitrust §§ 217-19, 222-25 (1977); Von Kalinowski, Antitrust Laws & Trade Regulations **[**8]** § 24.03 (1975). See also generally, e. g., *Hampton v. Graff Vending Co., 516 F.2d 100, 102 (5th Cir. 1975)*; *Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969)*; *Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 7* (5th Cir.), Cert. denied, *396 U.S. 901, 90 S. Ct. 212, 24 L. Ed. 2d 177 (1969)*; *Hartley & Parker Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962)*.

The theory and proof of Plaintiffs' case assigned National the role of their competitor and the beneficiary of Gates' price discrimination **[*965]** the so-called "favored customer." Plaintiffs sought to assign themselves the roles of the victims of Gates' price discrimination the so-called "disfavored customers." It is important to note that National, the wholly-owned subsidiary of Gates, was the only customer of Gates alleged to have been favored; there was neither any further allegation nor proof of any other beneficiary of Gates' alleged price discrimination.

Assuming Arguendo that Plaintiffs established the other prerequisites for a recovery, their theory and proof would support the jury's verdict only if the transfers of tires from Gates to its wholly-owned subsidiary, National, **[**9]** were considered sales within the meaning of the Robinson-Patman Act. Today, we reject what little authority we have found supporting the theory that under some circumstances a parent corporation's transfers to its wholly-owned subsidiary may be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Briefly, we shall explore the history of this theory and explain why we are not persuaded to follow in its future. Ours is a different course. We hold that ***HN3***[] transfers from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

The origins of the theory we reject today lie in *Danko v. Shell Oil Co, 115 F. Supp. 886 (E.D.N.Y.1953)*. In Danko the operator of a gasoline retail station sued a gasoline distributor and alleged, "the defendant directly or indirectly owns, operates, maintains and controls a gas station within one mile of plaintiff's station and Grants itself preferential treatment and discriminates against the plaintiff." *Id. at 888* (emphasis added). Thus, the plaintiff in Danko alleged, Inter alia, that it was the disfavored **[**10]** customer and sought to compare its purchases from the defendant with sales from the defendant to the defendant's wholly-owned retail gasoline stations to establish a price discrimination. The District Court denied the defendant's motion to dismiss for failure to state a claim on which relief could be granted without providing any economic, antitrust analysis and without citing any significant controlling precedent:

> The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser. In any event, it is doubtful that such relationship, if discriminatory, would be permitted to

> accomplish such objective. See for analogy, *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199*, and cases cited therein. That the Court actually looks behind form to see who the real competitors are, see *American Cooperative Serum Ass'n v. Anchor Serum Co., 7 Cir., 153 F.2d 907, 913, 914*. Surely, all of these unresolved factual questions, coupled with the statement in *Bruce's Juices v. American Can Co., 330 U.S. 743, 755, 67 S. Ct. 1015, 91 L. Ed. 1219*, with respect to what types of sales are actually **[**11]** discriminatory, constrain the Court to overrule the objection to the third cause of action.

Id. With the off-hand observation, "The fact that defendant itself may own and control such filling station would not destroy the relationship of vendor and purchaser," the District Court, seemingly unwittingly, created antitrust theory. At least, the District Court declined to dismiss the complaint which it understood to depend upon such a theory.

The apparent basis of this theory is found in the general postulate of ***antitrust law*** that substance and true competitive function control rather than corporate form. By analogy, the District Court relied on *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)* which involved the rather remote question whether a partially-owned subsidiary corporation could conspire with its parent corporation in violation of the Sherman Act. See also *Perkins v. Standard Oil Co., 395 U.S. 642, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*. The validity of this antitrust postulate is beyond peradventure, and with **[**12]** it we have no quarrel. There usually is no substitute for a careful **[*966]** analysis of the economic realities presented by the facts of a given case in light of the underlying purpose of the relevant antitrust statute. We simply refuse to follow the Danko analogy here. At the same time, we do not seek to exalt form over substance. Instead, we are convinced that substance may be coincident with form and that this is such a situation. If there be a form versus substance issue here, we are quite convinced that our antitrust analysis more properly emphasizes substance over form than the theory we reject today.

Although several courts have noted the theory first suggested in Danko, we have found no reported decision in which a Robinson-Patman Act damage award was actually sustained on the basis of the theory. [1.] **[**13]** We decline to be the first, for we are left unpersuaded by the mere repetition of all this encysted Obiter dictum. [2.]

Here, we deem it sensible to treat parent corporation and wholly-owned subsidiary corporation as a single economic unit. See Areeda, Antitrust Analysis P 701 n.13 (2d ed. 1974). There are other situations in which the single economic unit approach is applied which we find much more relevant to the issue at hand than the Danko analogy. ***HN4***[] If there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary's sales are attributable to the parent. Thus, a plaintiff might establish a Robinson-Patman Act violation if the evidence shows a price discrimination between a customer of the parent corporation and a customer of the wholly-owned subsidiary. The subsidiary and parent are treated as the same seller. The identical analysis is applied to determine **[**14]** whether a remote purchaser-plaintiff is an indirect purchaser from a seller which is involved in its customer's dealings with the plaintiff. See generally *Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4* (5th Cir.), Cert. denied, *396 U.S. 901, 90 S. Ct. 212, 24 L. Ed. 2d 177 (1969)*; *Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y.1966)*. See also generally Von Kalinowski, Antitrust Laws & Trade Regulations § 24.04(2), (3) (1975). These theories, which are neither invoked nor involved here, highlight the

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[1.] *Parrish v. Cox, 586 F.2d 9, 11-12 (6th Cir. 1978)*; *Brown v. Hansen, 556 F.2d 969 (9th Cir. 1977)*; *Brewer v. Uniroyal, Inc., 498 F.2d 973, 977 n.2 (6th Cir. 1974)*; *Mowery v. Standard Oil Co., 463 F. Supp. 762, 775-776 n.17 (N.D.Ohio 1976)*; *Schaben v. Samuel Moore and Co., 462 F. Supp. 1321, 1330 (S.D.Iowa 1978)*; *Diehl & Sons, Inc. v. International Harvester Company, 426 F. Supp. 110, 123 (E.D.N.Y.1976)*; *Snyder v. Howard Johnson's Motor Lodges, Inc., 412 F. Supp. 724, 730-31 (S.D.Ill.1976)*; *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915, 919 (D.Haw.1967)*; *Reines Distributors, Inc. v. Admiral Corporation, 241 F. Supp. 814, 815, 256 F. Supp. 581, 585-86, 257 F. Supp. 619, 621 (S.D.N.Y.1965)*. The unofficially reported decision in Mississippi Petroleum Inc. v. Vermont Gas Systems, Inc., 1972 Trade Cases P 73, 843 (S.D.Miss.1972) is not to the contrary.

[2.] Long ago, Mr. Justice Holmes once lamented: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States, 225 U.S. 347, 391, 32 S. Ct. 793, 811, 56 L. Ed. 1114 (1912)* (Holmes, J., dissenting).

theoretical flaw in the Danko approach. In the application of both the same seller doctrine and the independent purchaser doctrine, the parent and wholly-owned subsidiary are treated as a single economic unit. Thus, sales from the same economic unit to the favored customer and to the disfavored customer are compared to determine whether there has been a price discrimination. The requirement of two sales is satisfied. The Danko theory lacks this requirement. Under Danko, a sale from the parent corporation to the plaintiff is alleged as the disfavored sale. However, there is no sale to a favored customer for comparison and thus no price discrimination may be **[**15]** shown. Transfers from a parent corporation to its wholly-owned subsidiary corporation are transfers within the same economic unit. These transfers are the economic equivalent of intra-company transfers of goods. As such, these transfers cannot be considered sales for Robinson-Patman Act purposes. See generally authorities cited in note 1, Supra. See also generally Von Kalinowski, Antitrust Laws & Trade Regulation § 24.03(2) (1975).

[*967] The Robinson-Patman Act separates out and makes illegal competitively harmful discrimination. Intra-corporate transfers and transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate. The realistic effect on competition should control rather than esoteric and theoretical possibilities under the Danko theory couched in terms of "control" and "arm's length dealings." Realistically, the competition here was between Gates and National as a single economic unit, on the one hand, and Plaintiffs, on the other hand. Internal transfers between Gates and National were of no real competitive consequence. There is nothing in this record to suggest that disregarding the separate **[**16]** corporate entities will enable Gates and National to circumvent the Robinson-Patman Act. See generally *Brown v. Hansen Publications, 556 F.2d 969, 972 (9th Cir. 1977)*; *Brewer v. Uniroyal, Inc., 448 F.2d 972, 977 n.2 (6th Cir. 1974)*; *Mowery v. Standard Oil Co., 463 F. Supp. 762, 775-76 n.17 (N.D.Ohio 1976)*; *Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110, 123 (E.D.N.Y.1976)*; *Snyder v. Howard Johnson's Motor Lodges, Inc., 412 F. Supp. 724, 731 (S.D.Ill.1976)*. In this manner underlying substance controls surface form in economic and antitrust importance. In form, Gates sought to raise a corporate veil between its manufacturing and sales efforts by conducting its own retail operations through a separate corporate entity. There being no other owner of National besides Gates, the substance of this marketing technique was simply that a single economic unit manufactured and marketed its product. Therefore, we hold that a parent corporation's transfers to its wholly-owned subsidiary may not be considered separate sales to a favored customer in a Robinson-Patman Act price discrimination suit. Since National was the only customer of Gates alleged to have been favored **[**17]** and since there was neither any further allegation nor proof of any other beneficiary of Gates' alleged discrimination, Plaintiffs have failed to establish the requisite favored sale for a Robinson-Patman Act suit. [3.]

[18]** III.

The remaining issues Gates raises need not long detain us. First, we are not persuaded by Gates' efforts to upset the breach of contract recovery. Second, we do not believe that the District Court abused its discretion in denying Gates prejudgment interest in No. W-74-CA-41. Third, given our reversal of the Robinson-Patman Act claim, we deem it appropriate to remand for a reassessment of the issue of costs before the District Court in No. W-74-CA-41; costs on this appeal are awarded to Gates as the prevailing party. Fourth, we find no error in the District Court's

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3. Pragmatically our rejection or acceptance of the Danko theory would not change the fate of Plaintiffs' appeal. Even under the theory we reject, the separateness of parent and wholly-owned subsidiary must be established in order for a transfer between them to be considered a favored sale. There must be some showing of a lack of control by the parent and arm's length dealings between parent and subsidiary. See authorities cited note 1, Supra. The Plaintiffs here depend on little else but the appearances of independence incident to Gates' and National's separate corporate status. Gates exercised full dominion and control over National; there was no arm's length dealings between them. Thus, on this record we would reverse even under the Danko theory had we found the theory itself persuasive. See *Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969)* (appellate standard for review of jury verdict).

Those who suffer real antitrust damage are not necessarily left without any antitrust remedy either under our own analysis or under an unsuccessful attempt to recover on the Danko theory we reject. See, e. g., *Schaben v. Samuel Moore and Company, 462 F. Supp. 1321, 1332 (S.D.Iowa 1973)*; *Reines Distributors, Inc. v. Admiral Corp., 256 F. Supp. 581, 586 (S.D.N.Y.1966)*.

failure to award Gates attorneys' fees in No. W-74-CA-41. Finally, we reject Gates' claim that it was entitled, as a matter of right, to two separate judgments here.

IV.

In summary, in No. W-74-CA-9, the Robinson-Patman Act claim is reversed, the breach of contract claim is affirmed; in No. W-74-CA-41 we affirm except we remand **[*968]** for reassessment of the issue of costs before the District Court.

REVERSED in part; AFFIRMED in part; and REMANDED.

Larry v. Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council

United States Court of Appeals for the Third Circuit

May 24, 1978, Argued, Reargued En Banc May 17, 1979; July 20, 1979, Decided

No. 77-2259

Reporter
609 F.2d 1368 *; 1979 U.S. App. LEXIS 12988 **; 101 L.R.R.M. 2875; 86 Lab. Cas. (CCH) P11,469; 1979-2 Trade Cas. (CCH) P62,783

LARRY V. MUKO, INC., Appellant, v. SOUTHWESTERN PENNSYLVANIA BUILDING AND CONSTRUCTION TRADES COUNCIL, LONG JOHN SILVER'S INC., AND BUILDING AND CONSTRUCTION TRADES, COUNCIL OF PITTSBURGH, PENNSYLVANIA, AND VICINITY.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Core Terms

antitrust, anti trust law, exemption, contractors, wages, restaurants, proviso, subcontracting, nonunion, collective bargaining, working conditions, subcontractors, organizing, picketing, courts, employees, Sherman Act, nonstatutory, handbilling, directed verdict, Clayton Act, construction industry, union activity, labor law, elimination, site, general contractor, labor organization, labor policy, national labor policy

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Real Property Law > Construction Law > Contracts

HN1[] **Trials, Judgment as Matter of Law**

The granting of motions for directed verdicts is proper only if, without weighing the credibility of witnesses, as a matter of law, there could be only one reasonable conclusion as to a verdict.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN2[] **Exemptions & Immunities, Labor**

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.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN3[] Exemptions & Immunities, Labor

The construction industry proviso of § 8(e) of the Labor Act, *29 U.S.C.S. § 158(e)*, was not intended to authorize, and exempt from antitrust scrutiny, subcontracting agreements that are neither within the context of a collective bargaining relationship nor limited to a particular job site.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN4[] Collective Bargaining & Labor Relations, Bargaining Subjects

See *29 U.S.C.S. § 158(e)*.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

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

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5[] Collective Bargaining & Labor Relations, Bargaining Subjects

The *first amendment* is not viewed as compelling protection for an agreement illegal under § 8(e) of the Labor Act, *29 U.S.C.S. § 158(e)*, or the Sherman Act solely because that agreement was entered into as a result of protected speech.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

HN6[] Collective Bargaining & Labor Relations, Duty to Bargain

No employer may lawfully coerce its employees into a collective bargaining relationship, even for the purpose of avoiding economic injury. *29 U.S.C.S. § 158(a)(1)*.

Counsel: Robert A. King (argued), Melvin L. Moser, Jr., Buchanan, Ingersoll, Rodewald, Kyle & Buerger, Pittsburgh, Pa., for Larry V. Muko, Inc.

Stanford A. Segal (argued), Gatz, Cohen, Segal & Koerner, Pittsburgh, Pa., for Southwestern Pennsylvania Building and Construction Trades Council and Building and Construction Trades Council of Pittsburgh, Pennsylvania, and Vicinity.

Gilbert J. Helwig, John T. Tierney, III (argued), Joseph E. Camp, Reed, Smith, Shaw & McClay, Pittsburgh, Pa., for Long John Silver's Inc.

Baker Armstrong Smith, Atlanta, Ga., Thomas J. Brackett, Center on National Labor Policy, Arlington, Va., for amicus curiae.

Judges: Before ALDISERT, GIBBONS and HIGGINBOTHAM, Circuit Judges.Argued May 24, 1978Reargued en banc May 17, 1979Before SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, Circuit Judges.

Opinion by: GIBBONS

Opinion

OPINION OF THE COURT

[*1370] Larry V. Muko, Inc. (Muko), a Pennsylvania corporation engaged in the general contracting business, appeals from an order granting defendants' *Fed.R.Civ.P. 50(a)* motion **[**2]** for a directed verdict in an antitrust action seeking damages and injunctive relief under §§ 4, 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26*. The defendants are Long John Silver's Inc. (Silver's), a fast-food seafood restaurant chain, and two labor organizations, the Southwestern Pennsylvania Building and Construction Trades Council (Southwestern Council) and the Building and Construction Trades Council of Pittsburgh, Pennsylvania and Vicinity (Pittsburgh Council). We reverse and remand for a new trial.

I.

Muko is a nonunion general contractor. Its complaint charges that Silver's entered into an agreement with the defendant labor organizations that it would not award building and construction contracts to any contractor that was not a party to a current collective bargaining agreement with member unions of either the Southwestern Council or the Pittsburgh Council. The defendants' motions for a directed verdict were granted at the end of the plaintiff's case. ***HN1***[] The grant of those motions was proper only if, without weighing the credibility of witnesses, as a matter of law, there could be only one reasonable conclusion as to a verdict. Thus we must determine what, from Muko's evidence, **[**3]** a jury might have found.

The jury could have found as follows: Silver's is a national chain of fast-food seafood **[*1371]** restaurants with its headquarters in Kentucky. In 1973, when it first decided to enter the fast-food seafood business in Western Pennsylvania, Silver's contracted with Muko, after competitive bidding, for the construction of a restaurant in Monroeville, a Pittsburgh suburb. Muko was an experienced builder of fast-food restaurants. In 1973 it was Silver's policy to solicit bids on a competitive basis without regard to whether the contractor used union labor. The Monroeville site was picketed during construction by Council pickets. After the restaurant opened, Council representatives leafleted its patrons, asking them to refrain from patronizing Silver's because it used contractors who were paying less than the established prevailing construction wages in the area. Muko was also awarded a contract for the construction of a Silver's restaurant in Lower Burrell, and commenced construction there about the time the Monroeville restaurant opened.

Faced with handbilling at the completed Monroeville restaurant, and fearful of new picketing at the Lower Burrell construction **[**4]** site, Silver's approached the Councils and arranged for a meeting. On November 1, 1973, a meeting took place between Silver's vice president for real estate, its local real estate agent, and three council representatives. Silver's vice president said that he wanted the leafleting to end as quickly as possible. One of the Council representatives stated that he wanted future restaurants built by union labor. Another union representative gave Silver's vice president a form of contract used between the Councils' local unions and union contractors in the area, and supplied Silver's with a list of contractors with whom the local unions had collective bargaining agreements. A Council representative stated there would be no picketing or leafleting at Lower Burrell, the second Silver's location, pending a decision on the use of union contractors at future construction sites.

Silver's representatives left the meeting with the form contract and the list of union contractors. Within a week Silver's vice president for development sent the Councils a letter. The letter began by emphasizing Silver's desire "to establish good working relationships" with unions in the Pittsburgh area. It noted that **[**5]** the form contract was specifically designed for use by area contractors and local trade unions. But, the writer continued:

> I believe that we can serve the same purpose with this letter to show intent that Long John Silver's, Inc., plans to use only union contractors certified by the affiliated Building and Construction Trades Councils of Pittsburgh and Allegheny Kiski Valley and vicinity. We will also request that all the investors (property owners) developing for us use union contractors. By operating in this manner, we will accomplish a good working relationship with you. We have visited several of the contractors, the names of which we mentioned to you. As soon as we have firm bids on several construction sites, we will contact you to insure that these contractors are in good standing with the union.
>
> In any relationship between two parties there must be mutual need and assistance. . . . It is . . . extremely important to both parties that our location at Monroeville, Pennsylvania and the one under construction in Lower Burrell Township, Pennsylvania not be subjected to any kind of informational picketing.

Silver's had been satisfied with Muko's work at Monroeville, **[**6]** and had therefore contracted with Muko for erection of the second restaurant at Lower Burrell. The president of Silver's had told Muko it could construct all the chain's restaurants in Western Pennsylvania if it continued to offer high-quality work at competitive prices. After the meeting of November 1, 1973, Silver's asked Muko if it would build as a union contractor. It refused to do so, and subsequently was not asked to bid on any further jobs for Silver's. By the trial date twelve other restaurants had been built, all by union contractors whose prices for those twelve restaurants aggregated over $ 250,000 more than Muko would have charged. Muko's bids and cost estimates **[*1372]** for these twelve restaurants projected a profit even at its lower bid prices.

Muko's operation involved only a handful of construction employees, who functioned primarily as supervisors. The bulk of the work on its jobs was performed by subcontractors. Neither the Pittsburgh Council nor the Southwestern Council had any interest in or made any attempt to organize Muko's employees. Neither council ever represented those employees. Muko made a tender of proof that it was paying prevailing wage rates to **[**7]** its supervisory employees. The district court rejected the tender on the ground that it was irrelevant in the plaintiff's case, but suggested that it might be offered later, depending on the defendants' evidence. On this record we must therefore assume that Muko was paying those employees prevailing rates. There is no evidence in the record regarding the wage rates paid by Muko's subcontractors.

The defendants stipulated that Muko could prove the requisite jurisdictional relationship to interstate commerce and that direct out-of-state purchases would, had Muko obtained the additional contracts, have exceeded $ 50,000.

In face of the foregoing evidence the district court granted defendants' *Rule 50(a)* motions. No opinion was written, but the transcript of proceedings discloses that the directed verdict was granted solely because the court believed the evidence could sustain no finding other than a unilateral decision on the part of Silver's to accept bids only from union contractors.

II.

Clearly the directed verdict cannot be affirmed on the ground upon which the district court acted. Looking at the evidence, and particularly the letter of November 7, 1973, in the light most favorable **[**8]** to Muko, reasonable jurors could find that Silver's and the Councils agreed that, in consideration of the Councils refraining from informational picketing and leafleting directed at the Monroeville and Lower Burrell restaurants, Silver's would use, for the restaurants yet to be constructed, contractors with whom Council local unions had collective bargaining agreements. Since the jury could have found such an agreement, we cannot sustain the grant of a directed verdict on the theory that the only activity which Muko proved was a unilateral appeal to an employer for the exercise of managerial discretion. See *NLRB v. Servette, Inc., 377 U.S. 46, 54, 84 S. Ct. 1098, 12 L. Ed. 2d 121 (1964)*. Moreover, although the Councils argue on appeal that Muko failed to prove an injury to its business or property within the meaning of § 4 of the Clayton Act, that argument cannot prevail on the record before us. The jury could have found that but for the agreement to exclude nonunion contractors Muko would have been the low bidder on twelve restaurant jobs and would have made a profit on each. Finally, because of the parties' stipulation, we must assume that the twelve construction projects involved **[**9]** a substantial amount of interstate commerce. Since Muko established injury to its business or property and the contract which the jury could have found affected a significant amount of interstate commerce, the directed verdict can only be sustained if as a matter of law the agreement reached (1) was exempt from antitrust scrutiny, or (2) was lawful under the antitrust laws. We emphasize that in the procedural posture of this case we deal only with the narrow question whether any agreement which the jury might have found must be found to be exempt or legal for antitrust purposes.

III.

Because the jury could have found concert of action between Silver's and the Councils, neither the Clayton Act, §§ 6 and 20, *15 U.S.C. § 17*, *29 U.S.C. § 52*, nor the Norris-LaGuardia Act, §§ 4, 5, and 13, *29 U.S.C. §§ 104*, *105*, *113*, provide any statutory exemption from antitrust liability. See *United Mine Workers v. Pennington, 381 U.S. 657, 662, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*. Thus any immunity from antitrust coverage must be found in the nonstatutory **[*1373]** exemption. Moreover, the agreement which **[**10]** could have been found was outside the context of a collective bargaining relationship. Thus the significant labor law factors arising from that relationship to which we gave special deference in *Consolidated Express, Inc. v. New York Shipping Association, Inc., 602 F.2d 494 (3d Cir. 1979)*, are not present here. Accord, *Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 625-26, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. We must turn for guidance, therefore, to Connell, the one case in which the Supreme Court has dealt with an agreement, not in the collective bargaining context, between a labor union and a business organization. Connell recognized the possibility that agreements between labor unions and business organizations outside the collective bargaining context might be exempt, but held that the exemption was unavailable on the facts of that case. Unlike this case, Connell was before the Supreme Court after a full trial. Thus the Court was in a position to hold that nonstatutory labor exemption was unavailable as a matter of law. In the posture of this case, we need not reach so broadly. But if the jury could from the plaintiff's evidence have found facts **[**11]** falling within the principles established in Connell, we must remand for a new trial.

In Connell a labor union for one of the construction industry sub-trades had successfully used informational picketing to force a number of general contractors, with which it had no collective bargaining relationship, to agree to subcontract in that sub-trade only to subcontractors with whom the union had a current collective bargaining agreement. Connell, a general contractor who had been soliciting subcontract bids on a competitive basis without regard to union status, signed the tendered agreement under duress, and then sued for declaratory and injunctive relief, claiming that the agreement violated section 1 of the Sherman Act. The union argued that the agreement was exempt for two reasons: (1) it was directly related to the valid union goal of organizing as many subcontractors as possible; and (2) it was expressly authorized by the construction industry proviso to § 8(e) of the National Labor Relations Act, *29 U.S.C. § 158(e) (1976)*. The Court rejected both arguments.

Local 100 first contended that the agreement was protected by the nonstatutory exemption from the antitrust laws because, **[**12]** although entered into outside the collective bargaining context, it advanced the union's valid organizational objective. Rejecting that contention Justice Powell wrote:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal. Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

421 U.S. at 625, 95 S. Ct. at 1836 (footnote omitted).

We understand Connell to hold, then, that **[**13]** ***HN2***[] 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.

[*1374] On the record before us a jury could have found such an agreement. Like Connell Construction, Silver's purchases the services of building contractors. Like Connell, it has no collective bargaining relationship, actual or potential, with the Councils or their member locals. As in Connell, the jury could have found that the defendants entered into an agreement not to deal with nonunion contractors, which operated as a direct restraint on the business market by making those contractors "ineligible to compete for a portion of the available work." *421 U.S. at 625, 95 S. Ct. at 1836*. The plaintiff introduced evidence that this agreement had "substantial (actual) anticompetitive effects" an increase of more than $ 250,000 in the total price paid for the twelve restaurants **[**14]** built by union contractors. Finally, the jury could have found that the agreement between Silver's and the Councils had "a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." *421 U.S. at 635, 95 S. Ct. at 1841*. For, on plaintiff's evidence, that agreement "indiscriminately excluded nonunion (contractors) from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." *421 U.S. at 623, 95 S. Ct. at 1835*. We therefore conclude that the grant of a directed verdict cannot be affirmed on the theory that any agreement which might be found is as a matter of law within the nonstatutory labor exemption.

The Connell defendants also argued that the agreement challenged there was expressly authorized by the construction industry proviso to § 8(e) of the Labor Act, and therefore exempt from antitrust scrutiny. In answer to this argument the Court held that ***HN3***[] the construction industry proviso was not intended to authorize subcontracting agreements that are neither within **[**15]** the context of a collective bargaining relationship nor limited to a particular job site. To appreciate that holding one must start with the 1959 amendment to the Labor-Management Relations Act, which provides:

> ***HN4***[] (e) 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 unenforcible and void . . . .

29 U.S.C. § 158(e) (emphasis added). At the same time, recognizing the special historical situation in the construction and apparel industries, Congress added provisos to the general prohibition in section 8(e) creating limited exceptions for those two industries. The construction industry proviso reads:

> (N)othing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating **[**16]** 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). In rejecting the proviso's application to the Local 100-Connell agreement Justice Powell wrote:

> (The) careful limits (in § 8(b)(4) and § 8(e)) on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction-industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades **[*1375]** problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633, 95 S. Ct. at 1840 (footnotes omitted).

Absent the construction industry **[**17]** proviso, the "express or implied" agreement which the jury could have found between Silver's and the Councils would clearly fall within the prohibitions of § 8(e), since it required Silver's "to cease doing business" with Muko and all other nonunion contractors. And Connell is controlling on the question whether that agreement was protected by the construction industry proviso, for here there is neither a collective bargaining relationship with Silver's nor any evidence of a common-situs problem. Thus the grant of a directed verdict cannot be affirmed on the theory that any agreement which might be found is protected by the construction industry proviso to § 8(e). [1] This conclusion renders legally irrelevant the fact, relied upon by the dissent, that the agreement here was entered into as a result of handbilling protected by the first amendment and the publicity proviso to § 8(b)(4) of the Labor Act. The protections of the publicity proviso evidently extend only to handbilling conducted in conformity therewith. Nothing in § 8(b)(4) can reasonably be construed to authorize an agreement between a union and an employer that falls within the wholly independent prohibition of § 8(e) **[**18]** of the Act. ***HN5***[] Nor has the first amendment been viewed as compelling protection for an agreement illegal under § 8(e) or the Sherman Act solely because that agreement was entered into as a result of protected speech.

[19]** While Connell was decided on the basis of a full trial record, we have not yet heard the defendants' evidence in this case. Our holding that the grant of a directed verdict cannot be sustained on the basis of the nonstatutory exemption therefore should not be misconstrued as a holding that the defendants cannot establish in the court below that they are entitled to that defense. We hold only that Muko has introduced evidence sufficient to entitle it to have a jury determine that issue. Nor do we decide the question whether a finding that an agreement made outside the collective bargaining context violates § 8(e) by itself removes labor's nonstatutory antitrust exemption. Cf. Consolidated Express v. New York Shipping Ass'n, Inc., supra. The fact that in Connell Justice Powell considered the actual and potential anticompetitive effects of the agreement independently of the § 8(e) issue suggests that the presence of a § 8(e) violation may not itself decide the exemption issue. In this case, however, as in Connell, there is evidence tending to show both a market restraint unjustified by the congressional interest in the elimination of competition over wages and working conditions and **[**20]** a violation of § 8(e). We therefore need not and do not rule on the effect of a § 8(e) violation standing alone.

IV.

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[1] Chief Judge Seitz is of the view that the question whether the defendants' agreement is violative of § 8(e) of the NLRA is not presented as a "collateral issue" in this antitrust action, and need not be decided. See Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 626, 95 S. Ct. 1830, 1837, 44 L. Ed. 2d 418 (1975). He notes that the defendants here have not argued, as did the defendants in Connell, that their agreement was "explicitly allowed by the construction-industry proviso to § 8(e) and that antitrust policy therefore must defer to the NLRA." Id. Moreover, he believes that we should not convey the impression to the district courts that an appropriate short-hand method of deciding the applicability of the non-statutory exemption in cases such as this is to determine whether the challenged agreement constitutes an unfair labor practice; such a method would lead to the needless resolution by the federal courts of significant labor law questions that ought to be decided in the first instance by the NLRB. Cf. Consolidated Express, Inc. v. New York Shipping Ass'n, Inc., 602 F.2d 494 (3d Cir., 1979) (effect of prior NLRB determination that an agreement is violative of § 8(e)).

Silver's and the Councils urge that even if the labor exemption is inapplicable they were nevertheless entitled to a directed verdict on antitrust grounds. Their principal argument is that there was only a unilateral management decision resulting from unilateral union activity. We **[*1376]** have rejected that argument in Part II above. A factfinder could have found an agreement to exclude nonunion contractors from the Silver's construction market, a significant interstate market consisting of twelve construction projects. The premise of both the majority and minority opinions in Connell is that absent an exemption such an agreement may be the basis of a federal antitrust claim. The jury might have found a concerted refusal to deal with a class of contractors of which Muko is a member. But whether the evidence here is viewed as capable of sustaining a finding of a group boycott, to which a Per se rule would apply, or some lesser restraint to which a rule of reason analysis might apply, it was sufficient to take Muko's case to the jury. We have no occasion on this **[**21]** record to rule on whether, after hearing the defendants' evidence as well, the court should instruct the jury that it should measure the agreement by rule of reason or Per se standards. [2]

The Councils also urge, though not enthusiastically, that Muko made an insufficient showing of injury to business or property within the meaning of § 4 of the Clayton Act. Insofar as that contention rests upon the lack of evidence from which the jury could have found lost business and lost profits we reject it on the basis of the record evidence referred to in Part I above. Insofar as it rests upon the suggestion that the stockholders of Muko (Muko's beneficial ownership **[**22]** is not a matter of record) could have gone "double breasted" by forming a separate corporation and signing union contracts with Council members we reject it for two reasons. First, the plaintiff is a business corporation, and it, not its stockholders, suffered the injury to business and property to which § 4 refers. Second, ***HN6***[🡅] neither Muko nor any other employer may lawfully coerce its employees into a collective bargaining relationship, even for the purpose of avoiding economic injury. *29 U.S.C. § 158(a)(1)*.

V.

The order granting a directed verdict will be reversed and the case remanded for a new trial.

Concur by: ADAMS

Concur

ADAMS, Circuit Judge, concurring.

Were we in a position to decide this case on a clean slate, I would probably be inclined to hold that the union activity complained of here is not within the purview of the antitrust statutes but is instead solely a matter for scrutiny under labor law. I would subscribe to the view that unions ought to be subject to antitrust liability only when they combine with non-labor forces for the purpose of assisting those forces in suppressing commercial competition and in monopolizing the marketing of goods and services. When, however, **[**23]** unions are essentially pursuing traditional labor objectives, such as organizing employees or seeking to obtain higher wages and better working conditions for their members, it would appear logical to me that resort should be had primarily to labor law concepts to circumscribe the permissible scope of their conduct and to penalize them for their excesses.

Such an approach, it may be argued with a measure of assurance, would not appear to conflict with congressional intent inasmuch as Congress has on a number of occasions enacted legislation in order to remove certain labor activity from the ambit of the antitrust laws. [1] **[**24]** And, at one time it could plausibly have been submitted that the

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[2] Because of the dispute's labor context, Judge Weis is of the view that the activity here should not be construed as a conventional group boycott to which the Per se rule would apply. He would use the rule of reason standard. See *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc., 494 F.2d 602 (3d Cir. 1979)* (Weis, J., Concurring and dissenting).

[1] Thus, for example, as the dissent in greater detail, portions of the Clayton Act were enacted in 1914 for the purpose of inhibiting federal courts from using the Sherman Act in order to curtail labor activity. In § 6 of the Clayton Act, *15 U.S.C. § 17*,

extent **[*1377]** of the incursion by the antitrust laws into the labor law domain was indeed to be found somewhere along the foregoing line of demarcation. [2]

But whatever the merits of such an approach, the Supreme Court has rather clearly chosen to allow greater sway to the antitrust laws in the labor field. As the majority opinion points out, under the most recent Supreme Court pronouncement in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*, it is immaterial for purposes of determining whether labor-related activity is exempt from possible antitrust scrutiny that the union has as its goal legitimate and legal objectives: "(T)he methods the union chose are not immune from antitrust sanctions simply because the goal is legal." [3] So long as there is a "direct restraint on the business market" having "substantial anticompetitive effects, both actual and potential, that would not flow naturally from the elimination of competition over wages and working **[**25]** conditions," Connell teaches, the union's activity "contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws." [4] Given this explicit ruling by the Supreme Court, which I believe the majority has demonstrated is controlling as applied to the evidence introduced by the plaintiff in this case, [5] I am constrained to join in the majority's opinion.

Dissent by: ALDISERT

Dissent

ALDISERT, Circuit Judge, dissenting.

Our late colleague Abraham Freedman **[**26]** was fond of saying at decision conferences, "The way you come out in this case depends on how you go in." Judge Freedman was expressing in a few words one of the most important aspects of the judicial process that in judicial decision making, value judgments inhere in the choosing of the controlling legal precept.

The majority has made a value judgment. They have decided that when a labor union is involved in litigation with a business firm other than one with which it has a collective bargaining agreement, the court is required to take as a starting point the body of antitrust laws. They ask whether the alleged agreement here was exempt from antitrust scrutiny or lawful under ***antitrust law***, but do not ask what I perceive to be the real issue does ***antitrust law*** apply to these facts at all, and if so, why. From the majority's initial premise, it follows that organized labor's activity is generally proscribed by antitrust laws unless labor can convince the court that its activity falls within some narrow exception to those laws. All labor exemptions rest on the meaning and interaction of the antitrust and the labor statutes. But these exceptions, which have been given the patronizing **[**27]** labels, "statutory" and "non-statutory" exemptions, have been carved out, not by Congress, but by the federal courts.

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unions were declared not to be illegal combinations, and labor was pronounced not to be a commodity or article of commerce. Also, § 20 of the Act, *29 U.S.C. § 52*, proscribed the issuance of injunctions against specifically enumerated practices of labor unions and removed any taint of illegality from those practices. And the Norris-LaGuardia Act, *29 U.S.C. §§ 101-115*, promulgated in 1932, further narrowed the circumstances under which the antitrust laws may be brought to bear against labor unions. See generally *United States v. Hutcheson, 312 U.S. 219, 229-31, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*.

2 See *Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*; *United States v. Hutcheson, supra*; *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*.

3 *Connell, supra, 421 U.S. at 625, 95 S. Ct. at 1836*.

4 Id.

5 Because the plaintiff appeals from the grant of defendants' motions for a directed verdict, entered at the end of plaintiff's case, it is entitled to a reversal if sufficient evidence exists to support a jury finding in its favor. See, e. g., Fireman 's *Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1177* (3 Cir. 1976), Cert. denied, ***429 U.S. 1053, 97 S. Ct. 767, 50 L. Ed. 2d 770 (1977)***.

One who agrees with the majority's value judgment, and the political, sociological, and economic philosophies which influence it, will not fault the result it commands. But I disagree with their fundamental legal and philosophical premises. While I admit that their view is supported by a respectable **[*1378]** body of federal decisions, I argue for a different set of fundamental values, values less antagonistic to the rights of organized labor and more reflective of the national labor policy judgments made by Congress.

I have a second disagreement with the majority which is more prosaic I do not share their unabashed infatuation with the decision in *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. As a member of an inferior court in the federal judicial hierarchy, I must respect the precedential value of Connell. But I detect from it no inspirational philosophy or policy statements which persuade me to extend its holding, certainly not to the dissimilar, material facts of this case.

I.

My **[**28]** starting point is a recognition that both the labor and the antitrust laws embody equally important congressional declarations of public policy. Unlike the majority, I do not think that either policy has a preferred status over the other. They must be viewed, in Justice Frankfurter's felicitous expression, "as a harmonizing text." [1] "On the one hand, the national labor policy favors collective bargaining as a means for promoting labor relation peace through equalization of the bargaining power in the labor market. On the other hand, the national antitrust policy favors competition in the market place as a means of protecting consumers from the evils of monopoly power and restraints of trade. The conflict created by these policies is apparent. To achieve their fundamental goals, unions, by their very nature as combinations of employees, must eliminate competition in the labor market by monopolizing the supply of labor. Powerful unions also have the potential for imposing restraints on competition in the market place, for example, by affecting the cost of labor and by limiting the use of new and more efficient methods of production." [2] In order to harmonize these apparently divergent **[**29]** policies, and because of the legislatively enacted national labor policy, I think it proper to presume that labor activity does not come within the purview of the antitrust laws unless it is Clearly not conduct for which the labor laws provide penalties and sanctions.

Milton Handler has observed in a discussion of *Connell, United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, and *Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*, that these cases present a paradox:

> How can we justify requiring certain conduct under the labor laws and at the same time subject that conduct to the panoply of sanctions imposed by the antitrust laws? And if union activities are forbidden as unfair labor practices under the labor laws, punishable by the recovery of **[**30]** single damages, why add criminal and treble damage exposure under the antitrust laws? Doesn't antitrust have enough to do without this unwelcome intrusion into the area of mandatory bargaining and unfair labor practices? [3]

I share Handler's concern; I have a fear that federal judges who do not share the political, sociological, and economic viewpoints that underlie the national labor policy are inclined to have that separately enacted congressional policy swallowed by our antitrust laws. Although invested with much power, federal judges must guard against using it improperly to impose their personal views when those views vary directly with policy pronouncements of the legislative branch. John Chipman Gray set forth the proper hierarchy when he wrote:

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[1] *United States v. Hutcheson, 312 U.S. 219, 231, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*.

[2] F. Bartosic & R. Hartley, Labor Relations Law in the Private Sector 183 (ALI-ABA 1977).

[3] Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term 1977, 77 Colum.L.Rev. 979, 1022 (1977).

> The State requires that the acts of the legislative organ shall bind the courts, and so far as they go, shall be paramount to all other sources. This may be said to **[*1379]** be a necessary consequence from the **[**31]** very conception of an organized community. [4]

Many courts are ignoring the lessons of history. In the past, Congress has twice resorted to specific legislation to counteract federal court decisions holding labor activity within the prohibitions of the antitrust laws. First the Clayton Act of 1914 was passed in response to criticism of judicial decisions applying Sherman Act sanctions to trade union activities. [5] As explained in *United States v. Hutcheson, 312 U.S. 219, at 229-30, 61 S. Ct. 463, at 465, 85 L. Ed. 788 (1941)*, § 20 of the Clayton Act "withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them since the use of the injunction had been the major source of dissatisfaction and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.' " In addition, § 6 of the Act provides: **[**32]**

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; Nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (my emphasis).

The Clayton Act itself, however, engendered further controversy and legislation. As stated by the Hutcheson Court:

> It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically, the courts restricted the scope of § 20 to trade union activities directed against an employer by his own employees. *Duplex Co. v. Deering, (254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921))*. Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived **[**33]** the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. Ibid., pp. 485-486. Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act. Act of March 23, 1932, 47 Stat. 70, *29 U.S.C. §§ 101-115*.
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> The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation.

312 U.S. at 230-31, 61 S. Ct. at 465-66.

The lesson of this history is that the courts should stop presuming that labor's activities come within the framework of the antitrust laws. The proper approach, as I see it, is to accommodate a number of statutes: the Sherman Act, the Clayton **[**34]** Act, the Norris-LaGuardia Act, and also the public policy pronouncements of the National Labor Relations Act.

[*1380] II.

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[4] J. C. Gray, The Nature and Sources of the Law 124-25 (1921).

[5] "This statute (the Clayton Act) was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 484, 41 S. Ct. 172, 182-83, 65 L. Ed. 349 (1921)* (Brandeis, J., dissenting).

The orthodox accommodation of the national labor policy with ***antitrust law*** was first recognized in *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*, where the Supreme Court held that labor could claim no immunity from antitrust laws if it collaborated with management to suppress commercial competition in the industrial market. This was eminently sensible and was recently reaffirmed by this court to prohibit labor unions from joining businessmen in a blatant restraint of trade when the prime objective of the trade restraint was not the legitimate subject of union organizational activity. *United States Steel Co. v. Fraternal Association of Steelhaulers, 601 F.2d 1269 (3d Cir. 1979)*.

Justice Stone, writing for the Court in Apex Hosiery, emphasized that the Sherman Act was not intended to cover any activity by a labor organization, or anyone else, unless that activity had, or was intended to have, a substantial effect upon commercial competition. This he termed the Sine qua non of antitrust liability. Justice Stone then specifically **[**35]** determined that the antitrust laws would be inapplicable, even were commercial competition adversely affected, if the challenged restraint resulted from the elimination of differences in labor standards or were a by-product of union activity regarding wages, hours and conditions of employment. He said:

> A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in § 6 of the Clayton Act . . . it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.
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> . . . (Successful) union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based **[**36]** on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

310 U.S. at 502-04, 60 S. Ct. at 997 (footnotes omitted).

Justice Stone's analysis is generally considered the centerpiece of what has developed into the non-statutory exemption carved out by the courts to uphold joint activity of labor and nonlabor parties when considerations of labor policy outweigh those of the antitrust policy. In *Hutcheson, supra*, and in *Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*, this notion was refined to provide that labor organizations would lose their immunity when the union activity was designed to "aid nonlabor groups to create business monopolies and to control the marketing of goods and services." *Allen Bradley, supra, 325 U.S. at 808, 65 S. Ct. at 1539*.

Further development occurred **[**37]** in *Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*, where, although no single opinion of the court emerged, at least six justices would have tested the legality of the activity in terms of the union's objective. When the union sought better wages, hours or working conditions, I. e., legitimate subjects of collective bargaining, its actions were protected by antitrust immunity. When what was sought by the union would constitute a forbidden restraint on the product market, however, there could be no immunity. **[*1381]** In a critical passage of Jewel Tea, Justice White, writing for himself, Chief Justice Warren and Justice Brennan, stated that exemption from Sherman Act coverage depends in large measure on the extent to which the activity or agreement is "intimately related to wages, hours and working conditions" and obtained "through bona fide, arm's-length bargaining in pursuit of (the union's) own labor . . . policies, and not at the behest of or in combination with nonlabor groups . . . ." *381 U.S. at 689-90, 85 S. Ct. at 1602* (opinion of White, J., announcing the judgment of the Court). Three justices who did not join in Justice **[**38]** White's plurality opinion, but concurred in the result, would have gone further. Justices Goldberg, Harlan, and Stewart believed that agreements dealing with mandatory subjects of bargaining are wholly outside the antitrust laws. *Id. at 697-735, 85 S. Ct. 1596*.

Justice White's Jewel Tea formulation is extremely important because, in 1975, he was to join in the opinion of the Court in Connell. Summarizing the aforementioned precepts and agreeing with their application to the facts in that case, the Connell majority stated:

> 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 organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See Mine Workers v. Pennington, supra, 381 U.S. at 666, 85 S. Ct. 1591; **[**39]** Jewel Tea, supra, 381 U.S. at 692-693, 85 S. Ct. 1603-04 (opinion of White, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, E. g., *Federation of Musicians v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

421 U.S. at 622-23, 95 S. Ct. at 1835.

III.

The critical factors which emerge from this analysis are the characterization and evidence of the challenged restraint. It becomes apparent that in accommodating the tension between the nation's antitrust and labor policies, the line must be drawn by identifying labor's specific objective and methods. If union efforts and methods are directed solely at raising labor standards by increasing wages, regulating hours and improving working conditions, the union's activities, although conducive to lessening competition, are nonetheless exempt from the proscriptions of **[**40]** the antitrust laws. When the activity goes beyond this purpose, it risks losing the protection afforded by the federal labor policy. A "direct restraint on the business market," one whose "substantial anticompetitive effects, both actual and potential . . . would not follow naturally from the elimination of competition over wages and working conditions," will not be protected by the exemption. *Connell, supra, 421 U.S. at 625, 95 S. Ct. at 1836*.

But having indicated how the line is to be drawn is not to say that judicial precedents fashion an easy test to determine exactly where the axe must fall. [6] Any test used to make that decision must include a presumption **[*1382]** that ***antitrust law*** will not normally apply to union activity and that the union is not to be saddled with the burden of proving its activity is exempt. Rather, the burden of proving Non-applicability of the exemption should fall on the party alleging restraint.

[41]**

By virtue of the sophistication of our national labor policy, See, e. g., *Republic Steel Corp. v. UMW, 570 F.2d 467 (3d Cir. 1978)*; *United Steelworkers v. NLRB, 530 F.2d 266 (3d Cir. 1976)*, labor enjoys a wide body of statutory protection. To say that its activities are not protected one should have to prove that labor has forfeited the rights guaranteed it and that it is somehow no longer entitled to rely on the crisp and clear edict of the Clayton Act, I. e., "nor shall (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." *15 U.S.C. § 17*. It is meaningless, therefore, to demonstrate only that union activity inhibits competition in the antitrust sense because, as stated by Dean St. Antoine, "the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically

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[6] Substantial uncertainty surrounds the boundary between the labor and the products markets as well as the appropriate method for accommodating the enforcement of the Sherman Act with the National Labor Relations Board's jurisdiction over the subject matter of collective bargaining. Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U.Chi.L.Rev. 659, 704 (1965).

incompatable. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it." [7] In this regard, Professor Archibald Cox has written:

[42]**

> The purpose and effect of every labor organization is to eliminate competition in the labor market, Chief Justice Taft's classic statement observed:
>
> "(Labor unions) were organized out of the necessity of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal in equality with their employer."
>
> Each bricklayer's local seeks to control the supply of bricklayers' services available to contractors within its geographical jurisdiction. United Steelworkers of America controls the supply of labor available to United States Steel Corporation. In this sense every union is an avowed monopolist.

Cox, Labor and the Antitrust Laws A Preliminary Analysis, 104 U.Pa.L.Rev. 252, 254 (1955) (footnote omitted).

The doctrine of Stare decisis requires inferior courts in the judicial hierarchy to be bound by the determinations of superior courts. Were **[**43]** I writing a majority opinion I would probably be restrained from voicing these independent observations. But a separate opinion is a legitimate medium through which opposing views may be advanced to encourage open and robust debate. If our tradition did not provide for the vehicle of the separate opinion but permitted only rote obeisance to decided cases, the law would be embalmed, unreceptive to reexamination, incapable of adjustment to experience or change. Were I permitted to escape from the judicial hierarchy, intellectual integrity would compel my criticism of past judicial usurpation of the congressional mandate in cases similar to this one. I would observe that "(t)he historian must take the long view of the matter" and note that by action of the federal courts "an anti-trust act was converted into an anti-union act," [8] **[**44]** that "(laws) . . . on unionization and other reform legislation of a kind that had been enacted in European countries a generation before were delayed ten to twenty-five years by the High Court." [9]

[*1383] IV.

While being critical of the judicial abrogation of the national labor policy, I think that, consistent with the doctrine of Stare decisis, one can concede a precedential or institutional value of Connell and still legitimately argue that the rule announced there does not command a similar result in this case. In the view I take, Connell is not an example of a principled decision suggesting a desirable development of the law. It is not a case which should be used to spawn a large progeny. Rather, it states a rule which should be limited to its facts.

A.

A recent publication by the American Law Institute-American Bar Association Committee on Continuing Professional Education expresses a similar view.

> In evaluating Connell's new consensus, the result reached by the majority can be viewed as another Sui generis response to a particular problem in a specific industry rather than the exposition of a governing principle that might guide lower courts and litigants in future cases.

F. Bartosic & R. Hartley, Labor Relations **[**45]** Law in the Private Sector 190 (1977).

Likewise, Connell has met with strong criticism from other commentators. Consider Dean St. Antoine's pointed remarks:

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7 St. Antoine, Connell: ***Antitrust Law*** at the Expense of Labor Law, 62 Va.L.Rev. 603, 604 (1976).

8 Levy, Judicial Review, History, and Democracy: An Introduction, in Judicial Review and the Supreme Court 36 (1967).

9 M. Parenti, Democracy for the Few 311 (1977).

> The Connell majority erred in failing to realize that under established precedents, the antitrust laws exempt agreements, whether primary or secondary, that are aimed at promoting union organization, as well as agreements that are aimed at eliminating competition over labor standards. The principal qualification, as Allen Bradley suggests, is that the restriction must not be broader than the objective requires. Perhaps Justice Powell had something like this in mind when he commented in Connell that the challenged agreements "did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100." But in the parlance of the building trades, a "nonunion" firm in the jurisdiction of Local 100 would have meant any employer not having a contract with Local 100. Certainly there is nothing in the record to indicate that Local 100 was seeking to use the subcontracting clause to establish the sort of "geographical enclave" involved in Allen Bradley. Thus, without **[**46]** ever undertaking the critical inquiry into the extent to which the subcontracting agreement was related to union organizational objectives, the Connell majority arrived at the conclusion that the union had lost its antitrust immunity.
>
> The most egregious failure of the Connell majority to take proper account of the policies of the labor laws in working out an accommodation with the antitrust laws came last, and Justice Stewart made it the principal focus of his dissent. As he pointed out, Local 100's secondary activity at the Connell site was subject to comprehensive regulation under Sections 8(b)(4) and 8(e) of the NLRA and Section 303 of the Labor Management Relations Act (LMRA). Congress, in his view, meant to impose carefully defined sanctions for union secondary violations, and in so doing, meant to exclude private antitrust suits as a remedy.

St. Antoine, Supra note 7, at 622, 626 (footnotes omitted).

In his annual survey of antitrust cases Milton Handler suggests that Connell (along with the Pennington and Jewel Tea decisions) amounts to an improper application of ***antitrust law***:

> (W)e now have the uncertainties of what conduct is intimately related to wages, **[**47]** hours and conditions of employment, which mandatory subjects are and which are not exempt, and finally which unfair labor practices are within antitrust's coverage and which are not. Frankly, whatever may have been the deficiencies of the pre-Pennington labor-antitrust tenets, I cannot perceive how these post-Pennington changes provide any improvement. I do perceive how they compound the confusions and uncertainties with **[*1384]** which this murky field abounds, I thus adhere to my frequently expressed view that antitrust is a singularly inappropriate weapon to curb labor union abuses and that such abuses should be prohibited by specific labor legislation with specific and exclusive remedies.

Handler, Supra note 3, at 1025 (footnotes omitted).

Professor Monaghan is also of the view that Connell was incorrectly decided and that the Court's interpretation limiting the § 8(e) proviso to agreements within a collective bargaining context was unresponsive to the congressional purpose behind the proviso.

> (T)he Court's results, both on the antitrust and section 8(e) issues, appear incorrect. Unlike the restrictions found to violate the Sherman Act in Allen Bradley, Local 100's **[**48]** agreement seems fully related to the union's organizing campaign. Obviously, the exclusion of nonunion subcontractors from the Dallas area was crucial to the Local's success. As the Court suggested, however, the subcontracting agreement might also prevent subcontractors outside the union's geographical jurisdiction from working in the Dallas area. But the union could not succeed in organizing plumbers in Dallas if general contractors remained free to import nonunion subcontractors. Similarly, once an outside subcontractor performs work within the union's jurisdiction, the Local may have a labor dispute with it over union recognition. Since general contractors dealing with such subcontractors would be allies of an employer with whom the union has a dispute, an agreement preventing such subcontracting should be within the construction industry proviso of section 8(e).

Monaghan, The Supreme Court, 1974 Term, 89 Harv.L.Rev. 1, 244-45 (1975) (footnotes omitted).

Professors Areeda and Turner in their treatise on antitrust also question the desirability of the Connell rule. See 1 P. Areeda & D. Turner, ***Antitrust Law*** 218-22 (1978). See also Christensen, The Supreme Court's Labor Law **[**49]**

Decisions, October 1974 Term Past, Prologue, and the Potomac Parallax, in Labor Law Developments 1976, 33 (1976).

B.

Assuming as we must, however, the viability of Connell as the Supreme Court's most recent pronouncement in this area, a comparison of its facts is particularly useful in weighing the competing labor and antitrust considerations presented in this appeal. A five-four decision, Connell involved a factual complex held not to fit within the labor exemption to the antitrust laws.

Local 100, a bargaining representative for workers in the plumbing and mechanical trades, approached Connell, a general contracting firm, and demanded that it sign an agreement to award subcontracts only to firms that had "an executed, current collective bargaining agreement with Local 100 . . . ." *421 U.S. at 619-20, 95 S. Ct. at 1834*. This was part of a larger union campaign to obtain identical agreements with general contractors throughout Dallas. [10] When Connell refused to sign an agreement, the union posted a picket at one of its major construction sites, and 150 workers walked off the job, bringing construction to a halt. Connell subsequently signed the agreement under protest and sued, **[**50]** claiming the agreement violated the Sherman Act and was therefore invalid.

The Supreme Court did not find the agreement to be violative of the Sherman Act but remanded the proceedings for a new trial on the issue, after determining that the circumstances evidenced the kind of "direct restraint on the business market" which could not claim exemption from the antitrust laws, *421 U.S. at 625, 95 S. Ct. at 1836*. This conclusion was compelled by the presence of three factors. First, the agreement indiscriminately forbade the hiring of nonunion subcontracting firms, even if a **[*1385]** firm's competitive advantage resulted from efficiency and not from substandard wages or working conditions. Second, only those subcontractors who were parties to current contracts with Local 100 could **[**51]** be hired, an arrangement allowing the union to manipulate the subcontractor market by agreeing or refusing to contract with any firm it might choose. Third, the union was party to a multiemployer bargaining agreement that contained a most-favored nation clause which in effect sheltered association subcontractors against competition from outside subcontractors in that part of the market covered by subcontract agreements between general contractors and Local 100.

C.

The facts of the present appeal differ materially from those in Connell. Arguably, Connell's first element is present an "agreement" that commits Long John Silver's to hiring union craftsmen, and not hiring even an efficient nonunion contractor. Yet I am not persuaded that appellant introduced enough evidence to prove the second element. Long John Silver's letter to the unions indicates an intent to use only contractors "certified" by the unions; Muko introduced no evidence to explain the significance of certification, or to show that the unions exercised the degree of market control that Local 100 sought in Connell. Moreover, the agreements in Connell "did not simply prohibit subcontracting to any nonunion firm; They prohibited **[**52]** subcontracting to any firm that did not have a contract with Local 100." *421 U.S. at 624, 95 S. Ct. at 1836* (my emphasis). No such comprehensive restraint was present here, nor could it be properly inferred. As for the third element, there is neither allegation nor evidence of a multiemployer agreement with a most-favored nation clause.

More important than point-by-point distinctions, however, is the fundamental difference between the methods employed to press the cause of labor by the appellees here and those employed by Local 100 in Connell. In Connell, Local 100 had launched an all-out campaign to obtain identical agreements with general contractors throughout Dallas. Contractors like Connell who refused to sign would be, and were, picketed until they did. The picketing at Connell's site closed it down. [11] In contrast, the record here discloses no such widespread, dominating

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[10] By the time the case went to trial, Connell and five other general contractors had been induced to sign agreements, and the union was waging a selective picketing campaign against those who resisted. *421 U.S. at 621, 95 S. Ct. 1830*.

union action. Picketing occurred at only one site, without causing a shutdown, and the handbilling which took place at the completed location lasted for only a week. The meeting between the unions and Long John Silver's occurred two months later. For all that appeared in appellant's case, the unions were concerned **[**53]** solely with persuading one firm in the entire Pittsburgh area to hire union craftsmen to build its restaurants. There is no evidence that the unions distributed handbills at any other establishment constructed by Muko, or at the premises of another company. [12] Nor is there evidence that Muko was picketed while it worked jobs for other employers. Thus this case presents a picture entirely different from Connell. This was an instance of union activity which was low-key and narrow in scope; an activity "intimately related to wages, hours and working conditions," normal aspirations of a union with a one-employer target; an activity unaccompanied by any effort to subject an entire industry to its demands and substantially restrain the products market.

[54]**

Finally, I consider it especially significant that the alleged agreement in the present case, Long John Silver's letter to the unions, was a direct result of legitimate handbilling on the part of the unions. The peaceful distribution of handbills, within the permissible limits of § 7 of the National **[*1386]** Labor Relations Act, *29 U.S.C. § 157*, carries the protection of the *first amendment*. [13] Subject to certain reasonable restrictions not involved in these proceedings, See, e. g., *Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976)*, and subject also to unfair labor practice considerations set forth in *29 U.S.C. § 158(b)(1)*, union handbilling is a protected activity. E. g., *Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945)*; *Texaco, Inc. v. NLRB, 462 F.2d 812* (3d Cir.), Cert. denied, *409 U.S. 1008, 93 S. Ct. 442, 34 L. Ed. 2d 302 (1972)*. Handbilling is also protected by the statutory publicity proviso of § 8(b)(4) of the National Labor Relations Act, *29 U.S.C. § 158(b)(4)*. E. g., *Local No. 54, Sheet Metal Workers, AFL-CIO, 179 N.L.R.B. 362 (1979)*; Plumbers and Pipefitters *Local No. 142, AFL-CIO, 133 N.L.R.B. 307 (1961)*. **[**55]** Paragraph (4) of § 8(b) prohibits certain forms of secondary boycotts, but the publicity proviso reads as follows:

> Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products **[**56]** are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

The handbilling in this case was a form of publicity, carried on to inform the public of the labor dispute between the unions and Muko. Neither Muko nor Long John Silver's contends that the handbills were untruthful, or that the handbilling induced Long John Silver's employees not to perform their jobs.

V.

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[11] The majority in Connell declined to consider whether this picketing was lawful. *421 U.S. 637-38, n. 19, 95 S. Ct. 1830*. But Justice Stewart's dissent argued convincingly that it could not be lawful under the majority's position. *421 U.S. at 648, 95 S. Ct. 1830*.

[12] Although Muko's complaint alleges that appellee unions engaged in similar activities with respect to construction of other fast food restaurants, Amended Complaint at Par. 20, the contention has not been urged on appeal.

[13] Section 7, *29 U.S.C. § 157*, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in *section 158(a)(3)* of this title.

Connell is but one Supreme Court decision, albeit the most recent, in this difficult area of the law. I make use of it in conjunction with previous applicable cases, while the majority gives it a far broader, in my view an extravagant, interpretation that fails to account for other equally important Supreme Court pronouncements on this subject.

Federal courts make individual decisions when deciding the case or controversy before them. **[**57]** Individual decisions give way to "rules" which, in Roscoe Pound's formulation, are "precepts attaching a definite detailed legal consequence to a definite, detailed set of facts." Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul.L.Rev. 475, 482 (1933). The essence of law as an ongoing process requires that we look not to One "rule" alone and "colormatch" it with the case at hand, but that we see the rule of a case as a single fiber in the pattern of rules created by previous holdings. The fabric of the law cannot depend for its strength on any one thread but must be woven with the woof and warp of many cases. Therefore, I refuse to make of Connell a whole cloth, let alone the coat of many colors envisioned by my brothers. I view Connell with other Supreme Court cases as, for example, *Jewel Tea, supra*, noting the precise extent of Justice White's participation in both. I simply cannot agree with the majority's characterization of Connell as a piece of judicial legislation which virtually destroys labor's exemption from the antitrust laws "outside a collective bargaining relationship." Maj. op. at 1373.

[*1387] VI.

Giving full consideration to both the **[**58]** antitrust and the national labor policies, I would hold, as a matter of law, that appellant did not make out a prima facie case that would bring the alleged restraint within the bar of the antitrust laws. I would affirm the judgment of the district court.

End of Document

United States v. Continental Group, Inc.

United States Court of Appeals for the Third Circuit

April 3, 1979, Argued ; July 20, 1979, Decided

Nos. 78-2328, 78-2330 to 78-2332

Reporter
603 F.2d 444 *; 1979 U.S. App. LEXIS 12989 **; 1979-2 Trade Cas. (CCH) P62,782

UNITED STATES OF AMERICA v. CONTINENTAL GROUP, INC., Appellant in No. 78-2328, CHASE BAG COMPANY, Appellant in No. 78-2330, COOPER, JAMES K., Appellant in No. 78-2331, RUE, HARRISON B., Appellant in No. 78-2332.

Subsequent History: **[**1]** As Amended August 28, 1979.

Prior History: APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (Criminal Nos. 76-00514-01/03/06/10, E.D. Pa.)

Core Terms

Bag, conspiracy, prices, district court, Cooper, knowingly, meetings, effects, joined, appellants', consumer, withdrawal, fix prices, attended, hearsay, independent evidence, Sherman Act, beyond a reasonable doubt, alleged conspiracy, price list, anticompetitive, participated, conspiring, convicted, co-conspirators, manufacturers, declarations, trial judge, competitors, instructions

LexisNexis® Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN1[] **Appeals, Standards of Review**

When an appellant asserts a general insufficiency of the evidence to prove the crime charged, the court must sustain the jury's verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision.

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

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

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > Members of Conspiracy

HN2[] **Exemptions, Statements by Party Opponents**

See *Fed. R. Evid. 801(d)(2)(E)*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Civil Procedure > Judicial Officers > Judges > General Overview

HN3[] **Judges, Discretionary Powers**

The control of the order of proof at trial is a matter committed to the discretion of the trial judge.

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

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

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

HN4[] **Conspiracy, Elements**

While the practicalities of a conspiracy trial may require that hearsay be admitted "subject to connection," the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.

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

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

HN5[] **Inchoate Crimes, Conspiracy**

Whenever reasonably practicable or whenever possible, the trial court should require the government to prove the existence of the conspiracy and each defendant's connection with it by independent evidence before admitting hearsay declarations of an alleged coconspirator.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Criminal Law & Procedure > Trials > Motions for Acquittal

HN6[] **Appeals, Standards of Review**

If the judge does allow the jury to consider the out-of-court statements, the court must assume that he made the necessary finding and its only task is to decide if he had reasonable grounds for doing so.

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

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

HN7[] **Appeals, Reversible Error**

No court has held, however, that an instruction that gives the jury an opportunity to second-guess the court's decision to admit coconspirator declarations, otherwise inadmissible as hearsay, is reversible error prejudicing the defendant. To the contrary, it has been generally held that, so long as the court fulfills its responsibility to make the initial determination, such a charge only provides a windfall to the defendant.

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

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

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > Members of Conspiracy

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN8[] **Exemptions, Statements by Party Opponents**

Testimony relating statements made by a particular defendant or, in the case of corporate defendants, by their agents are admissible against that defendant without resort to the coconspirator exception. *Fed. R. Evid. 801(d)(2)(A)* & *(D)*.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

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

The Supreme Court has rejected the claim that conviction of a misdemeanor violation of the Sherman Act requires a finding of specific intent or purpose to produce anticompetitive effects.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN10[] **Antitrust & Trade Law, Sherman Act**

The Supreme Court held that the Sherman Act did not create a strict-liability crime, and that the prosecution was required to prove either (1) that defendants knew of the probable anticompetitive effects of their actions, which effects actually occurred, or (2) that defendants acted with the conscious purpose of producing anticompetitive effects, whether or not those effects actually occurred.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Antitrust & Trade Law, Sherman Act**

The existence of some competitive activity among alleged coconspirators is not sufficient to negate the existence of an illegal conspiracy.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

HN12[] **Trials, Jury Instructions**

Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion.

Counsel: Patrick T. Ryan (argued), William J. Lehane, Wilson M. Brown, III, Drinker, Biddle & Reath, Philadelphia, Pa., for appellant Continental Group, Inc.

Henry T. Reath (argued), Michael M. Baylson, Peter J. Hoffman, Alexis J. Anderson, Duane, Morris & Heckscher, Philadelphia, Pa., for appellant Chase Bag Company.

H. Francis DeLone (argued), Mark A. Klugheit, Barbara P. Ianacone, Dechert, Price & Rhoads, Philadelphia, Pa., for appellant James K. Cooper.

Robert W. Sayre (argued), James G. Rosenberg, Stephen S. Aichele, Saul, Ewing, Remick & Saul, Philadelphia, Pa., for appellant Harrison B. Rue.

John H. Shenefield, Asst. Atty. Gen., Barry Grossman, Daniel J. Conway, Andrea Limmer (argued), Dept. of Justice, Washington, D. C., Walter L. Devany, Morton M. Fine, Donald C. Klawiter, James A. Backstrom, Jr., Dept. of Justice, Philadelphia, Pa., for appellee.

Judges: Before SEITZ, Chief Judge, and HUNTER and GARTH, Circuit Judges.

Opinion by: SEITZ

Opinion

[*447] OPINION OF THE COURT

On October 29, 1976, a grand **[**2]** jury in the Eastern District of Pennsylvania returned a one-count indictment charging five corporations and seven individuals with conspiring "to raise, fix, maintain and stabilize the prices and terms and conditions of sale of consumer bags" in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*. The indicted corporations were Continental Group, Inc. (Continental), American Bag & Paper Corporation (American), Chase Bag Company (Chase Bag), Harley Corporation (Harley Corp.), and St. Regis Paper Company (St. Regis). The individual defendants were James K. Cooper (vice president and general manager of Continental's Flexible

Packaging Division), Peter J. Weggeman (general sales manager of Continental's Flexible Packaging Division), David Mawicke (manager of paper product sales for Continental's Flexible Packing Division), Stanley A. Schottland (president of American), Harrison B. Rue (vice president of Chase Bag's Converting Division), William H. Versfelt (vice president and general divisional manager of St. Regis's Bag Packaging Division), and Edward W. Weikum (manager of converter sales and license relations in St. Regis's Bag Packaging Division).

As defined in the indictment, **[**3]** "consumer bags" are small, pre-formed paper containers used to package such products as pet foods, cookies, tea, coffee, kitty litter, chemicals, and agricultural products. The bags usually have printed exteriors designed as specified by the customer. They are often lined or coated. In addition to packages designed for consumer items, the term "consumer bags" also includes such coated paper containers as air sickness bags.

Prior to trial Harley Corp., American, and Schottland (American's president) pled nolo contendere. Beginning on September 30, 1977, the three remaining corporate defendants (Continental, Chase Bag, and St. Regis) and the six remaining individual defendants (Cooper, Weggeman, Mawicke, Rue, Versfelt, and Weikum) went to trial before a jury. At the close of the government's evidence, the district court granted motions for judgment of acquittal on behalf of Mawicke and Versfelt. After the close of all evidence the jury returned a verdict acquitting St. Regis, Weggeman, and Weikum and convicting Continental, Chase Bag, Cooper, and Rue.

After denying post-trial motions, the district court fined Continental $ 750,000 and fined Chase Bag $ 600,000. It sentenced **[**4]** both Cooper and Rue to four months imprisonment to be followed by thirty-two months probation. In addition, it fined Cooper $ 40,000 and fined Rue $ 30,000. These convictions and sentences form the basis of the present appeal.

I

In its opinion on appellants' post-trial motions, the district court summarized the evidence presented at the 43-day trial. See *United States v. Continental Group, Inc., 456 F. Supp. 704, 708-14 (E.D.Pa.1978)*. Although we will examine portions of this evidence in some detail in considering each appellant's claim that the evidence was insufficient to support conviction, See Part II, Infra, a brief overview of the alleged conspiracy will aid our analysis.

The government charged that various manufacturers of consumer bags had begun to conspire to fix prices as early as 1950. This conspiracy allegedly continued, despite changes in participants, until the indictment was returned in 1976. Significantly, the grand jury charged that the conspiracy extended beyond December 21, 1974, the effective date of an amendment making violation of *section 1* of the Sherman Act a felony rather than a misdemeanor. Pub.L. 93-528, § 3, 88 Stat. 1708 (1974).

Of the indicted **[**5]** defendants, only American was alleged to have participated in 1950. Other companies alleged to have participated **[*448]** in the 1950's, however, included Benjamin C. Betner Company (Betner) and Arkell & Smith Company (Arkell & Smith). Continental acquired Betner in 1953; Chase Bag acquired Arkell & Smith in 1967. Although testimony concerning the meetings held in the 1950's was sketchy, the record indicates that some discussion of prices did occur.

In 1960 or 1961 representatives of Continental, Bemis Bag Company (Bemis Bag), and Arkell & Smith allegedly met in New York to put together a price list to be used in pricing consumer bags. The list consisted of a loose-leaf binder breaking down the various components or "factors" of a job and assigning a price to each. Factors included such specifications as the amount and type of paper, the type of coating, and the amount of printing. When a potential customer asked one of the manufacturers to quote a price on a particular job, that manufacturer would bid by adding up the necessary factors from the list. Continental, American, Bemis Bag, and Arkell & Smith allegedly adopted this pricing format. Later entrants into the industry **[**6]** allegedly were encouraged to price from the list.

During the 1960's Continental, the largest manufacturer of consumer bags, assumed the role of "price leader." Semi-annual revisions in the price list, either single-factor or across-the-board, would be initiated by Continental, published in the Wall Street Journal, and mailed to competitors. These increases and their effective dates allegedly were cleared in advance at meetings attended by representatives of Continental, Arkell & Smith (Chase Bag after 1967), American, Harley Corp., and St. Regis. In 1971 these manufacturers all joined the Paper Sack Shipping Manufacturers' Association (PSSMA). That organization held semi-annual or quarterly meetings at resorts around the country. According to the government, the defendant corporations would gather during these conventions at informal meetings to discuss and set prices. The corporations and corporate personnel attending these meetings varied from meeting to meeting, as did the exact topics of conversation. These informal gatherings continued into 1976.

In support of its allegations that the defendants conspired to fix prices, the government introduced three types of evidence. **[**7]** First, it presented testimony by participants in the various meetings. Because of the long time frame and the large number of meetings, the government's witnesses often were unsure about who attended particular meetings or about what was discussed. Second, the government presented evidence of inter-defendant phone calls to compare prices on particular bids. The government contended that these calls were made to ensure that the conspirators were abiding by the price list. Defendants argued that the phone calls that did occur were made in order to support a "meeting competition" defense under the Robinson-Patman Act, *15 U.S.C. § 13(b)*. Finally, the government introduced economic testimony aimed at demonstrating that the defendants made parallel and nearly simultaneous changes in their price lists between 1970 and 1976. Defendants contended that these data were misleading, that all price changes were cost-justified for each manufacturer individually, and that any parallelism was the result of legitimate price leadership/followership.

Additionally, the defendants presented evidence allegedly demonstrating that the consumer bag industry was very competitive. An economist testified **[**8]** that the industry's low profit margin and other economic indicators belied any concerted effort to maintain prices at an artificially high level. Moreover, defendants and some of their customers testified that discounts from list prices were very common and very competitive.

II

All the appellants argue that the government produced insufficient evidence to support their convictions. To the extent that they argue that *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*, requires proof of a conspiracy's anticompetitive effect and that the government failed to provide such **[*449]** proof, we will treat that question in our consideration of Gypsum's applicability to this case. See Part IV, Infra. ***HN1***[] To the extent that each appellant asserts a general insufficiency of the evidence to prove the crime charged, we note that we must sustain the jury's verdict "if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *Burks v. United States, 437 U.S. 1, 17, 98 S. Ct. 2141, 2150, 57 L. Ed. 2d 1 (1978)*.

A

Continental contends that the evidence was insufficient for the jury to conclude **[**9]** that Continental had participated in the ongoing, twenty-six year conspiracy charged in the indictment.

Viewed in the light most favorable to the government, the evidence demonstrates that various manufacturers of consumer bags began to meet to discuss prices as early as 1951. These meetings took place several times a year up until 1971, the year that the manufacturers joined PSSMA. Early participants included representatives of Betner (Continental after 1953), American, Oneida Packaging Products (Oneida), Thomas M. Royal Co. (Royal), and Union Bag & Paper Co. (Union). Although the existence and extent of any agreement to fix prices during that early period is perhaps uncertain, Stanley Schottland testified that since 1950 American had followed price increases discussed at those meetings.

Continental's participation in the alleged conspiracy entered a new phase in 1961. According to Rose Loughrey, a price analyst for Continental, she received orders from George Buchanan, her supervisor, to attend a meeting with representatives of Bemis Bag and Arkell & Smith to develop a new price list for consumer bags. Buchanan told her that this list was to be used by Continental, American, **[**10]** Arkell & Smith, Bemis Bag, and Oneida. When Loughrey complained that such a meeting was illegal, Buchanan threatened her with dismissal. Loughrey attended the meeting and helped to develop the price list format. Some time after she reported back to Buchanan, he told her that the list had been accepted without protest. On further orders, Loughrey published the list. About twice each year she would revise the list and arrange for its distribution.

Robert Harley testified that soon after Harley Corp. entered the consumer bag industry sometime in 1960 or 1961, he received an invitation from Fred Hinkle of Continental to attend a meeting in New York City. Harley believed that he received the invitation because he had refused to tell Rose Loughrey over the phone what price he was charging Perk Foods for consumer bags. At the meeting, attended by Hinkle and Buchanan of Continental, Pavitt of American, and two representatives of Arkell & Smith, Hinkle told Harley that Harley Corp. didn't have to sell its bags "at what we consider under a market price." Harley told the participants that he had "no intention of doing anything to destroy the pricing structure in the market place." Hinkle **[**11]** then provided Harley with Continental's list, which Harley Corp. used thereafter.

In 1962, Loughrey and Hinkle of Continental, Eugene Pavitt of American, and representatives of Arkell & Smith met at Pavitt's home. According to Loughrey, she, Hinkle, and the Arkell & Smith people sought Pavitt's approval for an increase in the prices of heat-sealed bags. Pavitt reluctantly agreed to such an increase, saying "if you do (raise the price) we will follow." Loughrey issued new lists reflecting the changes.

Although representatives of the various competitors continued to meet through the 1960's, the record contains little evidence of who participated or what was discussed at any particular meeting. The record does indicate, however, that during this period various representatives of the defendant companies frequently exchanged phone calls to compare prices. Continental claims that these calls were made only to verify a customer's report of a lower price quoted by a competitor. According to Loughrey, however, when a prospective customer asked **[*450]** Continental for a bid, either she or Buchanan routinely would call competitors, ask if they had received a similar inquiry, and compare **[**12]** prices. Prior to 1961, Buchanan made the calls for large orders while Loughrey called for small orders. After 1961, Loughrey made almost all the calls herself. If the competitor's price was the same as that calculated by Loughrey, she would quote it to the customer. If they differed, she would consult her superiors before quoting a price.

In 1969, Pavitt of American hosted a meeting at the Philmont Country Club attended by George Landon and Fred Hinkle of Continental as well as representatives of Chase Bag and Harley Corp. Pavitt testified that Landon announced a three per cent price increase that Continental had made public a short while earlier. The advisability of such an increase was discussed by the participants, some of whom expressed surprise that Continental would commit itself to such an increase before the meeting. By the end of the meeting no one had expressed disagreement with a three per cent increase, and Pavitt left with the impression that all the participants had committed themselves to follow Continental's lead.

Similarly, Robert Harley described a meeting he hosted at Hilton Head Island, South Carolina, in January 1970. Landon of Continental stated that **[**13]** costs were increasing and that Continental was going to raise its prices. Harley responded that he was experiencing similar problems with costs and left with the impression that he had committed his company to mirror Continental's increase.

Prior to joining the PSSMA in 1971, Continental was represented at at least three other meetings where the participants discussed prices and industry conditions. During a golf outing at Tamarach Country Club in September 1970, Landon announced that Continental planned another three per cent increase effective January 1, 1971. Chase Bag and Harley Corp., whose representatives were present at Tamarach, thereafter implemented similar increases. In Spartansburg, South Carolina, in March 1971, the participants spoke generally about industry conditions and compared prices on certain types of bags. Finally, at Darien Country Club in May 1971, Continental and the other defendants agreed to join PSSMA.

Continental's representatives continued to meet with its competitors' representatives at informal "rump sessions" held at each PSSMA convention. Such sessions were held at Scottsdale, Arizona, in 1971, and at Boca Raton, Florida, and Chicago in 1972. **[**14]** The subjects discussed at these meetings, however, are unknown.

The first PSSMA-related meeting at which prices definitely were discussed was held at Tuckerstown, Bermuda, in October 1972. Landon and James Cooper (appellant in No. 78-2331) of Continental and Robert Harley of Harley Corp. hosted a breakfast meeting attended by representatives of St. Regis, American, and Union Camp. According to Harley, he and Landon accused Union Camp's Jack Bauman of undercutting certain prices quoted by Harley. Landon told Bauman that the other manufacturers would like to see "you people" use Continental's price list. Bauman responded that he would "take the matter under consideration."

In April 1973, at the PSSMA meeting in Atlanta, Landon of Continental told a group consisting of representatives of Harley Corp., Chase Bag, American, and St. Regis that Rose Loughrey had filed a discrimination suit against Continental and "had disclosed that this group of ours had been meeting, (and) named a lot of people and places." Harley then informed the group that his counsel had advised him to stop attending the rump sessions and to stop exchanging price information over the phone because such activities **[**15]** were illegal. Versfelt of St. Regis and Landon of Continental said that their attorneys had told them that the meetings were legal. Despite this discussion, the meetings continued and Harley continued to attend.

Later in 1973, at PSSMA's Pebble Beach convention, representatives of the defendant **[*451]** corporations met in Landon's hotel room. In the course of discussing revisions in the price list, Landon indicated "that he wanted it known" that Continental was the price leader of the industry.

A particularly significant meeting was held at the Chicago PSSMA convention in June 1974. Cooper and Weggeman represented Continental, Harrison Rue (appellant in No. 78-2332) represented Chase Bag. Others present included Harley of Harley Corp., Schottland of American, and Versfelt and Weikum of St. Regis. According to Harley, at an earlier meeting in New Orleans Weikum had expressed St. Regis's dissatisfaction with the price list for pet food bags. At that time Cooper had responded that Continental "liked the price book the way it was." Nevertheless, in Chicago, Versfelt and Weikum again suggested that St. Regis wanted to develop its own list for pet food bags. Schottland of American **[**16]** heard Cooper respond, "this will be fine, be my guest" or "go ahead, do it, that sounds great." Harley told the St. Regis people that if they revised the price list "we would follow their list."

St. Regis issued a revised list to be effective December 30, 1974. Chase Bag and Harley Corp. issued pet food lists identical to St. Regis's effective in January 1975. While Continental and American did not publish new lists until February 1975, both companies used the St. Regis list to price pet food bags in the interim.

In September 1975 the PSSMA held a convention in Bermuda. While there Cooper of Continental invited Harley of Harley Corp. and Schottland, Abe Mendenhall, and Theodore Hughes of American to a breakfast meeting. Harley testified that Cooper had told him that the purpose of the meeting was to get Schottland to stop delaying a price increase. Because a grand jury had begun an investigation into the industry, Schottland told Mendenhall and Hughes before the meeting that "I'm sure that nobody would be that dumb to bring up anything about prices, but if anybody does, for God's sake, don't open your mouth." According to Schottland, however, "(t)here was somebody that dumb."

[17]** Harley, Schottland, Mendenhall, and Hughes all testified as to what took place at the meeting. Cooper began by briefing them on the status of Rose Loughrey's lawsuit. He then announced that Continental intended to raise its prices by three per cent [1.] effective January 1, 1976. He specifically stated that he had the support of "the others" for such an increase. Cooper asked both Harley and Schottland if their companies would support such an increase; both indicated that they would. Although each of the defendant companies seemed to pursue an independent course during the next few months, all eventually announced a three per cent increase effective January 1, 1976.

After the announcement of this increase, the defendant companies met resistance from Ralston Purina, a major purchaser of consumer bags. In **[**18]** January 1976, at a PSSMA convention in Palm Beach, Florida, Harley discussed Harley Corp.'s pricing policy for Ralston with Cooper of Continental, Rue of Chase Bag, Weikum of St.

[1.] Schottland and Harley testified that Cooper announced a three per cent increase. Mendenhall and Hughes testified that Cooper mentioned a specific percentage, but they could not remember what it was.

Regis, and Schottland of American. In particular, he told Cooper that Harley Corp. was going to delay increasing its prices to Ralston until February 15. Cooper told Harley that Continental was going to do the same. Harley then gave Cooper, Rue, and Schottland a piece of paper with the prices Ralston had resisted, "(t)o let them know that the prices on that sheet were the prices that were being developed from our price book."

In addition to the evidence of meetings and telephone calls, the record contains economic testimony demonstrating a high degree of parallelism in the timing and amount of price changes by the defendant companies between 1970 and 1975. The district court has tabulated some of this evidence in its opinion. See *456 F. Supp. at 724-25*.

[*452] After reviewing the evidence concerning Continental's participation in the alleged conspiracy, we agree with the district court that there was substantial, even overwhelming, evidence of Continental's guilt. We recognize that the government **[**19]** shouldered a heavy burden when it charged a continuing 26-year conspiracy, but we believe that the government produced sufficient evidence to go to the jury on this allegation. Moreover, we note that the breakfast meeting in Bermuda took place in September 1975, well after the effective date of the amendment making a violation of the Sherman Act a felony. This meeting provides sufficient evidence for a jury to conclude that Continental's participation in the conspiracy extended into the "felony period." [2.]

B

Appellant James K. Cooper also argues that the government produced insufficient evidence to convict him of participation in the conspiracy charged. Cooper was general sales manager of Continental's Flexible **[**20]** Packaging Division from February 1970 to January 1974, and general manager of that division from January 1974 through 1976. In considering this contention we again stress that we must view the evidence in the light most favorable to the government. Moreover, we note that the government did not have to prove that Cooper participated in the conspiracy from its inception, but only that he knowingly became a member of the ongoing conspiracy. See *United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 182 (3d Cir. 1970)*, Cert. denied, *401 U.S. 948, 91 S. Ct. 928, 28 L. Ed. 2d 231 (1971)*.

During Cooper's tenure as general sales manager he served under George Landon and had no official authority to set the prices of consumer bags. Nevertheless, one facet of his job was supplying price information to Landon, who did have authority to set prices.

Testimony demonstrates that, prior to his promotion in 1974, Cooper accompanied Landon to various meetings identified as "conspiratorial" by the government. These meetings included the golf outing at Tamarach Country Club in September 1970 where Landon announced Continental's intention to increase its prices by three per **[**21]** cent. The evidence does not indicate, however, whether Cooper took any part in the ensuing discussion of prices.

Similarly, Cooper apparently accompanied Landon to meetings in Spartansburg, South Carolina (March 1971), Darien, Connecticut (May 1971), Tuckerstown, Bermuda (October 1972), Atlanta, Georgia (April 1973), and Pebble Beach, Florida (September 1973). As noted earlier, Landon spoke on behalf of Continental at each of these meetings while Cooper apparently took no active role.

At a meeting in New Orleans soon after his promotion to general manager, Cooper told representatives of St. Regis who were dissatisfied with the pet food price list that Continental liked the list the way it was. In June 1974 at a meeting in Chicago, the St. Regis representatives again voiced dissatisfaction with the list and announced that they were going to revise it. Cooper responded that "this will be fine, be my guest" or "go ahead, do it, that sounds great." Thereafter, Continental adopted the new list issued by St. Regis.

Cooper also presided at the breakfast meeting in Bermuda in September 1975. All four of the other men present, Schottland, Mendenhall, Hughes, and Harley, testified that **[**22]** Cooper sought Schottland's agreement to a three

[2.] Appellants contend that the government was obligated to prove an overt act by each defendant in furtherance of the conspiracy during the felony period. We need not decide here whether this contention is correct. But see *United States v. United States Gypsum Co., 600 F.2d 414, 417-20 (3d Cir. 1979)*.

per cent increase, See note 1, Supra, and that Cooper stated that he had the support of "the others" for this increase. Continental did, in fact, increase its prices by three per cent, as did each of the other defendant companies.

[*453] Between 1974 and 1976, Cooper also participated in the exchange of price information with Continental's competitors. Thus, in 1974 or 1975 he assisted Harley in obtaining the price that Continental was charging Keebler Cookies. During that same period Cooper called Hughes to find out whether American was going to sell "on list" in upcoming bids to Ralston Purina, Carnation, and American Airlines. Finally, in January 1976, he discussed with Harley, Rue, Weikum, and Schottland the prices that Harley Corp. was going to charge Ralston Purina after the most recent revision of the list.

Cooper argues that he introduced overwhelming evidence that any price increases made by Continental during his tenure as general manager were carefully planned responses to Continental's own corporate needs. Such internal planning, he argues, belies any conspiracy among competitors. We believe, however, that this **[**23]** question was for the jury to decide. Cooper forcefully argued this theory before them. Moreover, even if the evidence cited by Cooper did, in fact, prove overwhelmingly that Continental's pricing decisions were the product of internal corporate forces, such evidence would not rule out the conspiracy alleged by the government. We need only note that Continental was the self-professed "price leader," and that this role might well have permitted Continental to propose price increases that were best suited to its own corporate needs.

We conclude that there was substantial evidence to support the jury's conclusion that Cooper knowingly joined the ongoing conspiracy.

C

Appellant Chase Bag did not enter the consumer-bag industry until August 18, 1967, when it acquired Arkell & Smith, one of the originators of the price-list format. According to Rose Loughrey of Continental, Hinkle told her at that time that the new owners of Arkell & Smith did not want to exchange price information with Continental. As a result, Loughrey, refrained for a while from calling her contacts at Arkell/Chase. Within six to eight months, however, Chase Bag employees began to call her for prices and she resumed **[**24]** her normal exchange of information.

No Chase Bag representative attended any meeting of consumer-bag manufacturers until the summer of 1969, when a number of the alleged conspirators gathered at Seaview Country Club to meet Stanley Schottland, Eugene Pavitt's successor as president of American. Chase Bag was represented by Eugene Alexander, Chase Bag's product manager, and Frederick Kiendl, a former employee of Arkell & Smith who had been put in charge of Chase Bag's sales of "coated paper." Although prior to the takeover in 1967 Kiendl had controlled the pricing of consumer bags for Arkell & Smith, neither Kiendl nor Alexander had authority to price bags for Chase Bag. Both did, however, have "input" into the pricing decision. Apparently no price discussions occurred at the Seaview meeting.

Alexander hosted the golf outing at Tamarach Country Club in September 1970, in which Kiendl also participated. At that outing Landon of Continental announced that his company planned a three per cent increase effective January 1, 1971. Chase Bag subsequently enacted a similar increase.

In May 1971, Alexander and Kiendl attended the meeting at Darien Country Club along with James Wells, **[**25]** then vice president of Chase Bag, who did have authority to set prices. Although the participants at Darien apparently discussed the legality of their meetings and decided to join PSSMA, of which Chase Bag was already a member, no other price discussions occurred.

In April 1973, at the PSSMA meeting in Atlanta, Kiendl and Harrison Rue, who by that time had pricing authority, heard Landon of Continental report on Rose Loughrey's discrimination suit. Robert Harley again raised the question of the legality of the meetings.

[*454] The first active participation in such meetings by a Chase Bag employee apparently occurred at the Kansas City meeting in June 1973. Rue and Kiendl of Chase Bag, Cooper of Continental, Pavitt and Schottland of

American and representatives of Harley Corp. and St. Regis met in Schottland's suite for dinner. Pavitt was upset because a competitor had cut ten per cent off the list price American had quoted to Safeway Stores. Rue conceded that Chase Bag had given the discount, and an argument erupted between Rue and Pavitt.

Chase representatives also attended rump sessions in September 1973 at Pebble Beach (Rue), in January 1974 at Palm Beach (Alexander), **[**26]** and in April 1974 in New Orleans (Rue and Kiendl). Although prices were discussed at each of these meetings, the record does not indicate the extent to which Chase Bag's representatives participated in these discussions.

Rue and Kiendl were present at the Chicago meeting in June 1974 when St. Regis's representatives announced their intention to formulate a new price list for pet food bags. Harley testified that prior to the meeting he had called Schottland of American to find out why Schottland had not raised American's prices to Ralston Purina. According to Harley, "Stanley liked to say he was going to move his prices up with the rest of us, but he would always play some delayed action at some of his pet accounts." At the meeting Rue made derogatory remarks about Schottland's pricing policies and Schottland stormed out of the room.

At the same meeting Harley told the St. Regis people that if they revised the pet-food list Harley Corp. would follow it. Moreover, he testified that after the meeting he discussed St. Regis's proposal with Rue and that Rue stated that Chase Bag "was going to follow it too . . . ." As noted earlier, St. Regis issued its new list on December 30, 1974. **[**27]** The files of Chase Bag contained an identical list with Chase Bag's named on it with a date of January 2, 1975. And by January 24, 1975, Chase Bag's relevant prices were the same as those on the St. Regis list.

Kiendl of Chase Bag attended a dinner meeting in January 1975 on Marco Island, Florida. At the meeting he continued the feud between Chase Bag and American when he got into a heated argument with Schottland. According to Schottland, Kiendl felt "that American was not putting its prices up with the important customers on what (Kiendl) considered to be the proper time, in terms of material increases."

No representative of Chase Bag attended the September 1975 breakfast meeting in Bermuda where Cooper of Continental solicited and received Harley's and Schottland's agreement to a three per cent increase effective January 1, 1976. Nevertheless, Cooper did say that he had the approval of "the others" for the increase. In fact, Chase Bag thereafter enacted such an increase in January 1976.

Finally, Rue of Chase Bag called Harley in December 1975 to ask him what prices Harley Corp. was going to charge Ralston Purina after the January price increase became effective. Later, **[**28]** at the January 1976 meeting in Palm Beach, Harley gave Rue, Cooper, and Schottland a piece of paper bearing the prices he had quoted to Ralston.

Chase Bag argues strenuously that this evidence was insufficient to convict it of the crime charged. It contends that the timing of all its price increases was completely consistent with its role as a price follower. Moreover, Chase Bag argues that the behavior of its representatives at the various meetings and rump sessions was perfectly consistent with innocence.

Were it not for the incident involving the St. Regis price list, we might be inclined to agree that the government failed to carry its burden of proof. That incident, however, convinces us that the district court did not err in allowing the charge against Chase Bag to go to the jury. As noted earlier, Harley testified that in June 1974 Rue committed Chase Bag to the then-unpublished St. Regis list for pet-food bags. Chase Bag did, in fact, adopt an identical list in January 1975. Significantly, this adoption took place after December 21, 1974, and thus within the felony period. But see Note 2, Supra.

[*455] Recognizing the importance of the St. Regis incident, Chase **[**29]** Bag suggests several reasons why we should discount that evidence. First, it argues that Harley's testimony is completely implausible because Rue would never have committed Chase Bag to a price list he had not seen. We note, however, that such a commitment is not implausible if Rue had reason to believe that the other manufacturers also would adopt the St. Regis list. Harley's testimony is thus quite consistent with the conspiracy charged by the government.

Second, Chase Bag argues that St. Regis did not issue its list until December 30, 1974, that the list in Chase Bag's file had a date of January 2, 1975, and that this time span is so short as to belie any inference of reliance on the St. Regis list. We believe, however, that the jury was entitled to draw the opposite conclusion: that the short time span implies a prior commitment to adopt the list.

Third, Chase Bag argues that the jury's acquittal of Weikum and St. Regis demonstrates that they did not believe Harley's account of the incident. Jury verdicts, of course, need not be internally consistent. See, e. g., *Dunn v. United States, 284 U.S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 356 (1932)*. Moreover, it was Rue of Chase **[**30]** Bag, and not Weikum or any other representative of St. Regis, who expressed a commitment to Harley to follow the St. Regis list. Thus the acquittal of Weikum and St. Regis does not necessarily indicate that the jury rejected Harley's testimony about the incident.

Finally, and quite correctly, Chase Bag argues that it was not charged with conspiring with Harley Corp. in 1974 to fix the price of pet food bags, but rather with joining an ongoing, 26-year conspiracy to fix the prices of consumer bags. Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by Rue's apparent agreement with Harley to fix prices.

Confronted with this evidence of express agreement, we believe that the jury was entitled to infer that Chase Bag's participation in other "conspiratorial" activities was not wholly innocent and that it knowingly joined the ongoing **[**31]** conspiracy.

D

On February 12, 1972, appellant Harrison B. Rue became vice president of sales for Chase Bag, a position which he retained through 1976. Like the other appellants, Rue asserts that the government failed to produce sufficient evidence to support his conviction.

Given the foregoing discussion, the evidence against Rue can be summarized rather briefly. He represented Chase Bag at the meetings held in April 1973 in Atlanta, in June 1973 in Kansas City, in September 1973 in Pebble Beach, in April 1974 in New Orleans, in June 1974 in Chicago, and in January 1976 in Palm Beach. At two of those meetings (Kansas City and Chicago), he argued about pricing policy with representatives of American. He controlled Chase Bag's price list for consumer bags from 1972 through 1976, a period during which Chase Bag's price movements were demonstrably parallel to the movements of the other alleged conspirators. Moreover, according to Harley's testimony, Rue expressly agreed in June 1974 that Chase Bag would adopt the St. Regis price list for pet food bags when it was published. Chase Bag did, in fact, adopt a list identical to the St. Regis list.

Like Chase Bag, Rue argues that the **[**32]** St. Regis incident is not probative of his guilt. We conclude, however, that this agreement, when combined with the other evidence of arguably conspiratorial activities, constitutes substantial evidence supporting the jury's verdict as to Rue.

[*456] III

The appellants contend that their convictions must be reversed and a new trial granted because the district court erred in permitting the jury to consider hearsay declarations and actions of alleged coconspirators against all the defendants without first making a finding that the government had established the existence of the alleged conspiracy and the participation therein of each defendant and alleged coconspirator by a preponderance of independent evidence. ***HN2***[] See *Fed.R.Evid. rule 801(d)(2)(E)* ("A statement is not hearsay if . . . (t)he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."). They also contend that the district court abused its discretion in refusing to require the government to establish the existence of the conspiracy charged and the participation therein of each defendant by a preponderance of independent **[**33]** evidence before introducing any hearsay attributed to other members of the alleged conspiracy.

We will deal with the latter contention first. Appellants concede, as they must, that ***HN3***[] the control of the order of proof at trial is a matter committed to the discretion of the trial judge. See *Geders v. United States, 425 U.S. 80, 86, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976)*; *United States v. American Radiator & Standard Sanitary Corp., supra, 433 F.2d at 195*. In American Radiator, this court recognized that the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy. Id.

In this case, the district court initially determined that it would permit the government to introduce into evidence otherwise inadmissible declarations of alleged coconspirators "subject to the obligation of the Government, before the case is completed, to establish the existence of the conspiracy and prove aliunde as to every separate defendant." This court approved the procedure outlined by the district court in this case in *United States v. Bey, 437 F.2d 188, 191 (3d Cir. 1971)*, **[**34]** in which the following passage from an opinion of the Second Circuit Court of Appeals was quoted with approval:

> ***HN4***[] While the practicalities of a conspiracy trial may require that hearsay be admitted "subject to connection," the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.

United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), Cert. denied, *397 U.S. 1028, 90 S. Ct. 1276, 25 L. Ed. 2d 539 (1970)*.

This court has recognized that there is a real danger in a conspiracy trial involving numerous defendants that the jury may find a particular defendant guilty merely because of his association with the other defendants. See *United States v. American Radiator & Standard Sanitary Corp., supra at 195*. One aspect of this danger is that the trial judge, after admitting hearsay declarations of alleged coconspirators subject to later connection, may find at the close of all the evidence that the government has not borne its burden of proving by independent evidence that **[**35]** those declarations were made during the course and in furtherance of a conspiracy joined in by both the defendant and the declarant. Cautionary instructions to the jury might not suffice to cure the resulting prejudice to the defendant. See *Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949)* (Jackson, J., concurring). In such instances it may be necessary for the trial judge to grant a defendant's request for a mistrial. See *United States v. Bey, supra at 191*, Quoting *United States v. Geaney, supra at 1120*.

Recognizing these problems, some appellate courts have indicated their preference that, "***HN5***[] whenever reasonably practicable" or "whenever possible," the trial court should require the government to prove the existence of the conspiracy and each defendant's **[*457]** connection with it by independent evidence before admitting hearsay declarations of an alleged coconspirator. See *United States v. James, 590 F.2d 575, 582* (5th Cir.) (en banc), Cert. denied, *442 U.S. 917, 99 S. Ct. 2836, 61 L. Ed. 2d 283 (1979)*; *United States v. Macklin, 573 F.2d 1046, 1049 n.3* (8th Cir.), Cert. denied, *439 U.S. 852, 99 S. Ct. 160, 58 L. Ed. 2d 157 (1978)*. We agree **[**36]** that the danger of prejudice to the defendant inherent in the practice of admitting coconspirator declarations, otherwise hearsay, subject to later proof of the requisite conspiracy, dictates that the practice be carefully considered and sparingly utilized by the district courts. Nonetheless, given the large amount of interrelated testimony to be considered in this case, we believe that alternative approaches may have been unduly complex and confusing to the jury or to the court. We therefore conclude that the district court's decision to admit such declarations "subject to later connection" was not inconsistent with the sound exercise of its discretion.

The appellants have placed greater reliance on what they characterize as the district court's failure to make a finding, before submitting this case to the jury, that the government had, in fact, established the existence of the alleged conspiracy and the connection of each defendant with it by a clear preponderance of evidence independent of the hearsay declarations. Absent such a finding it would have been error for the court to have submitted the case to the jury without cautionary instructions limiting the use of hearsay statements **[**37]** as to particular defendants. See *United States v. Trowery, 542 F.2d 623 (3d Cir. 1976)* (per curiam), Cert. denied, *429 U.S. 1104, 97 S. Ct. 1132, 51 L. Ed. 2d 555 (1977)*; *United States v. Bey, supra.*

Appellants' position is that the trial judge in this case abdicated his responsibility under Trowery and Bey and allowed the jury to make the determination as to whether the government had established sufficient independent evidence of the conspiracy. We disagree with the appellants' characterization of the district court's actions.

Following the close of the prosecution's case, appellants Continental, Chase Bag, and Rue filed motions to strike the hearsay testimony of government witnesses against each of them for failure of the government to prove the existence of the conspiracy and their connection with it by a preponderance of independent evidence. The appellants' motions and Chase Bag's memorandum of law in support of its motion explicitly brought the decision in Trowery on the government's burden of proof to the district court's attention. It appears obvious to us that when those motions were denied, in an order entered on November 3, 1977, the district court implicitly found **[**38]** that the government had met its burden under Trowery and Bey. There is no requirement in either of those opinions that the trial judge enter specific findings of fact supporting his conclusion that a clear preponderance of independent evidence has been presented establishing a conspiratorial relationship between the hearsay declarant and each of the defendants.

A long line of authority in the Second Circuit supports our conclusion that the denial of the appellants' motion to strike constituted a finding by the court that the government had met its burden under Trowery. See, e. g., *United States v. Green, 523 F.2d 229, 233 n.4 (2d Cir. 1975)*, Cert. denied, *423 U.S. 1074, 96 S. Ct. 858, 47 L. Ed. 2d 84 (1976)* ***HN6***[] ("If the judge does allow the jury to consider the out-of-court statements, we must assume that he made the necessary finding and our only task is to decide if he had reasonable grounds for doing so."); *United States v. Baker, 419 F.2d 83, 88-89 (2d Cir. 1969)*, Cert. denied, *397 U.S. 976, 90 S. Ct. 1086, 25 L. Ed. 2d 265 (1970)* (denial of a motion for acquittal on conspiracy charge constitutes a determination that there was sufficient independent evidence to justify admission **[**39]** of hearsay declarations of coconspirators); *United States v. Geaney, supra at 1120* ("we must assume on appeal that the trial judge was satisfied of the existence of a conspiracy on the basis of non-hearsay evidence.").

[*458] Appellants suggest that the foregoing authority has been undermined by the more recent opinion of the Second Circuit Court of Appeals in *United States v. Ziegler, 583 F.2d 77 (2d Cir. 1978)*. In Ziegler the trial judge had "admitted all proffered declarations of co-conspirators subject to connection, without at any time making any preliminary finding based on non-hearsay evidence, that the conspiratorial relationship between the witness (Sic) and the appellant had been sufficiently established by independent evidence Aliunde to warrant admission of such declarations." *Id. at 80-81* (footnotes omitted). That omission was found to constitute harmful error. Ziegler was a case, however, in which the trial judge explicitly refused to comply with applicable Second Circuit precedent because he disagreed with it. Thus, the Ziegler court distinguished the cases relied upon here that hold that the requisite finding can be inferred from the court's submission of **[**40]** the evidence to the jury: "Where, as here, the district judge declines to make the determination when asked to do so and expresses his disagreement with controlling Second Circuit precedent, we must resolve any remaining ambiguity in favor of the accused." *Id. at 80 n.5*. In this case the district court made the requisite determination when asked to do so by denying the appellants' motions to strike the hearsay testimony.

The appellants assert that the district court's denial of their motions to strike did not constitute the findings required by Trowery and Bey, that the court impermissibly left that finding for the jury's consideration, and that the truth of their assertions is demonstrated by the court's charge to the jury and by the court's opinion accompanying the order denying their post-trial motions for judgment of acquittal and a new trial.

In charging the jury, the district court employed one of the government's requested instructions:

> Now whether or not therefore any particular defendant was a member of or participated in a common plan in determining as to that defendant that involvement can only be established beyond a reasonable doubt by evidence as to that defendant's **[**41]** own conduct; that is, what that defendant himself said or did. If it appears beyond a reasonable doubt from the evidence that a common plan did exist and that a defendant was one of its members, then the act knowingly done and the statements knowingly made by any other person likewise found to be a conspirator may be considered by you as evidence in the case to each defendant found to be a member, even though the act done and the statements made occurred in the absence and without the

> knowledge of an absent defendant, provided that the acts done or the statements made were during the existence of a common plan and in furtherance of the purpose and objectives of the plan.
>
> To summarize, you may not use a statement made by any of the alleged conspirators against the particular defendant to prove that that defendant was a member of the plan or conspiracy. Membership by an individual defendant or a corporate defendant must be proved by the acts or statements of that defendant himself or itself but if membership has been so proved thereafter you may consider the acts and statements of any other member of the conspiracy against a particular defendant so found to be a member and **[**42]** so long as he remains in the conspiracy, provided the acts and the statements were during the continuance of the plan and conspiracy in furtherance of it.

Appendix at 400-01.

It is true, of course, that the instruction given the jury on the sufficiency of independent evidence was superfluous. In Trowery this Court held:

> If the evidence is admitted, it then goes to the jury without special instruction. The issue of concert of action, as it applies to the question of admissibility of evidence, is determined by the trial judge as a matter of law, rather than being submitted to the jury.

542 F.2d at 627. In this regard, Trowery reiterated the earlier holding in Bey :

> **[*459]** Nor was it necessary for the trial court to instruct the jury to consider the (hearsay) statement only if it found independent evidence of the conspiracy. Once the judge has made the initial determination of admissibility, the jury should not be given an opportunity to second-guess his decision.

437 F.2d at 191-92.

HN7[] No court has held, however, that an instruction that gives the jury an opportunity to second-guess the court's decision to admit coconspirator declarations, otherwise **[**43]** inadmissible as hearsay, is reversible error prejudicing the defendant. To the contrary, it has been generally held that, so long as the court fulfills its responsibility to make the initial determination, such a charge only provides a windfall to the defendant. See, e. g., *United States v. Enright, 579 F.2d 980, 987 (6th Cir. 1978)*; *United States v. Smith, 578 F.2d 1227, 1233 (8th Cir. 1978)*; *United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977)*.

Despite their present reliance on the court's charge as evidence of the trial judge's abdication of his responsibility under Trowery and Bey, the defendants did not object to that charge after it was given. Moreover, an additional factor buttressing our conclusion that the charge lends no support to the appellants' claim of reversible error is that Chase Bag itself asked that such a charge be given. In its requested points for charge, modifying those submitted by the defendants jointly, Chase Bag requested that the jury be instructed:

> Chase cannot be convicted of being a member of the conspiracy unless you are satisfied that the government proved beyond a reasonable doubt by independent first-hand testimony that Chase joined **[**44]** the conspiracy. Mere out-of-court statements by others who did not testify is not sufficient to prove that Chase joined the conspiracy.

In a footnote to that request Chase Bag stated:

> This requested point appears to be in conflict with the Third Circuit's decisions in *United States v. Trowery, 542 F.2d 623 (3d Cir. 1976)*. Chase, however, asserts that without this point it is being subjected to trial with a standard of proof less than "beyond a reasonable doubt." Chase, therefore, reserves its rights in this regard.

Appendix at 310. Our examination of the record convinces us that the appellants suffered no prejudice from the court's instruction to the jury concerning independent evidence of the conspiracy.

Appellants also rely on the district court's post-trial opinion as evidence that the court abdicated its responsibility under Trowery. In the appellants' joint motion for a new trial they asserted that the district court had erred in denying their pre-trial motion to regulate the order of proof, in admitting testimony at trial containing hearsay, and in denying their motions to strike that testimony. In its opinion denying their motion, the court stated: **[**45]**

> In the instant case, the Court did not abuse its discretion to permit the Government to introduce hearsay statements of alleged coconspirators subject to their later connection with the conspiracy by clear, independent evidence, because the evidence in this case clearly was sufficient for the jury to find beyond a reasonable doubt that a conspiracy existed and that each of the defendants knowingly joined and participated in that conspiracy during the felony period.

456 F. Supp. at 720. We believe that this statement must be read in the total context of the district court's opinion. In an earlier passage, the district court accurately summarized this court's holding in Trowery, stating that the case

> enunciated the well-settled rule . . . that to determine whether statements of an alleged coconspirator are competent against the non-declarant, the trial judge must determine whether it has been proved, by a clear preponderance of the evidence independent of the hearsay statement, that a joint undertaking existed at the time of the statement or action and that the declarant was a participant.

[*460] Id. Thus, contrary to the appellants' assertions, the district **[**46]** court's opinion does not demonstrate confusion on the part of the trial judge about Trowery 's requirements as to the role of the court and the jury on this issue. Rather, the court's opinion, viewed in its entirety, must be read as holding that, not only was there a clear preponderance of independent evidence from which the judge had found the requisite conspiratorial relationship, but also that there was sufficient evidence for the jury to have found beyond a reasonable doubt that such a relationship existed.

Although the better practice is for the district court to place in the record an explicit Trowery ruling accompanied by such exposition as seems appropriate under the circumstances, we believe that the district court in this case was aware of its responsibilities under Trowery and Bey. Furthermore, we believe that the district court made an explicit finding when it denied the appellants' motions to strike hearsay testimony, that there was a clear preponderance of non-hearsay evidence establishing the existence of a conspiracy and the participation of each of the defendants and declarants therein. Under such circumstances, the court's later instruction to the jury directing **[**47]** them not to consider hearsay declarations against any defendant unless they were first satisfied, beyond a reasonable doubt and based on independent evidence, of that defendant's participation in a joint venture with the declarant, was, at worst, harmless error.

It only remains for this court to consider whether the district court "had reasonable grounds" to make such a finding. *United States v. Bey, supra, at 191*. In making this determination, we note that, with a few minor exceptions, [3] the facts considered in the discussion of each appellant's challenge to the sufficiency of the evidence are supported by evidence independent as to that appellant. ***HN8***[] Testimony relating statements made by a particular defendant or, in the case of corporate defendants, by their agents are admissible against that defendant without resort to the coconspirator exception. See *Fed.R.Evid. 801(d)(2)(A)* & *(D)*. Moreover, a number of the statements attributed to persons other than the defendants were not admitted for the truth of the declaration, and therefore do not constitute hearsay at all. See *Fed.R.Evid. 801(c)*. Given the testimony of prosecution witnesses that they participated in the alleged conspiracy, **[**48]** and given the non-hearsay evidence linking each appellant with that conspiracy, we conclude that the district court did not err in admitting all coconspirators' statements against all the appellants.

IV

Appellants challenge various aspects of the instructions delivered to the jury by the district court. Most significant, they have challenged the instructions on intent and on withdrawal from the conspiracy.

A

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[3] The most notable exception is Cooper's alleged statement at the breakfast in Bermuda that he had the support of "the others" for a three per cent increase. Although this statement appears to be hearsay as to Chase Bag and Rue, we believe that the remaining, independent evidence against those defendants is sufficient to support the district court's decision under Trowery.

Appellants advance three arguments in support of their contention that the district court erroneously instructed the jury on the issue of intent. First, they argue that because violations of the Sherman Act are now felonies, See **[**49]** Pub.L. 93-528, § 3, 88 Stat. 1708 (1974), the district court erred in refusing to require a finding of specific intent to bring about anticompetitive effects. Second, they argue that *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*, controls this case and renders the district court's instructions on intent erroneous. Third, they argue that one portion of the district court's charge allowed the jury to return a verdict of guilty without any finding of intent whatsoever.

[*461] 1

HN9[] The Supreme Court has rejected the claim that conviction of a misdemeanor violation of the Sherman Act requires a finding of specific intent or purpose to produce anticompetitive effects. See *United States v. United States Gypsum Co., supra, at 444* & n.21, *98 S. Ct. 2864*. Nevertheless, appellants contend that the government must be held to this higher standard now that the crime charged is a felony.

Certainly nothing in the legislative history of the 1974 amendment to the Sherman Act indicates any Congressional intention to alter the mens rea necessary for conviction. In fact, all indications are that, despite the increase in penalties, Congress intended **[**50]** that "(n)o change would be made in the substantive ***antitrust law*** itself." 120 Cong. Rec. 36340 (Nov. 19, 1974) (statement of Congressman Hutchinson). Nor are we persuaded that the absence of a showing of specific intent denies the appellants due process of law. See *United States v. Foley, 598 F.2d 1323, 1335-36 (4th Cir. 1979)*. We conclude, therefore, that conviction of a felony for violating the Sherman Act does not require a showing of specific intent to produce anticompetitive effects. Accord *United States v. Foley, supra* ; United States v. Noll Manufacturing Co., 1977-2 Trade Cas. P 61,712 (N.D.Cal.1977).

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Alternatively, appellants argue that the Supreme Court's decision in *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*, necessitates reversal of their convictions. In Gypsum, handed down seven months after the jury returned its verdict in this case, the Court rejected an instruction that allowed the jury to convict defendants of violating the Sherman Act if the jury concluded that the exchange of prices among the defendants had an unreasonable anticompetitive effect, regardless of the defendants' knowledge of or desire for **[**51]** that effect. The district court had instructed:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Id. at 430, 98 S. Ct. at 2869. ***HN10***[] The Supreme Court held that the Sherman Act did not create a strict-liability crime, and that the prosecution was required to prove either (1) that defendants knew of the probable anticompetitive effects of their actions, which effects actually occurred, or (2) that defendants acted with the conscious purpose of producing anticompetitive effects, whether or not those effects actually occurred. *Id. at 444* & n.21, *98 S. Ct. 2864*.

Appellants allege that Gypsum 's standards apply to this case and that the district court erred in failing to instruct the jury in those terms. Moreover, appellants contend that the government's alleged failure to introduce any evidence of actual anticompetitive effects entitles them to judgments of acquittal under Gypsum 's standards. In considering these claims we first **[**52]** must determine what level of intent must be proven where the defendants are charged with price fixing; we then must evaluate the district court's instructions and the government's evidence against that standard.

In *United States v. Gillen, 599 F.2d 541 (3d Cir. 1979)*, this court held that Gypsum did not alter the "long-established rule of law on price-fixing cases" that proof of the requisite mens rea is satisfied by proof that the defendant formed or joined a conspiracy to fix prices. *Id., at 545*. We noted that in Gypsum the conduct described in the challenged instruction, exchanging prices, was not a per se violation of the Sherman Act. Instead, it might have fallen within "the gray zone of socially acceptable and economically justifiable business conduct." *438 U.S. at 441,* 98 S. Ct. at 2875. Gillen, on the other hand, stood accused of price fixing, "an area of the law in which people either can or ought to be able to predict the legal consequences of their actions." United States v. Gillen, supra, at 544.

[*462] It is important to note, as did the Supreme Court in Gypsum, that conspiracy cases actually involve two types of intent, the intent to agree and the intent to **[**53]** effectuate the object of the agreement. See 438 U.S. at 443 n.20, 98 S. Ct. 2864. Clearly, it is not sufficient for the government to prove that the defendants agreed to do something; agreement itself is not illegal. Instead, the government must prove that the defendants agreed to effectuate an illegal purpose, E. g., to fix prices. This illustrates the crucial distinction between Gypsum And Gillen. An agreement to exchange prices, by itself, is not illegal; an agreement to fix prices is. [4]

[54]** This case, like Gillen, involves a conspiracy to fix prices. Nevertheless, appellants suggest two reasons why Gillen might be distinguishable. First, they argue that in Gillen the evidence of a conspiracy was overwhelming and that the only real issue was whether the defendant had joined that conspiracy. See United States v. Gillen, supra, at 546. In this case, they argue, the existence of a price-fixing conspiracy was fiercely contested below. But we fail to see what effect the amount of proof can have upon the standard of proof. Although the existence of a price-fixing conspiracy may have been indisputable in Gillen, the government was still required to meet its burden of proving that Gillen had knowingly agreed to fix prices. See id. at 545-46.

Alternatively, appellants note that Gillen was a nonjury trial and that the issue presented to this court was the sufficiency of the district court's findings of fact rather than the sufficiency of jury instructions. Again, we fail to see what effect this fact should have upon the rule announced in Gillen. Whether the ultimate fact-finder is a judge or a jury, the legal standards remain the same.

Because we believe that Gillen controls **[**55]** this case, the inquiry becomes whether the district court adequately instructed the jury that the government had to prove that defendants knowingly joined or formed a conspiracy to raise, fix, stabilize, or maintain prices. Accord, United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979). Our examination of the district court's instructions convinces us that they do satisfy this requirement. A few examples from the charge will illustrate this conformity:

> (T)his indictment charges that . . . the defendants and other co-conspirators engaged in a single combination and conspiracy in unreasonable restraint of trade and commerce . . . and that this combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants . . . the substantial terms of which are to raise, to fix, maintain and stabilize prices and terms, conditions of sale of consumer bags.
>
> To create (a conspiracy) two or more persons must enter into a mutual agreement or understanding that they will act together for an unlawful purpose or to accomplish a lawful purpose by an illegal means. In the absence of an agreement or **[**56]** mutual understanding or meeting of the minds there can be no conspiracy.
> What must be proved beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that two or more persons including one or more of the defendants on trial now knowingly became members of the conspiracy charged in the indictment.
>
> **[*463]** (Before) you may find that the defendants became a member of the conspiracy charged the evidence must show beyond a reasonable doubt, first, that the conspiracy was knowingly formed; secondly, that the defendants knowingly participated in a conspiracy with the intent to further or advance some objective or purpose of the conspiracy. This latter requirement is satisfied if the evidence consisting of that defendant's own statements and conduct shows beyond a reasonable doubt a knowing assistance of any kind in effectuating the objective of the conspiracy.

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4. Appellants argue that the distinction drawn in Gillen is erroneous because the defendants in Gypsum also were accused of conspiring to fix prices. See 438 U.S. at 427, 98 S. Ct. 2864. This argument fails to recognize the narrow focus of the Supreme Court's opinion in Gypsum. The district court's instructions in that case allowed the jury to convict the defendants if the jury concluded that there was an agreement to exchange price information and that such exchanges had the effect of stabilizing prices. This instruction rendered the indictment and the government's theory of the case irrelevant.

> It is not necessary for the prosecution to prove knowledge by a defendant that a particular statute or act or provision of law was an object of this conspiracy. If you find as jurors in this case beyond a reasonable doubt that the conspiracy charged was formed in the manner **[**57]** that I have mentioned on the basis of the evidence, if you find it was knowingly formed for the purposes outlined in the indictment, and that a defendant or any defendant thereafter knowingly by his own statements or conduct became a member of the conspiracy, then it would be as I have outlined in summary up to this point your duty to consider that defendant guilty of the crime charged.
>
> On the other hand, if you find either that the conspiracy was not knowingly formed or even though formed that a defendant by his own or its own statements or conduct became a member, if you should fail to find either of those, then you should return a verdict of not guilty.

Reading the charge as a whole, we believe that the district court adequately instructed the jury that it had to acquit a particular defendant unless it found that he knowingly formed or joined a conspiracy to raise, fix, maintain, or stabilize the prices of consumer bags.

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Despite the general import of the charge, appellants argue that one instruction in particular allowed the jury to convict them without any finding of intent whatsoever. At one point the district court charged:

> Now in order to establish **[**58]** the offense charged in this indictment the proof need not show that the accused acted willfully or with specific intent or bad purpose either to disobey or disregard the law. The element of intent (in) the offense charged (is) established if the evidence in the case shows beyond a reasonable doubt that the act or acts of the accused were voluntarily and intentionally; that is, that they were knowingly done.
>
> The purpose of that word "knowingly" is to insure that no one will be convicted for an act done because of mistake or inadvertence or accident or other innocent reason.
>
> If these acts knowingly done resulted in an agreement of the type forbidden by the Sherman Act, the law presumes that the person so acting intended that result as being the necessary and natural consequence of those acts.

Appellants focus on the highlighted language, comparing it to the presumptions of intent condemned in Gypsum and in *Sandstrom v. State of Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)*.

As noted earlier, in Gypsum the district court instructed the jury to presume, as a matter of law, that the defendants intended to act anticompetitively if that result was **[**59]** the "necessary and natural" consequence of exchanging prices. In Sandstrom, the defendant was convicted of "deliberate homicide," defined in the relevant statute as homicide committed "purposely or knowingly." The defendant had admitted to killing the victim, but contended that a personality disorder prevented him from killing her purposely or knowingly. The Supreme Court rejected, as a violation of the defendant's right to have all elements of the charge against him proven beyond a reasonable doubt, a charge that "(t)he law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom v. State of Montana, supra, 99* ***[*464]*** *S. Ct. at 2453*. See also *United States v. Garrett, 574 F.2d 778 (3d Cir. 1978)*.

In examining the instruction challenged in this case, we again note that we are dealing with charges of a conspiracy to fix prices, a per se violation of the Sherman Act. Had the highlighted portion of the instruction been delivered in another context, it might have run afoul of Gypsum or Sandstrom. The problem would stem from the meaning of the term "these acts knowingly done." If that term referred, for example, to an agreement to exchange prices, **[**60]** then the district court would have erred in charging the jury that it could presume criminal intent if a violation of the Sherman Act was the "necessary and natural consequence" of that agreement.

Here, however, "these acts knowingly done" refers to an agreement to fix prices. As the district court instructed almost immediately after the challenged instruction,

> (a) conspiracy to fix prices, maintain prices, is unlawful even though the conspiracy may be formed or engaged in for what appeared to be the conspirators' worthy motives and agreement among the competitors, the purpose of effecting price is illegal no matter what the motive of the conspirators were (sic). It does not matter whether their motives were good or bad or whether there were a mixture of good and bad. Therefore, you should consider only whether or not the defendants conspired or agreed to fix prices. You must disregard any questions on the reasonableness of their actions, their economic impact or good motives, as these are entirely irrelevant and immaterial to that issue.

In order to trigger the "presumption" challenged by appellants, the government had to prove that any particular defendant knowingly **[**61]** conspired to fix prices. Read in this context, the challenged instruction means nothing more than that a defendant is presumed to have intended to violate the Sherman Act if he joins in such a conspiracy. Perhaps a more artful, and more traditional, statement of this proposition would have been "ignorance of the law is no defense." But, unlike the charge condemned in Sandstrom, the challenged instruction does not relieve the government of the burden of proving any element of the crime charged. Thus, we do not believe that the district court erred in delivering such a charge in this context.

Appellants suggest that the highlighted portion of the challenged charge is susceptible of another interpretation, an interpretation that moves our inquiry outside the realm of Gypsum. Appellants' argument appears to be that the words "that result" refer only to "agreement," and that the highlighted instruction allows the jury to conclude that a defendant agreed to fix prices merely because his actions, viewed objectively, were consistent with the existence of such an agreement. There is a "significant difference," according to appellants, between " "knowingly (becoming) a member of a price **[**62]** fixing conspiracy' and "knowingly (doing acts which are held or construed to have) Resulted in an agreement.' " Appellants' Joint Reply Brief at 7 (emphasis and brackets in original).

An example may clarify their apparent argument: several persons are involved in a price-fixing conspiracy whereby they meet regularly and discuss prices; if one member proposes a price increase and the others do not speak against it, they are understood by the others to have agreed to go along; a new entrant into the industry attends a meeting and innocently says nothing when a price increase is proposed; later, the new entrant adopts the price increase put into effect by the conspirators. According to the appellants' reading of the instruction, the innocent entrant could be convicted of conspiring to fix prices merely because he "knowingly" performed acts which are "construed to have resulted in an agreement."

In support of this rather strained reading, appellants cite two other portions of the charge. First, they note that the district court, at one point, defined "conspiracy" as "a setting whereby two or more persons act **[*465]** or behave in a way That causes them to be said to have agreed **[**63]** that something should occur." (emphasis added). Second, they assert that the district court erroneously defined "knowing" action as action taken "voluntarily and intentionally" and not taken "because of mistake or inadvertence or accident." This definition, they assert, failed to require any criminal intent whatsoever.

In confronting these arguments, we note initially that appellants raise an issue quite different from that treated in Gypsum. Although both the instruction challenged in Gypsum and the instruction challenged here use the formula ("the law presumes that (a person intends) the necessary and natural consequences of (his) acts," under appellants' reading the challenged instruction focuses on an aspect of mens rea not considered in Gypsum. As already noted, Gypsum dealt only with the question of intent to produce anticompetitive effects, and not the more basic intent to agree. See *438 U.S. at 444 n.21, 98 S. Ct. 2864*. Appellants' reading of the district court's instruction goes to this more basic issue: whether a particular defendant ever entered into any agreement at all.

We do not believe that "a reasonable juror could have interpreted the instruction" as appellants **[**64]** suggest. See *Sandstrom v. State of Montana, supra, 99 S. Ct. 2450*. First, we note that the district court's definition of the term "knowingly" was quite proper. See 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 14.04 (1977) and cases cited therein. Appellants would have preferred a definition of "knowingly" that included a requirement of criminal purpose, but we already have rejected the notion that conviction for conspiring to fix prices requires a showing of "specific intent."

Moreover, the charge, read as a whole, precludes the possibility that any defendant could have been convicted absent a finding that he actually entered into an illegal agreement. The district court instructed, for example:

> The type (of) relationship contemplated by law as a conspiracy is an offense . . . in which each member becomes the agent of every other member. To create such a relationship two or more persons must enter into a mutual agreement or understanding that they will act together for an unlawful purpose or to accomplish a lawful purpose by an illegal means. In the absence of an agreement or mutual understanding or meeting of the minds there can be no conspiracy. **[**65]** It is the agreement to act together for an unlawful objective that constitutes the gist of this crime.
> Participation in the illegal scheme is as (much) a violation of the Sherman Act as a creation and promotion of one. However, it is the Government's burden to show such participation is a matter of choice beyond a reasonable doubt. It is not enough to show only that the parties acted uniformly or similarly or in ways that may seem to be mutually beneficial. If such actions were taken independently, solely as a matter of individual business judgment without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate (and) independent actions are substantially concurrent and intended towards the accomplishment of similar objectives separately pursued by them.
>
> Now mere presence at meetings, mere presence of defendants with other defendants in and of itself is not evidence of a conspiracy. As I mentioned before, a person, in order to be named to be a member of a conspiracy, must be a knowing participant and presence without more is not sufficient participation for a person to be said to be a knowing **[**66]** participating conspirator.
>
> Now, silence is not agreement without a specific understanding among the alleged co-conspirators that silence will **[*466]** constitute agreement or by clear evidence that the party whose silence is being considered has intended that his silence be deemed as agreement or acquiescence by him. Even if one of the co-conspirators believed at any time that he was agreeing by remaining silent, that person's understanding is not binding on anyone else. He can remain silent.
> The mere presence of a defendant on an occasion when a price-fixing agreement was reached by others is not sufficient to prove that such defendant joined in the conspiracy because he may have been silent.
> . . . (T)he point is silence under some narrow circumstances can be deemed to be agreement. But silence in itself can never be agreement. So before a party can be said to have agreed to something because he was silent, you must find other evidence that that party intended that his silence would be the equivalent of agreement.
>
> You may look to events that happened after the episode to determine whether or not during that particular episode he intended **[**67]** his silence to be agreement. But silence should not be lightly considered as agreement. But under the proper evidentiary support it can be.

In sum, we believe that the district court's instructions on the issue of intent were free of reversible error. Furthermore, because we have concluded that the government was not required to prove the existence of any anticompetitive effect beyond the existence of the price-fixing conspiracy itself, See *United States v. Gillen, supra*, we reject the appellants' contention that they are entitled to judgments of acquittal.

B

Appellants also allege that the district court's charge on the issue of withdrawal was inadequate. The district court instructed the jury:

> Regarding possible withdrawal of a defendant from the conspiracy you are instructed that once it is shown to your satisfaction that a defendant knowingly joined a conspiracy he or it is presumed in law to remain a member of the conspiracy until it affirmatively appears from the evidence that the defendant in good faith

> disavowed and completely withdrew from any participation in the conspiracy. If you are convinced that a price fixing conspiracy as alleged by the Government did **[**68]** exist and that a particular defendant was a party to such conspiracy, that defendant cannot be found guilty of the offense charged if he or it effectively withdrew from the conspiracy before December 21, 1974. You may find that one or more defendants withdrew from the alleged price fixing conspiracy. The law provides that one who may have in passing been a member, been a party to a conspiracy, is not guilty if he has withdrawn from it prior to the time period covered by the charges against him.
>
> An individual or corporation may withdraw or abandon a conspiracy by renunciation or by engaging in conduct which is inconsistent with the idea of continued participation in the alleged scheme. Mere cessation of activity in furtherance of the conspiracy is not sufficient to establish withdrawal. For a defendant to be deemed to have withdrawn there must be evidence showing withdrawal by some affirmative action. Such action must consist of a definite and decisive step of some kind which shows complete disassociation. For example, to disavow or defeat the purpose of a conspiracy or some other conduct wholly inconsistent with continued adherence to the conspiratorial objects would **[**69]** be the type of decisive act that a party could look to as being the basis for withdrawal.
>
> A defendant may also withdraw from a price fixing conspiracy by notifying his alleged co-conspirators of his intent to withdraw. Such notification can consist of any communication or conduct reasonably calculated to reach the other alleged co-conspirators and proof of such communication does not require evidence that the defendant directly informed each alleged **[*467]** co-conspirator of his or its intention to withdraw.

Appellants do not contend that this charge misstates the applicable law in any way. Instead, they assert that it was deficient in failing to put before the jury appellants' contention that resumption of competitive activity before December 21, 1974, would constitute withdrawal from the alleged conspiracy. In particular, appellants asked the district court to add to its instruction on withdrawal the following specification:

> In this case, for instance, competitive activity is inconsistent with the idea of cooperation in the fixing of prices. If a defendant, who at first apparently cooperated with his or its competitors in the fixing of prices, resumed competitive **[**70]** activity by December 21, 1974, then he or it has effectively withdrawn from the conspiracy charged.

As the government points out, however, the appellants' proffered charge is misleading. ***HN11***[] The existence of some competitive activity among alleged coconspirators is not sufficient to negate the existence of an illegal conspiracy. See, e. g., *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; *In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127, 1136-37 (5th Cir. 1976)*; *Plymouth Dealers' Association v. United States, 279 F.2d 128, 132 (9th Cir. 1960)*. By contrast, in *United States v. United States Gypsum Co., 550 F.2d 115, 130 n.15 (3d Cir. 1977)*, *Aff'd, 434 U.S. 422, 98 S. Ct. 52, 54 L. Ed. 2d 71 (1978)*, the defendants requested an instruction that resumption of competitive behavior "could" constitute an effective withdrawal. Because the instruction requested in this case was imprecise, the district court was entitled to reject it. See, e. g., *United States v. American Radiator & Standard Sanitary Corp., supra, at 199*.

Nevertheless, appellants argue that the district court's instruction that "(mere) cessation of **[**71]** activity in furtherance of the conspiracy is not sufficient to establish withdrawal" prevented the jury from considering resumption of competitive activity at all. We do not agree. The district court's statement of the law in this regard is quite correct. See *United States v. Heckman, 479 F.2d 726, 729 (3d Cir. 1973)* (quoting *United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964)*, Cert. denied, *379 U.S. 960, 85 S. Ct. 647, 13 L. Ed. 2d 555 (1965))*. Moreover, we believe that withdrawal through resumption of competitive activity constitutes something more than "mere cessation of activity in furtherance of the conspiracy."

Finally, appellants contend that the district court erroneously refused to instruct the jury that withdrawal could be demonstrated by circumstantial evidence. They argue that because the district court specifically charged the jury that a conspiracy could be inferred from circumstantial evidence, they were entitled to "the other side of the coin," that withdrawal also could be so inferred. We note, however, that the district court gave a lengthy instruction on the use of direct and circumstantial evidence in general, and explained that the two types of evidence **[**72]** "have equal rank." Furthermore, the jury was instructed to "consider the circumstantial evidence and the direct evidence and the evidence that may be mixed." Given this umbrella charge, we do not believe that the district court erred in declining to specify that withdrawal could be proven by circumstantial evidence.

To the extent that the district court declined to elaborate on appellants' contention that resumption of competitive activity constituted an effective renunciation of the alleged conspiracy, we note that ***HN12***[] "(o)nce the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *United States v. Bayer, 331 U.S. 532, 536, 67 S. Ct. 1394, 1396, 91 L. Ed. 1654 (1947)*. Under the circumstances of this case, we conclude that the district court neither misstated the applicable law nor abused its discretion.

[*468] V

We have examined the appellants' other contentions [5.] and find them to be without merit. The judgments of the district court as to all defendants therefore will be affirmed.

[73]**

Concur by: HUNTER, III

Concur

JAMES HUNTER, III, Circuit Judge, concurring:

I agree with the result reached by the majority in parts I, II, III, and IV(B)-V. Moreover, since this panel is bound by the decision of a prior panel in *United States v. Gillen, 599 F.2d 541 (3d Cir. 1979)*, I concur in part IV(A) of the majority's opinion. I feel compelled, however, to note my belief that the rule of law announced in Gillen, and followed by the majority here, is inconsistent with the Supreme Court's holding in *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*. Were it not for Gillen, I would vote to reverse the judgments of conviction entered against each defendant, and remand for a new trial.

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5. These include (A) appellants' joint contention that the district court erred in refusing to direct the government to immunize *William S. Doolan, United States v. Herman, 589 F.2d 1191 (3d Cir. 1978)*; (B) Continental's contentions that the district court abused its discretion in denying Continental's motion for a new trial under *Fed.R.Crim.P. 33*, that the district court erred in charging the jury on the government's burden of proving Continental's participation in the conspiracy during the felony period, that the district court erroneously admitted evidence of activities antedating the crime charged, that the district court erred in admitting the testimony and exhibits of Julius Tolton, that the district court erred in refusing to admit defense exhibit AE-204, that the district court erroneously admitted vague and imprecise accusatory testimony by government witnesses; (C) Chase Bag's contentions that the district court erred in refusing to explain Chase Bag's defense contentions to the jury, that the district court erroneously charged the jury with a sterile recitation of black letter law, that the district court erred in its charge on corporate culpability, that the district court erred in its charge on apparent authority for a corporate agent, that the district court failed to give a proper instruction on price leadership/followership, that the district court erred in denying Chase Bag's motions for severance and for a bill of particulars, that the district court erroneously limited cross-examination by Chase Bag's counsel, that the district court erred in admitting Stanley Schottland's testimony concerning his understanding of the meaning of silence at allegedly conspiratorial meetings, that the district court erred in refusing to allow Chase Bag's counsel to give the jury selected exhibits collected in "jury books," that the district court improperly restricted counsel's time for closing argument, that the district court erred in its procedure for selecting the jury; (D) Cooper's contentions that the prosecutor engaged in improper summation and rebuttal, that the district court erred in admitting the testimony of Robert Pentz, that the district court erred in denying Cooper's motion for severance, that the trial court's general management of the proceedings deprived Cooper of a fair trial; (E) Rue's contentions that the district court erred in refusing to charge the jury in a way that ensured separate consideration of the charges against Rue, and that the district court erred in refusing to take corrective action as to alleged misstatements of fact made by the prosecution.

In view of Judge Adams' well reasoned concurring opinion in Gillen, a detailed critique of that case is unnecessary. Suffice it to say that Gypsum, as I read it, created the rule that "intent is a necessary element of a Criminal antitrust violation," *438 U.S. at 443, 98 S. Ct. at 2876*, and held that the intent element can be satisfied only by proof that a defendant specifically intended to produce anticompetitive effects, or by proof that he knew anticompetitive **[**74]** effects would probably result from his conduct, coupled with evidence that such effects actually took place. Regrettably, the majority in Gillen chose to disregard the mandate of Gypsum, holding that intent as defined by Gypsum is not an element of all criminal antitrust violations, but rather only of those violations governed by the rule of reason. With regard to per se offenses, the majority held that "no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy." *599 F.2d at 545*.

Because this panel is governed by the holding in Gillen, I reluctantly agree with Judge Seitz and Judge Garth that the district court's charge which instructed the jury that to find the defendants guilty of conspiracy, it must conclude that the conspiracy "was knowingly formed" and "knowingly participated in" was not reversible error. Were this panel free, however, **[*469]** to judge the adequacy of the jury instructions under Gypsum rather than Gillen, a reversal would, in my judgment, be required. Since there was insufficient evidence introduced to enable the jury to find that the alleged conspiracy actually had anti-competitive effects, the government **[**75]** was obligated, under Gypsum, to prove that defendants possessed a specific intent to produce such an effect. The court's charge, however, plainly failed to bring this element of the offense to the jury's attention.

Sherman v. British Leyland Motors, Ltd.

United States Court of Appeals for the Ninth Circuit

July 24, 1979

Nos. 76-3172, 76-3582

Reporter

601 F.2d 429 *; 1979 U.S. App. LEXIS 12944 **; 1979-2 Trade Cas. (CCH) P62,784

GARY H. SHERMAN and VINCENT IMPORTS, INC., doing business as EUROPEAN MOTORS, Plaintiffs and Appellants, vs. BRITISH LEYLAND MOTORS, LTD., LEYLAND MOTOR SALES, INC., BRITISH LEYLAND MOTORS, INC., BRITISH MOTOR CAR DISTRIBUTORS, LTD., and PETER SATORI COMPANY, LTD., Defendants and Appellees.

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

Core Terms

franchise, dealer, distributor, Rationalization, manufacturer, renew, summary judgment, Dealers' Act, termination, conspiracy, district court, appoint, dealership, anti trust law, good faith, circumstances, nonrenewal, subsidiary, products, markets, rights, plaintiffs', geographic, territory, relevant market, state claims, Sherman Act, accessories, competitors, horizontal

LexisNexis® Headnotes

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

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

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

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

When all of the plaintiffs' claims are resolved against them by summary judgment, the burden is upon the defendants to show the absence of any genuine issue of material fact which would preclude a finding by reasonable jurors for the nonmoving party; and, in determining whether the burden of proof was met in a motion for summary judgment, the court must draw all reasonable inferences of fact in favor of the nonmoving party.

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

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

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

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

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

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

HN2[] **Summary Judgment, Opposing Materials**

If the nonmoving party has raised a genuine issue of material fact, and the evidentiary matter in support of the motion does not establish the absence of such issue, summary judgment must be denied even though no opposing evidentiary matter is presented. Substantial evidence to raise a triable issue is more than a mere scintilla, but the moving party has the burden of clearly demonstrating the absence of any genuine issue as to the existence of each material fact which under applicable principles of substantive law would be required to support a judgment in its favor.

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

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

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

HN3[] **Franchise Relationships, Franchise Agreements**

The requisites of a sufficient claim under the Automobile Dealers' Day in Court Act, *15 U.S.C.S. § 1222* are: (1) the plaintiff must be an "automobile dealer;" (2) defendant must be an "automobile manufacturer" engaged in commerce; (3) there must have existed a manufacturer-dealer relationship created by written franchise agreement; and (4) plaintiff must have been injured by the defendant's failure to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer.

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

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

HN4[] **Franchise Relationships, Elements**

Under the Automobile Dealers' Day in Court Act, *15 U.S.C.S. §§ 1221-1225*, a manufacturer may be liable notwithstanding it is not a party to the franchise if the party contracting with the dealer is the manufacturer's agent or merely a "straw man" erected to insulate it from statutory liability.

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

Business & Corporate Law > Distributorships & Franchises > General Overview

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

HN5[] **Franchise Relationships, Elements**

The term "franchise" is defined in *15 U.S.C.S. § 1221(b)* as the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. It is clear that without a written franchise there can be no claim or cause of action under the Automobile Dealers' Day in Court Act.

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

HN6[] **Fiduciary Duties, Good Faith & Fair Dealing**

The failure to exercise good faith within the meaning of *15 U.S.C.S. § 1221(e)* has a limited and restricted meaning. It is not to be construed liberally. It does not mean "good faith" in a hazy or general way, nor does it mean unfairness. The existence or non-existence of "good faith" must be determined in the context of actual or threatened coercion or intimidation. In order to lack good faith the manufacturer's actions must be unfair and inequitable in addition to being for the purpose of coercion and intimidation.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN7[] **Antitrust & Trade Law, Sherman Act**

In determining whether a restraint is unreasonable under the Sherman Act, *15 U.S.C.S. § 1*, the primary considerations are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects. Under this rule, the factfinder weighs all of the circumstances of the 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 > Vertical Restraints > General Overview

HN8[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In cases involving the defense of primary responsibility clauses in vertical situations, even if genuine agreements calling for areas of primary responsibility may be valid, where a primary area of responsibility is used to mask the application of an illegal territorial restriction, illegality will nevertheless be found.

Antitrust & Trade Law > Clayton Act > General Overview

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

See *15 U.S.C.S. § 14*.

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

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

Under *15 U.S.C.S. § 2*, it is required that the monopolist must have engaged in "willful" acts directed at establishing or retaining its monopoly as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. But plaintiff need not show that such acts were of a kind that would be unlawful for an ordinary enterprise.

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

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

For purposes of *15 U.S.C.S. § 2*, direct evidence of specific intent to control prices or destroy competition is not indispensable when the claim is founded upon a substantial claim of restraint of trade i. e., a *15 U.S.C.S. § 1* violation. In these circumstances the requisite specific intent may be inferred. Market power is relevant to determining whether such an inference is proper; but where a *§ 1* violation "clearly exists," proof of market power is unnecessary to support an inference of specific intent.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

In attempted monopolization, as with monopolization itself, individual conduct may be measured against the same "reasonableness" standard governing concerted and contractual activity under *15 U.S.C.S. § 1*. The requirement that there be a demonstration that a defendant's specific intent to control prices or destroy competition has a dangerous probability of success may be satisfied either by direct proof of market power, or by inference from proven specific intent.

Counsel: David C. Phillips, Tuckman, Goldstein & Phillips, San Francisco, Cal., John R. Schoemer, Jr., Townley, Updike, Carter & Ridgers, New York City, for British Leyland.

Robert L. Gorman, Jeffrey J. Parish, Skornia & Rosenblum, San Francisco, Cal., for Sherman.

Judges: Before BROWNING and CHOY, Circuit Judges, and CHRISTENSEN, [*] District Judge.

Opinion by: CHRISTENSEN

Opinion

[*433] This is an action for alleged violations of the federal Automobile Dealers' Day in **[*434]** Court Act, [1] and the antitrust laws, [2] and on pendent state claims. [3] The district court granted summary judgment in favor of the

[*] The Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

[1] Also known as the Automobile Franchise Act, *15 U.S.C. §§ 1221-1225 (1976)*. For convenience this Act usually will be referred to hereinafter as the "Dealers' Act".

[2] *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2 (1976)*; § 3 of the Clayton Act, *15 U.S.C. § 14 (1976)*.

defendants on all claims. Presented by plaintiffs' appeal is the broad issue typical for such rulings of whether the pleadings, affidavits and depositions before the district court established as a matter of law that plaintiffs' claims did not justify trial on the merits. [4] The answer, of course, depends upon resolution of ancillary issues. Defendants' cross-appeal **[**2]** involves deposition costs which were disallowed by the trial court.

An alphabetized list and description of the parties in the margin [5] may prove useful, since relationships and distinctions among them will be important from the outset.

[3]** FACTS OF RECORD

Among facts which affidavits, depositions and admissions before the district court tended to establish were:

[*435] In 1968 British Leyland took over through merger the business of the principal British automobile makers (excluding General Motors, Ford and Chrysler): British Motor Corporation, manufacturer of Austin, MG and Jaguar automobiles, and Leyland Motor Corporation, maker of Triumph, Rover and Land Rover. British Leyland thereupon became the parent of three separate United States marketing organizations: British Motor Holdings (U.S.A.), Inc., which marketed MG; Leyland Motor Corporation of North America, the importer of Triumph (and at that time Rover);

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[3] Pendent state claims for breach of contract, interference with prospective business advantage and fraud.

[4] *Fed.R.Civ.P. 56*.

[5] BRITISH LEYLAND MOTOR CORPORATION, LTD. (hereinafter referred to as British Leyland) a defendant-appellee, in 1968 became the top company of the British Leyland group as the result of the merger of British Motor Corporation, manufacturer of Austin, MG and Jaguar, and Leyland Motor Corporation, manufacturer of Triumph, Rover and Land Rover. As a result of this merger, British Leyland became the parent of three separate U.S. marketing organizations: British Motor Holdings (U.S.A.), Inc., which marketed MG; Leyland Motor Corporation of North America, the importer of Triumph (and Rover at that time), and Jaguar Cars, Inc., importer of Jaguar. These three U.S. companies were consolidated into British Leyland Motors, Inc. (BLM), on October 1, 1968, which continued to operate through three divisions up to 1972: Jaguar, Triumph-Rover and Austin-MG.

BRITISH LEYLAND MOTORS, INC. (BLM), a Delaware corporation, a defendant-appellee, is the wholly-owned subsidiary of British Leyland, being the October 1, 1968, consolidation of the three U.S. companies as mentioned above. BLM as the United States importer resells British Leyland products to its wholly-owned subsidiary, Leyland Motor Sales, Inc. (LMS), or to independent distributors such as British Motor Car Distributors, Ltd. (BMCD).

BRITISH MOTOR CAR DISTRIBUTORS, LTD. (BMCD), another defendant-appellee, is a wholly-owned subsidiary of Jensen International Motors Corp. and its ownership is independent of the other defendants-appellees. BMCD is a distributor of passenger cars, parts and accessories manufactured by British Leyland and imported by BLM.

LEYLAND MOTOR SALES, INC. (LMS), another defendant-appellee, is a wholly-owned subsidiary of defendant-appellee BLM. LMS is a distributor of passenger cars, parts and accessories manufactured by British Leyland and imported by BLM. Plaintiff-appellant Vincent's franchise agreement involved here was signed with LMS for an additional one-year period expiring December 2, 1973.

Peter SATORI Company, Inc. (Satori), a defendant-appellee, was a long-established retailer of imported cars in Pasadena, California, where Vincent did business. Satori bought Jaguars from one independent distributor in Los Angeles, and MG and Austins from another distributor in Compton, California. It was appointed a full-line British Leyland dealer in Pasadena when Vincent lost its Triumph franchise in the same city in 1972 in connection with BLM's consolidation of its wholesale distribution system pursuant to a "Rationalization Program".

Gary H. SHERMAN, plaintiff-appellant, was the president and sole shareholder of the other plaintiff-appellant, Vincent Imports, Inc., dba European Motors, which conducted business as a retail automobile dealership in Pasadena, California, from December 1, 1971, until March 15, 1974.

VINCENT IMPORTS, INC. (Vincent), dba European Motors, one of the plaintiffs-appellants, conducted business as a retail automobile dealer in Pasadena, California, from December 1, 1971, until March 15, 1974. Sherman became the president and sole shareholder of Vincent on December 1, 1971, and continued as such during all relevant times. Vincent previously had been a Triumph dealer, and under Sherman was given a one-year Triumph franchise by LMS. The franchise was renewed by LMS on December 2, 1972, for an additional one-year period.

and Jaguar Cars, Inc., importer of Jaguar. These three United States companies were consolidated into British Leyland Motors, Inc. (BLM), on October 1, 1968. BLM continued to operate through three separate divisions handling Jaguar and Triumph, Rover and Austin, and MG, respectively, until 1972, when BLM began actively to implement a program of consolidation of its wholesale distribution system by means of a "Rationalization Program". [6] Under that plan the wholesale distribution of all British Leyland **[**4]** automobiles in the United States was to be handled by a single organization for each territory either Leyland Motor Sales, Inc. (LMS), or some independent distributor.

Prior to the consummation of the program LMS, as the wholly-owned subsidiary of BLM, distributed Triumph automobiles, parts and accessories throughout California. Effective October 1, 1973, LMS' distribution rights for Triumph, together with Rover and Land Rover automobiles, were terminated and it no longer did business in southern California. British Motor Car Distributors, Ltd. (BMCD), another defendant-appellee, became the sole distributor of Triumph, along with MG and Jaguar, in a territory centered in southern California. LMS in exchange for its Triumph, Rover and Land Rover distribution rights in southern **[**5]** California became the exclusive distributor for all Leyland automobiles in northern California. This, of course, resulted in BMCD's becoming the Triumph distributor in the Pasadena area where Vincent's business was situated.

Vincent had been first franchised to sell the Triumph line on March 15, 1971, at a time when the plaintiff corporation was owned by one Vincent Santangelo. All corporate stock was transferred to Sherman on December 1, 1971. The latter applied to LMS for appointment as a Triumph dealer and received a one-year franchise which expired December 1, 1972. That franchise was renewed by LMS for a second year to expire on December 1, 1973. The franchise was in the form of a "Distributor-Dealer Agreement" which appointed Vincent "as an authorized dealer for new Triumph vehicles, replacement parts, equipment and accessories as offered for sale by the distributor." The agreement read in part:

> 16. Termination. (a) This Agreement shall be deemed canceled, without further action by the Distributor, in the event of the termination or cancellation of the Distributor's Distribution Agreement with British Leyland Motors Inc. or upon the withdrawal for any reason of the right **[**6]** of the Distributor to purchase the Vehicles and to resell the same within the area in which the Dealer is located. The Dealer acknowledges that all of his rights under this Agreement are subordinated to, and conditional upon the continuance of, the ability of the Distributor to supply the Dealer with the Products.
> (b) Either party may in its full discretion and with or without any cause cancel this Agreement upon not less than 30 days' written notice to the other.
> (c) The Distributor may at its option terminate this agreement for cause forthwith by giving the Dealer written notice of such termination. It is agreed that any of the following will give the Distributor cause to terminate this Agreement:
>
> **[*436]** (1) The death, incapacity, removal, resignation or withdrawal from active participation with the Dealer for any reason of any of the persons listed in the Schedule as principals of dealership (Sherman was listed in that schedule as president and his wife Helga Sherman as vice-president of Vincent).
>
> (2) Any sale, transfer, or change by operation of law or otherwise of any substantial interest in the direct or indirect management or ownership **[**7]** of the Dealer, except in the case where the persons referred to in (1) above remain in the active management and substantial ownership of the Dealer. . . .
> 24. Manufacturer and/or Importer Not a Party. Neither British Motor Corporation, Ltd., . . . nor affiliated companies of British Leyland Motor Corporation, Ltd., is a party to this Agreement, and none of them shall be deemed to have assumed any liability or obligation to the Dealer hereunder.

A "Distribution Agreement" dated October 1, 1973, between BLM and BMCD in implementation of the Rationalization Program provided in part that BMCD would become the sole distributor in southern California of not

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[6] Gary W. Whitehead, president of both BLM and LMS, conceived the Rationalization Program, perhaps as early as 1968. He, together with Michael H. Dale, a vice-president of BLM and also LMS, participated in the implementation of the program.

only the Austin and MG, but also of the Triumph, Rover, Land Rover and Jaguar lines, and that LMS would become the sole distributor of all of those automobiles in northern California. Paragraph 7 of that agreement read in part:

> Dealer Organization. (a) It is acknowledged that neither party is the successor-in-interest of the other in the territory to be taken over. Neither party shall be deemed to assume any liability under any dealer agreement of the other, or upon any representation made by the outgoing distributor **[**8]** to any of its dealers which exceeds in scope or otherwise differs from the written dealership agreement. . . .
> (b) Without the prior consent of the other party, neither BLM (nor LMS) nor the Distributor (BMCD) will renew or extend any dealer agreement now in force, nor will it appoint any new dealer or make any representations to any dealer as to its future status after transfer of distribution has been effected.

In an addendum "United States Distributor's Agreement" contemporaneously executed [7] it was stipulated that the distributor would have the sole right to appoint dealers authorized to sell the vehicles at retail ("Authorized Dealers") from places of business located within its area. There was another provision stating: "Nothing contained in this agreement shall limit or restrict the geographic territory within which, or the persons from whom, the Distributor or its Authorized Dealers may sell the Vehicles, parts and accessories."

[9]** By October 30, 1973, BMCD had taken over LMS' position as distributor of Triumph in the southern California area pursuant to these distribution agreements. On that date, BMCD sent a letter to Vincent and other Triumph dealers informing them that BMCD had been reviewing dealer candidates with the view to establishing a strong dealer network "for the sale of all Triumph's (sic) as well as the other British Leyland lines of cars in the Southern California territory." The recipients were advised that "we have not yet completed the screening process, and will not be able in all cases to announce final dealer appointments for several more weeks." The letter added:

> In the interim, as an accommodation in these circumstances, we would be happy to process all orders for vehicles and for parts and accessories, to the extent of the available supply, on the same basis as we intend to follow once the dealership appointments have been made. The terms which we will honor are set out in the **[*437]** form of dealership agreement which is enclosed along with this letter, for your review. Unless informed by you that these terms are not acceptable, we shall accept your orders during the interim **[**10]** period on this basis.
> Please understand that the enclosed form of agreement is not intended to establish a new dealer arrangement with you, or to renew any agreement that has previously been outstanding. This accommodation is intended to apply only as transitional measure, effective for forty-five days from the date of this letter.
> We are proceeding as quickly as possible to review the candidacy of each potential dealer for the vehicles which we will be distributing and hope to be in a position to announce our appointments in the near future. Thank you for your continuing cooperation, and we look forward to being in touch with you shortly.

The recipient was asked to sign an acceptance on the bottom of the letter and return it to BMCD.

Sherman, believing that Vincent's relationship with BMCD as a successor to LMS would be governed by the still subsisting franchise agreement with LMS and that the requested acceptance might waive Vincent's rights thereunder, did not sign or return the letter. Vincent continued to receive from BMCD some Triumph automobiles. While it asserts that these did not represent a fair allocation, this contention is not affirmatively supported **[**11]** by the record. In any event, Sherman had the justified impression that Vincent would not be appointed dealer for Triumph automobiles unless it was willing to accept the full Leyland line. He was unwilling to agree to Vincent's full-line representation to the extent that this would involve models which in his judgment were not likely to be profitable and competitive.

Defendant-appellee Satori, on the other hand, was willing to accept, and was granted by franchise from BMCD, the full Leyland line, including Triumph, and Vincent's franchise was not renewed by BMCD.

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[7] The text of this agreement apparently was not made part of the record on appeal but appears in the brief of appellees at 90-97. It, however, is referred to on the record in the "Distribution Agreement" as "Exhibit A".

Vincent's performance as Triumph dealer under its franchise was appropriate and satisfactory. Had it not been for the Rationalization Program its Triumph franchise again would have been renewed. [8] The nonrenewal of that franchise resulted in the destruction of Vincent's business, which was closed March 15, 1974.

[12]** PROCEEDINGS IN DISTRICT COURT

Vincent and Sherman filed this action in the district court on May 5, 1976. The complaint stated, among other things, that commencing at a time unknown to plaintiffs and continuing to the termination of plaintiffs' franchise on or about December 10, 1973, the named defendants, and other persons unknown, engaged in a continuous covert agreement, combination and conspiracy in unreasonable restraint of interstate commerce and trade in the sale of Triumph automobiles, parts and accessories, in violation of *section 1* of the Sherman Act; and that they conspired to monopolize and engaged in monopolization of such trade and commerce in violation of *section 2* of the Sherman Act. It was further alleged that pursuant to such conspiracy, through termination of plaintiffs' franchise, defendants accomplished the elimination of Vincent as a franchised Triumph dealer and as a viable automobile business.

With particular reference to its Dealers' Act claim, it was alleged that the defendants coerced plaintiffs by threats of termination or nonrenewal of plaintiffs' Triumph franchise unless plaintiffs agreed to assign the franchise without consideration to the defendant **[**13]** Satori; and that defendants interfered with plaintiffs' business by arbitrarily and unfairly limiting the number of Triumph automobiles, parts and accessories allocated to them, resulting in loss of good **[*438]** will and profits. Other allegations were that the defendants violated the terms of the Dealers' Act and plaintiffs' franchise by conspiring with each other to eliminate plaintiffs as a franchise dealer for Triumph automobiles unless plaintiffs accepted another automobile line; that plaintiffs were unable to accept such unlawful demands and that as a consequence on or about December 10, 1973, defendants refused to renew the franchise.

As to the pendent state claims, there were allegations that among the implied terms and warranties of the franchise was the undertaking of the parties to act in good faith in the performance and renewal of the franchise and that the franchise would be renewed unless good cause existed for nonrenewal. On or about December 10, 1973, as a result of the conspiracy alleged elsewhere in the complaint, defendants, according to the complaint, breached the franchise by unilaterally, without cause, and in bad faith refusing to renew the franchise and **[**14]** refusing to sell to plaintiffs any new Triumph automobiles, parts and accessories. It was asserted also that defendants had represented that Vincent would remain a Triumph dealer as long as it performed its obligations under the franchise, and that such representations were fraudulently made with intent to induce plaintiff to execute and continue the franchise. Compensatory, trebled, and punitive damages, declaratory relief, attorneys' fees and costs were prayed for by plaintiffs on the various claims.

Following an extended period of discovery, all of the defendants moved for summary judgment on all claims. On April 12, 1976, the district court, without opinion, granted defendants' motion to dismiss Sherman on the antitrust and state claims for lack of standing to sue. Orders granting summary judgments in favor of the other defendants on the state claims and later on the federal claims followed, again without opinion. Summary judgment dismissing plaintiffs' action as to all claims and in favor of all defendants was formally entered by the clerk on July 21, 1976, in accordance with the district court's rulings. Plaintiffs were taxed costs of $ 1,792.06, but the court refused to assess **[**15]** against them defendants' costs for deposition copies and the travel and sustenance expense of their counsel in attending depositions outside the forum district. Plaintiffs timely appealed and defendants cross-appealed.

ISSUES

Presented on appeal are the following subsidiary issues on the basis of which we must determine whether the granting of summary judgment against the plaintiffs was justified:

> I. Did Sherman individually have standing to sue and could Satori or British Leyland be held liable in any event?

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[8] "It is perfectly true, as plaintiff says, that the Rationalization Program ultimately caused plaintiff to lose its Triumph franchise when it expired in December 1973." Leyland appellees' answering brief at 7.

II. Did genuine issues of material fact exist to preclude summary judgment on:
A. Plaintiff's Dealers' Act claim?

B. Plaintiff's claims under *section 1* of the Sherman Act or related claims regarding an illegal tying arrangement in violation of section 3 of the Clayton Act?

C. Plaintiff's claims under *section 2* of the Sherman Act?
D. Any of the pendent claims?
III. On defendant's cross-appeal, did the district court abuse its discretion in denying defendants the cost of transcript copies and the travel expense in question?

STANDARD FOR REVIEW

HN1[] Since all of the plaintiffs' claims were resolved against them by summary **[**16]** judgment, the burden was upon the defendants to show the absence of any genuine issue of material fact which would preclude a finding by reasonable jurors for the nonmoving party; and, in determining whether the burden was met, we must draw all reasonable inferences of fact in favor of the plaintiffs. *Marquis v. Chrysler Corp., 577 F.2d 624, 631 (9th Cir. 1978)*; *Calnetics **[*439]** Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 683* (9th Cir.), Cert. denied, *429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976)*; See also *Stansifer v. Chrysler Motors Corp., 487 F.2d 59, 63 (9th Cir. 1973)*.

Among recognized corollary rules is that ***HN2***[] if the nonmoving party has raised a genuine issue of material fact, and the evidentiary matter in support of the motion does not establish the absence of such issue, summary judgment must be denied even though no opposing evidentiary matter is presented. See *Adickes v. S. H. Kress & Co., 398 U.S. 144, 159-60, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)*; *Dalke v. Upjohn Co., 555 F.2d 245, 248 (9th Cir. 1977)*. Substantial evidence to raise a triable issue is more than a mere scintilla, *Marquis v. Chrysler Corp., 577 F.2d at 631*, but the moving party has the **[**17]** burden of clearly demonstrating the absence of any genuine issue as to the existence of each material fact which under applicable principles of substantive law would be required to support a judgment in its favor. *United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970)*.

While the basic structure for claims and defenses is quite clearly defined by the contract documents, the questions of motive, purpose and economic effects beyond matters of admission and uncontroverted contentions do not readily lend themselves to summary resolution. See Calnetics Corp. At 684. See also *United States v. Yellow Cab Co., 338 U.S. 338, 341, 70 S. Ct. 177, 94 L. Ed. 150 (1949)*.

I. SHERMAN'S LACK OF STANDING; DISTAL DEFENDANTS

There are, at best, enough complexities in this case to commend the elimination as early as possible of any parties and related issues patently without significance or substance. The plaintiff Sherman is one such party because of his lack of standing. The defendant Satori is another because of the rather obvious absence of merit in the claims against him, and the issues with reference to British Leyland also appear insubstantial.

No claim or showing has been made that Vincent **[**18]** during material times did not maintain its corporate existence separate and apart from Sherman, notwithstanding that the latter was president and sole stockholder of the corporation. The franchise in question was signed by Sherman for and on behalf of the corporation. No rights or responsibilities were reserved expressly in any of the written documents in favor of, or against, Sherman. It is true that the franchiser recognized the importance of Sherman's services and those of his wife to the corporation, [9] and it is also true that by reason of Sherman's guarantee of certain obligations of the corporation to third parties the corporation became indebted to him. [10] **[**20]** But we have concluded that these circumstances do not warrant

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[9] Paragraph 16(c)(1) of the franchise agreement provided, among other things, that the "death, incapacity, removal, resignation, or withdrawal from active participation with the dealer for any reason of any of the persons listed on the Schedule as principals of the Dealership" would give the distributor cause to terminate the agreement. The schedule listed "Gary Harold Sherman President" and "Helga Sherman Vice President". But the franchise in paragraph 16(g) provided also "that either party may in its full discretion and with or without any cause cancel this Agreement upon not less than thirty days notice to the other."

departure from the general rule of separation of identities, nor afford Sherman standing to bring suit in his individual capacity as a shareholder or creditor on any of the claims asserted in this action, whether under the **[*440]** Dealers' Act, [11] **[**21]** the antitrust laws [12] **[**22]** or the pendent state claims. [13] The basis for the summary judgment against Sherman with reference to his Dealers' Act and fraud claims does not clearly appear from the record, but since related **[**19]** questions are akin to that of jurisdiction, [14] we notice them at the threshold.

[23]** Absence of liability on the part of Satori also clearly appears notwithstanding any view that may be taken as to liability of the other parties. As mentioned before, Satori was the Pasadena dealer who received a franchise for

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[10] Sherman alleged by affidavit:

My salary income and fringe benefits of approximately $ 36,000 per year ended with the loss of the Triumph franchise and in addition I was required to repay loans on behalf of the corporation by reason of my personal guarantee. In early 1974, I repaid $ 70,000 to banks as such guarantees. Of this amount, some $ 11,000 has been repaid to me by the corporation, leaving a balance owing to me, by the corporation, of approximately $ 59,000 which the corporation is wholly unable to pay.

[11] *Vincel v. White Motor Corp., 521 F.2d 1113 (2d Cir. 1975)*; *Lewis v. Chrysler Motors Corp., 456 F.2d 605 (8th Cir. 1972)*; *Milburn v. Ford Motor Co., 437 F. Supp. 7 (E.D.Okl.1977)*; *Rodrigue v. Chrysler Corp., 421 F. Supp. 903 (E.D.La.1976)*; Cf. *Kavanaugh v. Ford Motor Co., 353 F.2d 710 (7th Cir. 1965)*; *Judice's Sunshine Pontiac, Inc. v. Gen. Motors Corp., 418 F. Supp. 1212 (D.N.J.1976)*; *Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D.Pa.1972)*, Vacated on other grounds, *497 F.2d 577* (3d Cir.), Cert. denied, *419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 106 (1974)*, On remand, *406 F. Supp. 271 (W.D.Pa.1975)*; and *Klebanow v. N. Y. Produce Exch., 344 F.2d 294 (2d Cir. 1965)*; (where seemingly contrary results were reached, but on distinguishable facts, involving corporate or partnership disinterest or inability in prosecuting claims to the detriment of beneficial owners or ambiguous records). *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786 (5th Cir. 1971)*, is more nearly in point with reference to the Dealers' Act claims, but we are not persuaded to follow it. The provision involved in that case, and this, that if certain stockholders did not continue as principals in the business the dealership could be terminated by the franchiser, was for the benefit of the latter only and did not expand the parties to the agreement, as we view it.

[12] *15 U.S.C. § 15 (1976)*. *Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963)*, Cert. denied, *385 U.S. 976, 87 S. Ct. 507, 17 L. Ed. 2d 438 (1966)*; See generally the leading case of *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)*. Cf. *Perkins v. Standard Oil Co., 395 U.S. 642, 649, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)*; *Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967)*; *Hoopes v. Union Oil Co., 374 F.2d 480 (9th Cir. 1967)*; *Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967)* (distinguishable from the present case where the business and property were that of the corporation and the claims asserted were derivative). As stated in *Bravman v. Bassett Furn. Indus., Inc., 552 F.2d 90, 97* (3d Cir.), Cert. denied, *434 U.S. 823, 98 S. Ct. 69, 54 L. Ed. 2d 80 (1977)*: "These stockholders and creditor cases do not bear on Bravman's case (involving direct restraints upon his independent sales activities) for in all of them the alleged impact of a restraint of trade was felt in the business or property of a corporation, and the injury, if any, to the plaintiffs consisted only in the diminution of the value of the injured corporation." But see *Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386 (S.D.N.Y.1967)* (where unlike the present case the plaintiff officer of the corporation who was left in the case beyond a motion to dismiss on the pleadings had not had an opportunity to develop any record of his interest). We do not believe that *Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*, raises any question concerning our conclusion, dealing as that case does with direct damage to consumers rather than indirect losses suffered by corporate stockholders or creditors from the impact of ***antitrust law*** violations upon the corporation.

[13] Sherman lacks standing in his individual capacity to bring any of the pendent claims. Where there is an injury to the corporation, the cause of action should be brought by the corporation, or by the shareholders derivatively if the corporation fails to act; only for separate individual damage does an individual cause of action lie. *Jones v. H. F. Ahmanson & Co., 1 Cal.3d 93, 81 Cal.Rptr. 592, 460 P.2d 464 (1969)*; *Sutter v. General Petroleum Corp., 28 Cal.2d 525, 530, 170 P.2d 898, 901 (1946)*. Sherman lacked standing as a third party beneficiary, since his status was that of an incidental beneficiary. Where there was no direct undertaking or intention to benefit him, he had no rights under such a contract. ***Restatement of Contracts §§ 133***, 147; *Martinez v. Socoma Cos., 11 Cal.3d 394, 113 Cal.Rptr. 585, 521 P.2d 841 (1974)*.

[14] See Wright, Miller & Cooper, Federal Practice and Procedure § 3531 (1975). The trial court, although dismissing his antitrust and pendent claims for lack of standing, did not expressly deny Sherman's standing to individually maintain the Dealers' Act and pendent fraud claims. Without including the point in their cross-appeal, defendants argue that Sherman had no standing with respect to the latter claims also. Finally, the district court's dismissal of all claims as to all parties contained no explanation of reasons.

the full Leyland line upon the expiration of the Vincent franchise. There is no indication in the record that Satori was a manufacturer or agent of a manufacturer, or a party to the franchise in question, or that he conspired or combined with the other defendants in restraint **[*441]** of trade, in derogation of any contract rights of Vincent, or by fraud. Summary judgment of "no cause of action" as to Satori was clearly proper and is affirmed.

Nor was the dismissal of the action as to British Leyland error in any reasonable view of the record. [15] While this company actually was a manufacturer, it did not sign the franchise, nor insofar as the record discloses did it have anything to do with the franchise or any of the other contract documents, or with any alleged conspiracy in restraint of trade or any monopoly or attempt to monopolize. Any relationship of parent and subsidiary between it and others that may have done so is not enough. *Marquis v. Chrysler **[**24]** Corp., 577 F.2d 624 (9th Cir. 1978)*, Supra.

To simplify the discussion that follows and for differentiating reasons which will become more apparent in its course, we proceed to consider liability on the part of BLM, LMS and BMCD, the remaining defendants, to whom we will intend to refer unless the context otherwise indicates when "appellees" or "defendants" are mentioned. In a similar effort we will designate the surviving plaintiff-appellant as "Vincent" or "plaintiff".

II. ISSUES OF MATERIAL FACT

A. DEALERS' ACT

HN3[] The requisites of a sufficient claim under the Automobile Dealers' Day in Court Act are: (1) The plaintiff must be an "automobile dealer"; (2) defendant must be an "automobile **[**25]** manufacturer" engaged in commerce; (3) there must have existed a manufacturer-dealer relationship created by written franchise agreement, and (4) plaintiff must have been injured by the defendant's failure "to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer." *15 U.S.C. § 1222 (1976)*. See also *Stansifer v. Chrysler Motors Corp., 487 F.2d 59, 63 (9th Cir. 1973)*. [16]

While, as we have seen, Sherman individually was not an "automobile dealer" protected by the Act, Vincent clearly was such a dealer. Id. *§ 1221(c)*. It is unquestioned that BLM as **[**26]** well as LMS, its wholly-owned subsidiary, for purposes of this case should be deemed "automobile manufacturers" within the description of the Act. Id. *§ 1221(a)*. [17]

The situation of BMCD is different in several respects. It was not a subsidiary of any British Leyland company. It had no contractual relationship with British Leyland, nor did it ever assume to act for that manufacturer. Yet it did contract with one of the latter's "manufacturer" subsidiaries and acted in concert with, and in a sense for, both **[**27]** of them in carrying out the Rationalization Program. Whether BMCD thereby projected itself within the range of the term "manufacturer" and as such exposed itself to possible liability under the Dealers' Act, must be considered. We are confronted also with the related question of whether BMCD and BLM could be liable for violation of the Dealers' Act even though they were not signatories of the Vincent franchise.

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[15] While the answer of British Leyland was not made part of the record on appeal, memoranda before the district court indicate that its answer raised an issue of the In personam jurisdiction of the district court over it. Such issue remained unresolved when summary judgment was granted in its favor apparently on other grounds.

[16] Reference to the franchise agreement in this formulation departs from the not infrequent statements that there must be a written franchise agreement between the plaintiff and the defendant or between the manufacturer and the dealer. The latter statements would be unduly restrictive in view of the agency-conspiracy concept hereafter discussed.

[17] British Leyland Motor Corporation Limited, the English company . . . was, concededly, "the manufacturer" of Triumph cars in the 1971-1973 period. Its subsidiary, BLM, and the latter's subsidiary, LMS, are conceded to be each a "manufacturer" under the Dealer Act, although the Act also requires that there be a written contract between the manufacturer and the dealer, and there was no such contract between BLM and plaintiff.

Supplemental trial memorandum of the British Leyland defendants at R. 00534.

[*442] In *Stansifer v. Chrysler Motors Corp., 487 F.2d 59 (9th Cir. 1973)*, Supra, it was held that where there was no showing that a distributor had been the agent of the manufacturer in entering into contracts with the dealer or a "straw man" erected as an insulation against liability, the dealer had no cause of action against the manufacturer. [18] **[**28]** *Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978)*, determined that while a subsidiary of a manufacturer was liable under the Dealers' Act, as a "statutory" manufacturer, the manufacturer, Chrysler Corporation, itself was not liable because it was not a party to the franchise agreement illegally terminated by the subsidiary. [19]

Both BMCD and BLM maintain that these decisions insulate them from liability on Vincent's Dealers' Act claim, notwithstanding any improper failure of LMS to renew the dealer's franchise, also denied. LMS furthermore seeks protection from liability in Stansifer because any refusal to renew its agreement with Vincent was by BMCD after LMS had ceased to be the distributor for southern California and because there was allegedly no showing of an agreement or agency between BMCD and LMS. [20] Vincent attempts to counter this argument with the contention that BMCD "signed" its own franchise agreement with Vincent **[**29]** by its letter of October 30, 1973. [21] **[**30]** This contention borders on the frivolous since Vincent refused to acknowledge the terms of the letter, claims that it was not bound by it and relied upon the franchise granted by LMS for the remainder of its term. Vincent's argument that BMCD was the "successor in interest" to LMS wholly by reason of considerations discussed in *DeCantis v. Mid-Atlantic Toyota Distributors, 371 F. Supp. 1238 (E.D.Va.1974)*, in and of itself might be questioned in view of the rejection by that court of the application of the rule established by Stansifer. [22]

BMCD further argues that, despite the provisions of the contract between BLM and BMCD, neither BLM, LMS nor BMCD would renew or extend any dealer agreement then in force without the consent of the others, the evidence shows that BMCD ignored this provision and, in particular, that it acted unilaterally in its decision not to appoint Vincent for an additional term. There was at least conflicting evidence on this point aside from the inherent effect of **[*443]** the Rationalization Program. But in view of that effect it is plain that each entity, to the extent that it may have willfully combined with the others to carry out the **[**31]** terms of the program, acted for the others as well as itself in bringing about consequences which such program rendered inevitable. BLM without considering its

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[18] *Stansifer at 66*. Referring to provisions of the distributorship agreement some of which were similar to those with which we are concerned, including the provisions for a veto of the distributor's appointment of dealers, the court had observed: "Contractual provisions of the type here involved are not uncommon. In construing similar contracts the courts have held consistently that controls of the kind reserved by Chrysler do not create a relationship of agency, but rather one of buyer and seller." *Id. at 65*.

[19] Typical of supporting cases cited in *Marquis is York Chrysler-Plymouth v. Chrysler Credit Corp., 447 F.2d 786 (5th Cir. 1971)*, in which the court stated: "(T)here being no showing that would make either responsible for the acts of the other on an agency theory, and the facts indicating that they are separate legal entities each operating in its own sphere, only the one who has entered into a franchise agreement could be held accountable for performing or complying with it." *447 F.2d at 791*.

[20] See *Stansifer, 487 F.2d at 66*, Supra. However, for reasons hereafter discussed the problem in this case is essentially different than that in Stansifer.

[21] BMCD's letter . . . constitutes BMCD's version of its contractual relationship with plaintiffs between October 1 and December 15, 1973. The letter refers to an enclosed Dealer Agreement and says that BMCD will assume its terms are acceptable unless the dealer otherwise indicates. The letter and enclosure constitute a "franchise" within the meaning of the statute, and one which could not be terminated or nonrenewed by means of coercion or intimidation (the enclosure to the letter does not appear as part of the record before us).

Vincent brief at 40.

[22] The approach taken in *Stansifer v. Chrysler Motors Corp., supra*, in this court's view, misconceive(d) the nature of the remedy provided under the Automobile Dealers' Act, and, if followed, would effectively remove from the Act's protection all situations involving midstream changes in channels of wholesale distribution. This is a result which this court does not conceive as having been intended.

DeCantis v. Mid-Atlantic Toyota Distributors, 371 F. Supp. at 1243.

involvement through the Rationalization Program, directs attention to the provision of the Dealer's Agreement executed by LMS and Vincent that it would not be considered a party.

It is contended by plaintiff that all of the appellees were committed to the effectuation of the Rationalization Program in violation both of the Dealers' Act and the antitrust laws and that they conspired to implement that plan by the elimination of Vincent as a dealer, particularly if he did not agree to the "tying arrangement" of a full-line dealership. That the existence of such a unified program with its alleged consequences could not have been properly ruled out by summary judgment has been indicated to us by an independent and thorough review of the record which was before the district court and by the expressed position of the appellants as reflected in their briefs on this appeal.

For example, the British Leyland appellees state that by the spring of 1972, BLM "was ready to tackle the consolidation of wholesale distribution through a single **[**32]** organization in each territory, either LMS or an independent distributor. . . . The overlap and duplication of distribution functions were eliminated by the appointment of a single distributor which would have responsibility for the wholesaling to retail dealers of all British Leyland vehicle lines in that territory." British Leyland's answering brief at 6. BMCD states: "Recognizing the economics involved, BMCD set about appointing only full-line retail dealers of British Leyland Products." BMCD's brief at 6. The British Leyland appellees, "(a)part from matters of emphasis and a (claimed) serious flaw in the discussion of the relevant product market, do not challenge appellants' Statement of Facts." On the contrary, on the point of the effect of the Rationalization Program upon Vincent, they state: "It is perfectly true, as plaintiff says, that the Rationalization Program ultimately caused plaintiff to lose its Triumph franchise when it expired in December, 1973." British Leyland appellees' answering brief at 4, 7.

When such additional circumstances are superimposed upon the reservation in the written franchise of the right on the part of the other appellees to veto BMCD's action **[**33]** in appointing dealers, the transfer to that distributor of LMS' distributor rights under the franchise prior to the expiration of Vincent's dealership, and the other indicia of control which were indicated in Stansifer and Marquis to be insufficient separately to establish agency, it is apparent that there exists a situation quite different in this case with respect to the problem of agency.

Recognition of the differentiating circumstances of the present case involves no departure from the principles of Stansifer and Marquis. [23]

[34]** Reasonableness of the Rationalization Program is a different question. Appellees contend that this program is entirely reasonable and legal both under the Dealers' **[*444]** Act and the antitrust laws. If this should be the ultimate determination, Vincent would have no valid claim against any of the appellees, with the possible exception of LMS under the Dealers' Act, and no claim whatsoever under the antitrust laws, since such claims are inextricably intertwined with the consequences of the Rationalization Program.

We have concluded, however, that there was a showing by plaintiff before the district court sufficient to withstand a summary determination that such Rationalization Program as applied to it did not constitute a violation of the antitrust laws. Particularly, we have found that there was a Prima facie showing before the district court of a *section 1* conspiracy. For similar foundational reasons we believe that as to BLM and BMCD, as well as LMS, there was

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[23] ***HN4***[] "A manufacturer may be liable notwithstanding it is not a party to the franchise if the party contracting with the dealer is the manufacturer's agent or merely a "straw man' erected to insulate it from statutory liability." *Marquis at 630*.

HN5[] The term "franchise" is defined in *15 U.S.C. § 1221(b)* as "the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract." It is clear that without a written franchise there can be no claim or cause of action under the Act.

There was no written agreement between Chrysler and Stansifer. The written agreements were between Chrysler as manufacturer and Fisher as distributor and between Fisher as distributor and Stansifer as dealer. Nor is there any evidence that Chrysler had any direct dealings with Stansifer prior to the termination of the dealer agreement between Fisher and Stansifer.

Stansifer at 63-64.

sufficient evidential indication to preclude summary judgment on the issue of whether such appellees were manufacturers who at this stage should be deemed parties to the franchise because the putative conspiracy supplied **[**35]** the element of agency. We are mindful that Stansifer rejected a claim of conspiracy in similar context, but this was upon the basis of insufficiency of the evidence to sustain that theory. [24]

The franchise with which we are concerned was the agreement signed by Vincent and LMS. It cannot be disputed that at the time of the takeover of the Triumph distributorship by BMCD, Vincent had a subsisting Triumph franchise from LMS. It is the failure to renew that franchise upon which liability to Vincent under the Act depends, whether that failure is ascribable to BLM, **[**36]** LMS, BMCD or all three.

Whether BMCD was the successor in interest to LMS as franchiser or BMCD was an entity otherwise subject anew to the obligation of good faith consideration of the renewal of the franchise, may be a matter of mere semantics. Such distinction in any event was rendered unimportant by the concerted action of BLM, LMS, and BMCD in applying to Vincent and its franchise the consequences of the Rationalization Program pursuant to the agreement among them. This coalescence of forces resulted in the nonrenewal of Vincent's Triumph franchise. Accordingly, and in view of the intendments favorable to the nonmovant at this stage, we reject as too much of a "heads we win, tails you lose" proposition, LMS' argument that there was no duty on its part to grant a renewal of Vincent's franchise because its distributorship had been terminated before the expiration of the franchise, and the argument of BMCD that it had no duty under the franchise because it had not signed any agreement.

It is unnecessary for us to determine in the abstract whether an independent distributor who takes over an existing franchise granted by another distributor as a matter of law is under all of the **[**37]** duties of the original franchiser with respect to any obligation of renewal by reason of presumed common "control" by the manufacturer, [25] or whether this would be consistent with Stansifer and Marquis. Here, where there is indication that any assumption by BMCD of obligations and rights under the unexpired franchise, and the refusal to renew the dealership, were the result of agreement among the importer, the old distributor and the new distributor, each for the purposes of the summary judgment should have been deemed a representative of the others with respect to such franchise and its nonrenewal.

[*445] Whether there was evidence as to any appellee that it failed to act in good faith [26] in complying with the franchise or in its nonrenewal, and **[**38]** whether there was coercive conduct against Vincent must next be considered.

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[24] From an examination of the entire record we find no evidence to support appellant's contention that Chrysler was acting as Fisher's agent (with respect to alleged coercion by employees of Chrysler after termination of the franchise in question by Fisher).

Appellant also alleged in his complaint that appellees "conspired to wrongfully terminate plaintiff's non-exclusive dealership." No proof was offered to support this claim. . . .

487 F.2d at 66.

[25] See *DeCantis v. Mid-Atlantic Toyota Distributors, 371 F. Supp. 1238, 1242 (E.D.Va.1974)*. See also *Volkswagen Interamericana, S. A. v. Rohlsen, 360 F.2d 437, 441 (1st Cir. 1966)*; *Barney Motor Sales v. Cal Sales, Inc., 178 F. Supp. 172, 175 (S.D.Cal.1959)*.

[26] In view of the restrictive definition of "good faith" contained in *§ 1221(e)* of the Act, this court has said:

There is no question that ***HN6***[] the failure to exercise good faith within the meaning of the Act has a limited and restricted meaning. It is not to be construed liberally. . . . It does not mean "good faith" in a hazy or general way, nor does it mean unfairness. The existence or non-existence of "good faith" must be determined in the context of actual or threatened coercion or intimidation (citations omitted).

In order to lack good faith the manufacturer's actions must be unfair and inequitable in addition to being for the purpose of coercion and intimidation (citations omitted).

A showing of coercion and intimidation which produces unfair or inequitable results is essential to a valid **[**39]** claim of lack of good faith under the Dealers' Act. Thus it is necessary to consider not only whether a manufacturer has brought pressure to bear on the dealer, but its reason for doing so, since what constitutes coercion and intimidation will depend upon the circumstances arising from each particular case. *Autohaus Brugger at 911*.

Vincent asserts that the defendants breached the duty of good faith in violation of the Dealers' Act in several ways: by making it clear to plaintiffs that, unless dealers "got together" by way of merger or buy out, BMCD would terminate many of the franchises; the pointing out by an employee of BLM and LMS to dealers that a buy out was one method of handling the problems occasioned by the Rationalization Program; threats of BLM, LMS and BMCD that the Triumph dealership would be terminated unless Vincent agreed to buy and sell the entire Leyland line; the drastic reduction of its allocation of cars after August, 1972; demands that the dealer claim no rights and view BMCD as having no obligations after BMCD took over Triumph distributorship in Pasadena with the threat of nonrenewal so conditioned; attempts of BMCD to coerce Vincent into acknowledging the **[**40]** absence of a written franchise with BMCD, and the attempted intimidation of plaintiffs into surrendering the Triumph franchise in exchange for an unprofitable "Jensen" franchise.

We have reviewed the record bearing upon these claims and have concluded that there is no supporting indication of bad faith, intimidation or coercion except possibly from their relationship to the Rationalization Program for full-line dealerships, which we now discuss.

The suggestion to Sherman that a merger or buy out of another dealer was one way to be able to handle the full line was neither coercive nor intimidating in and of itself. [27] **[**41]** Any misallocation of automobiles apparently did not involve any threat or coercion, express or implied, and Vincent's suggestion of a disproportionate allocation at all is not supported by the record. [28]

BMCD's letter of October 30, 1973, presented a proposed interim arrangement which on its face appears reasonable in the course of BMCD's undertaking to review all **[*446]** candidates for appointments as dealers in the southern California area. Vincent's interpretation of the letter as a demand that the dealer not claim any rights and not view BMCD as having any obligation to the dealer in and of itself seems insignificant, if not unwarranted.

But conversations of Sherman with officers of BMCD are interpretable as impliedly threatening Vincent with the loss of the dealership unless he consented to full-line representation. Implicit in the entire relationship of the parties after the intervention **[**42]** of BMCD was that if Vincent would not undertake a full-line dealership, which he ultimately declined to do, his distributorship would not be renewed. A wrongful demand can be implicit, inferable from facts and circumstances without any showing of a formal one. *Marquis at 634*.

Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir.), Cert. denied, ***436 U.S. 946, 98 S. Ct. 2848, 56 L. Ed. 2d 787 (1978)***.

[27] Vincent claims coercion because of the suggestion of the president of BMCD and the vice-president of BLM and LMS that a merger or buy out of another dealer would be one way for the dealer to handle the full line. Sherman testified that he approached Satori about merger and was rejected, and that the matter ended there. It is straining to contend that Sherman's subjective feeling of coercion from the suggestion mentioned satisfied this element of a claim under the statute. Not the suggestion of merger but the unsatisfied insistence upon full-line representation was the cause of Vincent's rejection as a dealer.

[28] Misallocation of cars by itself without any threat of sanctions is not actionable under the Dealers' Act. See *Cecil Corley Motor Co. v. Gen. Motors Corp., 380 F. Supp. 819 (M.D.Tenn.1974)*. There was an uncontroverted showing that a fair share of available automobiles was furnished to Vincent, and there was an absence of any causal connection between the number of cars allocated and the nonrenewal.

Under various circumstances a manufacturer's insistence that a dealer carry a full line of products may be proper. [29] **[**43]** On the other hand, there is authority that this type of insistence may constitute a wrongful and coercive demand. [30] A differentiation or reconciliation of these cases is unnecessary here, since we are convinced in view of the basic principles espoused by both lines that this was not a case properly subject to resolution on summary judgment.

There is indication on the record that the pervasive policy and program of BLM, LMS and BMCD was to divide geographical markets between the latter two distributors and to eliminate such dealers as Vincent in all markets, notwithstanding the latter's previously successful operation of the existing franchise, unless it consented to full-line representation of British Leyland products. There was also a clear showing that following at least implied threats to this **[**44]** effect, Vincent's franchise was not renewed as the proximate result of its refusal to accept such full-line representation. Whether any related intimidations, pressures, threats and resistance which resulted in he nonrenewal of Vincent's franchise constituted a reasonable response to economic problems confronting the manufacturer, as appellees contend, or were unreasonable, unfair and unlawful conduct on their part, as Vincent asserts, should not have been resolved on summary judgment.

The presence or absence of business justification or necessity for the Rationalization Program, of course, is pertinent to this view but can better be explored with reference to plaintiff's antitrust claims. If, as we have concluded, there are issues precluding summary judgment that the application of that program to Vincent was lawful under the Antitrust Act, it seems clear that there would be a corresponding issue on this record under the Dealers' Act. [31] We cannot **[*447]** conceive that any unreasonable restraint of trade in violation of the antitrust laws could be upheld on the present record as a reasonable, fair or equitable basis for the nonrenewal of Vincent's franchise within the provisions **[**45]** of the Dealers' Act. We turn, then, to the antitrust issues.

[46]** B. *SECTION 1* OF THE SHERMAN ACT AND SECTION 3 OF THE CLAYTON ACT

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[29] *Colorado Pump and Supply Co. v. Febco, Inc., 472 F.2d 637, 641* (10th Cir.), Cert. denied, ***411 U.S. 987, 93 S. Ct. 2274, 36 L. Ed. 2d 965 (1973)***; *Volkswagen Interamericana, S. A. v. Rohlsen, 360 F.2d 437 (1st Cir. 1966)*; Ship and Shore Motors, Inc. v. British Leyland Motors, Inc., 1974-1 Trade Cas. P 75,102 (D.N.J.1974); *United States v. J. I. Case Co., 101 F. Supp. 856 (D.Minn.1951)*.

[30] *Am. Motors Sales Corp. v. Semke, 384 F.2d 192 (10th Cir. 1967)* (order certain unwanted models or risk being refused other models); Don Richard's Lincoln Mercury Jeep, Inc. v. Am. Motors Corp., 1976-1 Trade Cas. P 60,796 (D.Utah 1976) (relocate and carry full line or be terminated). Cf. *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974)*, Cert. denied, ***420 U.S. 992, 95 S. Ct. 1430, 43 L. Ed. 2d 674 (1975)*** (where discrimination against a dealer who refused to handle a second line of automobiles was held to violate the Dealers' Act but to have had no causal connection with nonrenewal of the franchise).

[31] "No provision of (the Dealers' Act) shall repeal, modify, or supersede, directly or indirectly, any provision(s) of the antitrust laws of the United States" *15 U.S.C. § 1224*. We assume a reciprocal preservation of the reach of the Dealers' Act by the antitrust laws so that both types of statutes are to be afforded their full effect in view of each other.

The Franchise Act reaches those activities of an automobile manufacturer which would constitute an unreasonable restraint of trade under the Sherman Act or another invalid trade practice. In the lack of good faith evaluation the presence or absence of such invalid trade practices is, of course, a foremost consideration.

Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 516 (10th Cir. 1976).

We are mindful of the comment in *Marquis at 641*, in connection with its rejection of antitrust claims made there, that the Dealers' Act was intended to supplement the antitrust laws and that "every Dealers' Act violation will not necessarily amount to an actionable antitrust violation." The converse, no doubt, is also true, but far from precludes recognition of an inescapable relationship under the circumstances here.

In reviewing dismissal of the antitrust claims, we must be mindful of the especially strict requirements of *Rule 56* in this field, [32] while recognizing that there are circumstances which authorize, indeed require, summary disposition. [33]

Vincent's position with respect to its *section 1* claims is that the established **[**47]** purpose and effect of the Rationalization Program was to reduce competition among distributors as well as dealers; that pursuant to such program, and as a result of a conspiracy for its establishment and effectuation among appellees, BLM (as importer) and LMS and BMCD (as distributors) formed a combination to divide geographically the market for British Leyland cars between formerly competing distributors and that BMCD, accordingly, became the only Leyland distributor in the area in which Vincent operated a dealership, the number of British Leyland dealers was reduced, Vincent's Triumph dealership was terminated and it was driven out of business. These results, says Vincent, were achieved among other means by both a horizontal and vertical division of markets geographically, a group boycott or concerted refusal to deal, and by a tying violation of both *section 1* of the Sherman Act and section 3 of the Clayton Act.

Appellees argue that their actions did not violate the antitrust laws because the Rationalization Program was a reasonable, if not the only possible, response to an economic plight in which the British Leyland companies found themselves in the early 1970's, and the BLM-BMCD **[**48]** agreement did not provide for exclusive geographic territories. Rather it gave BMCD a new development area which appellees characterize as akin to that of "primary responsibility", discussed in *GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 995, n.25 (9th Cir. 1976)*, *Aff'd, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*.

The British Leyland appellees refer to the LMS-BMCD exchange as "a vertically integrated manufacturer appoint(ing) one distributor (its own subsidiary) to sell its products in one area at the same time it appoints an independent company to sell the same lines in some other area." It is urged that such action is not unlawful in view of principles discussed in such cases as *Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976)*; *Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972)*; *Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977)*. Appellees say that there was no horizontal division of markets. They admit, but overlook the significance of the fact, that before the agreement for division of the northern and southern California markets BMCD and LMS regarded themselves as competitors selling different **[**49]** but competing automobiles. [34] The appellees further argue that **[*448]** there is no support in the record for the claim that the exchange of distribution rights between BMCD and LMS affected competition in southern California to appellants' detriment.

Whether there was evidence tending to show a horizontal division of markets among competitors depends primarily upon the agreement between BLM and BMCD [35] which provides in part:

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[32] The already discussed general standards for the review of summary judgment are applied even more strictly in antitrust context. *Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. See also *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 683-84* (9th Cir.), Cert. denied, ***429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976)***, Supra.

[33] E. g., *First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Mut. Fund Investors v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977)*; *Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972)*.

[34] Although the two distributing organizations regarded each other as competitors, since each up to that time had been selling either Triumph (LMS) or MG (BMCD) but not the other, this does not make the British Leyland Agreement appointing each to the full line in different sections of California a horizontal conspiracy to divide geographic markets, at least not less (sic) one disregards the fact that LMS is a wholly-owned subsidiary of British Leyland (emphasis added).

British Leyland answering brief at 14-15.

[35] Although this agreement was signed only by BLM and BMCD, Vincent contends that it is implicit in the writing and in the surrounding circumstances that LMS was deemed a part and parcel of the agreement. Those portions of the agreement relied upon by Vincent are these:

[50]**

> B. BLM is desirous of consolidating the distribution of its various lines through a single distribution channel, and has arranged to terminate the distribution of Jaguar in an area generally corresponding to (BMCD's current southern California area). BLM is prepared to add Jaguar, Triumph and Land Rover to (BCMD's Austin/MG distribution . . . within (BMCD's southern California area).
>
> C. In exchange therefor . . . (BMCD) is willing to surrender its distribution rights under the Northern Agreement, together with any claim it may have for the renewal of such agreement, to BLM in order that BLM may through its subsidiary . . . (LMS), add distribution of Austin, MG and Jaguar to its existing Triumph and Land Rover distribution.

LMS thereby became the franchise distributor of all British Leyland automobiles in northern California, giving up its Triumph, Rover and Land Rover distribution rights in southern California. BMCD became the southern California distributor of all Leyland cars in exchange for its rights to distribute Austin and MG in northern California. This in effect suggested an agreement between BMCD, as a competitor of LMS, and LMS to eliminate competition between **[**51]** them on the wholesale distribution level. There was proof before the court tending to show that MG and Triumph automobiles were in direct competition. More was involved than unilateral designation by a manufacturer of "areas of primary responsibility" in which a distributor was to operate. A jury could infer from the evidence **[*449]** that, despite the "area of primary responsibility" label, the defendants agreed to divide markets geographically. All of the other elements of resulting *section 1* violations appeared sufficiently to withstand summary judgment. *United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *White Motor Co. v. United States, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*.

If there were only a vertical geographic division of markets not a Per se rule, but "the rule of reason" would generally apply. [36] We address this and other alternative theories since we have not been asked, nor are we

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"C. In exchange therefor, the Distributor (I. e., BMCD) is willing to surrender its distribution rights under the Northern Agreement, together with any claim that it may have for the renewal of such agreement, to BLM In order that BLM may through its subsidiary, Leyland Motor Sales, Inc. ("LMS'), add distribution of Austin, MG and Jaguar to its existing Triumph and Land Rover distribution." (CT 363; emphasis added.)

"As of November 1, 1973, BLM shall have the right to transfer distribution rights to another distributor (Including LMS) through all or any part of the Development Area described in the Northern Agreement." (CT 364; emphasis added.)

"3. Transfer of Distribution. The Distributor and BLM (For itself and its subsidiary, LMS) pledge themselves to effect transfer of distribution rights in an orderly manner and with minimum disruption of the supply of cars and spare parts to dealers. Neither the Distributor, BLM, Nor LMS will enter into any extraordinary contracts or commitments in connection with distribution operations to be transferred, . . ." etc. (CT 364; emphasis added.)

". . . if the amount determined under (2) is larger than (1), BLM Or LMS will pay the Distributor the net balance." (CJ 366; emphasis added.)

"(e) The Distributor and BLM Or LMS will maintain records showing all sales under the foregoing provisions, and Each will supply to the other a statement signed by an officer and certifying as to the number of such sales." (CJ 367; emphasis added.)

"(b) Without the prior consent of the other party, neither BLM (Nor LMS) nor the Distributor will renew or extend any dealer agreement now in force, nor will it appoint any new dealer or make any representations to any dealer as to his future status after transfer of distribution has been effected."

"8. Warranties. BLM, For itself and for LMS, and Distributor each warrant and represent to the other as follows: . . ." etc. (CT 368, emphasis added.)

Appellants' opening brief at 26, 27.

[36] In so holding we do not foreclose the possibility that particular application of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. But we do make clear that departure from the rule of reason standard must be based upon demonstrable economic effect rather than as in Schwinn (*U. S. v. Arnold Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249*) upon formalistic line drawing.

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 58-59, 97 S. Ct. at 2562.

prepared, to rule as a matter of law in support of plaintiff's horizontal conspiracy theory. Only upon fully-developed facts will this case lend itself to nicely definitive treatment.

[52]** ***HN7***[] In determining whether a restraint is unreasonable, the primary considerations are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects. "Under this rule, the factfinder weighs all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., 433 U.S. at 49, 97 S. Ct. at 2557.

Appellees answer the charge of a vertical conspiracy in restraint of trade as they did the horizontal conspiracy claim and especially emphasize that the BMCD-BLM agreement provided merely for "areas of primary responsibility" rather than any exclusive dealerships. In this view they contend that any restraint was reasonable and that no legal injury was caused either to Vincent or competition within any relevant market. Reasons for rejecting the arguments as to a horizontal conspiracy apply generally to the claim of vertical conspiracy, [37] but the element of reasonableness warrants further comment.

[53]** It has been held ***HN8***[] in cases involving the defense of primary responsibility clauses in vertical situations that even if genuine agreements calling for areas of primary responsibility may be valid, where a primary area of responsibility is used to mask the application of an illegal territorial restriction, illegality will nevertheless be found. *Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975)*, Cert. denied, *423 U.S. 1055, 96 S. Ct. 787, 46 L. Ed. 2d 645 (1976)*; *Hobart Bros. Co. v. Gilliland, Inc., 471 F.2d 894* (5th Cir.), Cert. denied, *412 U.S. 923, 93 S. Ct. 2736, 37 L. Ed. 2d 150 (1973)*. The primary responsibility label did not immunize the arrangements among the appellees here from fact finding examination under the rule of reason.

[*450] Plaintiff had to demonstrate genuine issues of material fact not only with respect to the causal connection between its injury and defendants' actions, rather clearly appearing here, but also that its injury was of the type the antitrust laws were intended to prevent, that is, that defendants' conduct did have some anticompetitive effect beyond plaintiff's own loss of business or the market's loss of a competitor. *Knutson v.* ***[**54]*** *Daily Review, Inc., 548 F.2d 795, 803 (9th Cir. 1976)*, Cert. denied, *433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)*. [38]

We have concluded that the record sufficiently tended to support these essential elements also with reference to a relevant product and geographic market of imported sports cars with retail value of between $ 3,000 and $ 5,500 in the San Gabriel Valley. [39]

In *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126* (2d Cir.) (En banc), Cert. denied, ***439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)***, the majority held because of the vertical nature of the restraint that the rule of reason applied, while Judge Mansfield, dissenting, considered the Per se rule to have been invoked because of involvements of a horizontal nature. See also Note, Vertical Agreements to Terminate Competing Distributors, 92 Harv.L.Rev. 1160 (1979). Despite some ambivalence that may be encountered in this troublesome area, the facts of the present case render it more likely that a horizontal rather than a vertical agreement was operative.

[37] The question of whether a horizontal or vertical division was involved does not alter the effect of the proof tending to show that in either event there was a geographic division of the market. The fact that there was common ownership or control of contracting corporations did not liberate them from the impact of the antitrust laws, and in any event each Leyland appellee could be deemed as having conspired with the independent company, BMCD. See *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 141-42, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*. Cf. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82 (9th Cir. 1969)*, Cert. denied, ***396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*** (recognizing this general rule but holding that purely intra-corporate conspiracy is not enough to invoke it).

[38] In *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)***, this court said that "unless the alleged anticompetitive conduct is per se unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of plaintiff's case . . . and the burden of establishing it lies on him."

[55]** Defendants regarded as being included in plaintiff's burden the production of "data and other material necessary to measure the degree of "functional interchangeability' between the products involved as to price, use, quality and characteristics." *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977)*. Plaintiff denies that it had fair opportunity to develop the record in this respect, but we believe it is sufficient for present purposes. [40] Professor Aaker's statement inferentially took into consideration the problem of interchangeability in supporting plaintiff's definition of the relevant market and evaluating anticompetitive effects of the Rationalization Program. Plaintiff's showing as to impact on competition was far from complete or even satisfactory. Yet counterpoints sought to be made by appellees were directed primarily to a geographic and product market differently defined.

[56]** Without unduly fragmenting our consideration, and viewing the present record as a **[*451]** whole, [41] we do not rule out the existence of genuine issues of material fact with respect to a possible vertical conspiracy in restraint of trade and its anticompetitive effect upon the relevant market. [42] A paraphrasing of a portion of the opinion in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 831 (7th Cir. 1978)*, Cert. denied, *440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979)*, provides a summarization of our conclusions on the foregoing phrase of the *section 1* claim:

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[39] Sherman's own experience supported such a market definition. Vincent points to statements by defendants' employees to the effect that Triumph and MG competed and that both competed with "sporty" cars imported from Japan, Italy and Germany in the same price range. A damage study undertaken by Professor David A. Aaker, submitted to the district court by plaintiff as an addendum to an interrogatory reply, not only supported plaintiff's definition of the relevant market but described the reduction of competition resulting from the Rationalization Program in that market as "significant" both on the retail and wholesale levels. Vincent claimed that dealers in the Triumph and MG automobiles had been reduced from five to one in the market while the combining of the MG and Triumph shares of the market under a single distributor in the San Gabriel Valley established approximately 59% Total share as a consequence of the Rationalization Program. The defendants presented little direct rebuttal of these claims, their primary effort being to question plaintiff's definition as to both the product and geographical markets. Their data as to lack of economic impact related primarily to their own definition of the relevant market rather than to that of the plaintiff.

Appellees suggested that the relevant market would be southern California rather than merely the San Gabriel Valley. Such does not appear from the record as a matter of law. Much less is there legal support for the contention made by BMCD in its reply to an interrogatory that "plaintiffs' competitors in the sale of Triumph automobiles, parts and accessories included all retail dealers of foreign and domestic automobiles in the general price range of Triumphs (from $ 2,995) in California and adjacent areas (such as Las Vegas)." BLM, LMS and BMCD in their replies to plaintiffs' interrogatories at another point said: "During the one year that Gary Sherman was a Triumph dealer under the name of European Imports, it is assumed that his competitors were all the retail dealers of automobiles selling in the general price range of Triumphs (from $ 2,995 to.$ 4,095) in the City of Pasadena and in a broader area of Los Angeles County." (Record p. 00210.)

[40] Plaintiffs point out that when the motion for summary judgment was submitted below and when they filed their principal brief in this case, they had assumed in line with the district court's decision in GTE Sylvania that the rule was different than as finally approved by this court and the Supreme Court, and that without further discovery they have been handicapped in addressing the question of whether defendants' conduct was unlawful under the rule of reason. Since, however, their *§ 2* claims necessarily involved similar elements from the beginning, we shall evaluate the record in its present state.

[41] "Plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 (1962)*.

[42] It is true that the question of interchangeability within the claimed area has not yet been fully explored. But the entire question of relevant market where there are persuasive considerations advanced with respect to it, as here, is one of fact which we believe on the record before us it was inappropriate to resolve on summary judgment. Decisions holding that a single manufacturer's products cannot normally constitute the relevant market do not foreclose the plaintiff's claims as a matter of law, since plaintiff's position is that British Leyland products are only part of the relevant market. Nor does it appear as a matter of law that the Rationalization Program necessarily was lawful by reason of its procompetitive aspects.

> A horizontal agreement among potential competitors . . . not to compete with each other . . . is, we think, considerably more suspect than limitations imposed by a single independent manufacturer on its distributors as a condition of their distributorship, but even if we were inclined to agree with (the) . . . argument to the contrary and . . . that the Rule of Reason could be applied, we would be unable to agree that (Vincent) failed to (establish genuine issues of material fact) under that rule.

This case does not readily lend itself to a group boycott analysis with Per se consequences. As we have seen, the indication of any failure to fairly allocate automobiles to Vincent was insufficient to comprise a basis for the Dealers' Act claim, much less for any boycott claim. Yet with respect to the application of the Rationalization Program to preclude Vincent's access to the Triumph market as a part of a horizontal combination or conspiracy, further proceedings on that theory should not be ruled out. [43]

[58]** Vincent's present reliance upon section 3 of the Clayton Act [44] derives not from circumstances the Clayton Act directly applies to, but the tying consequences of the alleged conspiracy. Thus, in answer to an interrogatory propounded to it by the British Leyland defendants, plaintiff in the district court asserted that "there was an implied understanding that defendants refused to sell Triumph products to plaintiff **[*452]** except on the condition that plaintiffs would not purchase the products of defendants' competitors (and) this understanding was implied in all the circumstances surrounding the franchise. . . ." Other than for corresponding allegations in the complaint and this assertion, there can be found nothing in the record to justify such an invocation of the Clayton Act. This does not, however, preclude the possibility of a tying claim within the expanded meaning of Clayton Act § 3 in the light of *section 1* of the Sherman Act.

[59]** The principles applicable to such a claim have so recently been discussed in detail as to make unnecessary any exposition of the law of tie-ins here. *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1211-18 (9th Cir. 1977)*. See also *Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1977)*, Cert. denied, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)*. Despite a contrary holding with regard to the same "rationalization program" in *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52 (4th Cir. 1974)*, Cert. denied, *420 U.S. 992, 95 S. Ct. 1430, 43 L. Ed. 2d 674 (1975)*, [45] we are inclined to the opinion that enough has been shown of record here to have justified further proceedings beyond summary judgment on a tying theory.

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[43] See *Evanston Motor Co. v. Mid-Southern Toyota Distrib., Inc., 436 F. Supp. 1370 (N.D.Ill.1977)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 709-10, 3 L. Ed. 2d 741 (1959)*: "Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." Cf. *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)* (where the court broadly interpreted the concept of "boycott" in a McCarran-Ferguson Act context). Cf. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Inc., 416 F.2d 71, 76-78 (9th Cir. 1969)*, Cert. denied, ***396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*** (holding that the replacement of one exclusive distributor for another fell under a rule of reason rather than a Per se rule). See also *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126* (2d Cir.) (En banc), Cert. denied, ***439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)***.

[44] ***HN9***[] This act provides in the only part that could be relevant here:

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 . . . machinery . . . or other commodities . . . for use . . . or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . machinery . . . 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.

[45] In McGeorge there had been no proof that the tie-in between Triumph and Rover reduced competition. Nor did the case deal with any conspiracy aspects of the Rationalization Program. The decision was upon trial and in view of the factual finding that Leyland's conduct toward McGeorge did not impede competition. "(I)t is this fact which clearly distinguishes the case before us from the tie-ins which were condemned by the Court in *Fortner Enterprises v. U. S. Steel, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495* . . . ." *McGeorge at 58*. Cf. *Golden Gate Accept. Corp. v. General Motors, 597 F.2d 676 (9th Cir. 1979)* (where this

[60]** When a franchiser conditions the sale of a franchise on the buyer's agreement to buy additional products from the franchiser, the law of tying may come into play with its Per se consequences upon a demonstration by the claimant of requisite economic power and not an insubstantial effect upon commerce. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977)*. As we have seen, there is some indication in the record of a substantial effect upon commerce in a relevant market of the application of the Rationalization Program to Vincent because he would not accept the full British Leyland line. The economic power over Triumph automobiles, parts and accessories, the tying products, in the relevant market, and the combined market share of appellees with the consolidation in the market of MG's and Triumphs, estimated by Professor Aaker at 59%, as a result of the Rationalization Program are not adequately countered by appellees to foreclose this element on the present record.

C. *SECTION 2* OF THE SHERMAN ACT

Support in the record for a *section 1* claim does not, of course, necessarily indicate existence of a *section 2* claim, *United States v. Griffith, 334 U.S.* ***[**61]*** *100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*; *Moore v. Jas. H. Matthews & Co., 473 F.2d 328, 332 (9th Cir. 1973)*. But the record as to each claim has much in common here. Vincent's *section 2* contentions are in substance that appellees monopolized [46] **[**62]** the relevant market **[*453]** and attempted [47] **[**63]** and conspired [48] to monopolize this market, and that the district court erred in granting

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court rejected an antitrust claim because there was no allegation or evidence as to an adverse effect upon competition other than the fact that one distributor would be replaced by another. A related Dealers' Act claim also was rejected. That the circumstances were inapposite to those of the present case is demonstrated by the court's conclusion there: "GM did not act in bad faith by initially requiring that the Dealership be located at a specified (and previously agreed to) site. Thereafter, Kohlenberg prompted GM's actions by unilaterally breaching the location provision of the Agreement.").

[46] As recently again recognized in *Greyhound Computer Corp. v. IBM, 559 F.2d 488, 496 (9th Cir. 1977)*, Cert. denied, *434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)*, "monopoly power is the power to control prices or exclude competition." See *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*; *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975)*, Cert. denied, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*; *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975)*.

HN10[] It is required that the monopolist must have engaged in "willful" acts directed at establishing or retaining its monopoly "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. at 571, 86 S. Ct. at 1704*. But plaintiff need not show that such acts were of a kind that would be unlawful for an ordinary enterprise. *Greyhound Computer Corp. at 498*. In the last analysis a defendant's acts, otherwise lawful, must not be unreasonably restrictive of competition. See *Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973)*, Cert. denied, ***429 U.S. 857, 97 S. Ct. 155, 50 L. Ed. 2d 134 (1976)***.

[47] ***HN11***[] Direct evidence of specific intent to control prices or destroy competition is not indispensable when the claim is "founded upon a substantial claim of restraint of trade" I. e., a *§ 1* violation. In these circumstances the requisite specific intent may be inferred. *Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1051-52 (9th Cir. 1974)*; See *Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978)*, Cert. denied, ***440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979)***. Market power is relevant to determining whether such an inference is proper; but where a *§ 1* violation "clearly exists", proof of market power is unnecessary to support an inference of specific intent. *Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 12-13 (9th Cir. 1973)*, Cert. denied, ***417 U.S. 932, 94 S. Ct. 2643, 41 L. Ed. 2d 235 (1974)***. Even though the restraint effected may be reasonable under *§ 1*, it may constitute an attempt to monopolize forbidden by *§ 2* if a specific intent to monopolize is shown. *United States v. Columbia Steel Co., 334 U.S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)*. ***HN12***[] In attempted monopolization, as with monopolization itself, individual conduct may be measured against the same "reasonableness" standard governing concerted and contractual activity under *§ 1*. See *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 53 S. Ct. 471, 77 L. Ed. 825 (1933)*; Greyhound Computer Corp. At 505, n. 37. The requirement that there be a demonstration that a defendant's specific intent to control prices or destroy competition has a "dangerous probability of success" may be satisfied either by direct proof of market power, *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)*, or by inference from proven specific intent, *Greyhound Computer Corp. at 504*. Within the principles so explicated, we have concluded that the record is such as to have legally precluded the

summary judgment when there remained genuine issues of material fact which if resolved in Vincent's favor would have supported findings of a *section 2* violation. We believe that identification of the relevant market, market shares and monopoly power, specific intent, predatory conduct, dangerous probability of success, and antitrust injury are sufficiently suggested in the record to warrant their further exploration and analysis under *section 2* in the light of consideration relating more particularly to *section 1*. [49]

[64] [*454]** Except for the suggestions in the margin of relationships between the various *section 2* claims and the indication of a *section 1* conspiracy between competitors which we have already pointed out in some detail, we believe it to be both unnecessary and inappropriate for us now to launch into a full-scale review of the cases from this circuit expounding the law of monopoly and its application to various related states of facts, none of which seems sufficiently close in point to be controlling. The guiding principles have been well defined by a considerable body of law in this circuit, yet the leading cases of Greyhound Computer Corp., Moore and Continental T.V. demonstrate how difficult it is with situations of novelty and conflicting bases of economic justification to select from variant legal principles those that should control in a given case and determine in view of that selection at which point the permissible blurs into the forbidden zone. Here, the facts bearing upon the monopoly claims have been only vaguely and quite imperfectly developed. Indeed, if those claims stood alone it would be doubtful that enough has been shown to indicate error in the summary termination **[**65]** of them. Perhaps that very doubt should be enough to preclude summary judgment, in view of notable lack of countervailing economic data from the appellees, who after all have the ultimate burden of justifying summary judgment. It is no answer to say that appellees' practices are honestly commercial rather than predatory for if a jury could properly conclude that they possessed monopoly power in the relevant market they would be precluded from employing otherwise lawful practices that unnecessarily excluded competition in the market. If there is yet to be presented by plaintiff in this case a sufficient showing to demonstrate the possession of monopoly power in the market, neither has there been a showing by appellees to the contrary.

While the admonition of the Supreme Court against the compartmentalization of proof found in *Continental Ore, supra* note 41, at 31, was in the context of a single theory, that of conspiracy, the principle applies also to *section 2* claims as they may relate to, and in significant measure may depend upon, a possible conspiratorial framework involving competitors.

Without further analyzing the fragmentary and unsatisfactory economic data thus far presented **[**66]** or risking a crystallization of legal applications with respect thereto with the possibility of limiting the trial court's explorations, the case should be remanded as to all Sherman Act, as well as to the Dealers' Act, claims.

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summary rejections of plaintiff's attempted monopoly claim. *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1205 (1975)*, Cert. denied, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*.

[48] The evidence tending to establish an unlawful conspiracy coupled with that relating particularly to the attempted monopolization claim is sufficiently supportive of the conspiracy to monopolize formulation as to sustain against the motion for summary judgment the survival of plaintiff's claim on the latter theory also. In harmony with *Pacific Coast Agricultural Export Ass'n at 1205, n. 13*, we observe that possible jury consideration of the evidence concerning a conspiracy constituting an unreasonable restraint of trade must be kept in mind in determining the sufficiency of evidence to support both the attempted monopolization and conspiracy to monopolize charges without tight compartmentalization.

[49] In *Marquis, at 640*, this court in concluding that violation of the antitrust laws had not been made out, stated: "A manufacturer's refusal to deal with a distributor or a dealer does not violate the antitrust laws merely because it adversely affects the entity refused. In fact, such effects are 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 116, 119 (9th Cir. 1972)* (quoting Ricchetti (v. Meister Brau, Inc.), 431 F.2d (1211) at 1214 (9th Cir.)) (footnote omitted)." Although the evidence there had already been developed for trial purposes, there was no showing of market effects, nor was there any indication of a conspiracy between competitors as here. Cf. *Moore I, 473 F.2d 328 (9th Cir. 1973)* (where the court on surely more satisfactory but still fragmentary economic data bearing particularly on monopoly issues, required the case to go to trial on the latter issues as well as on the primary issue of tying, and thus made possible later definitive and differentiating ruling in another leading case, Moore II, Supra, on the basis of a fully-developed record).

D. PLAINTIFF'S PENDENT CLAIMS

Since Vincent's federal claims continue viable, we are not called upon to determine whether there would have been justification for the trial court's entertaining the state claims on their merits notwithstanding dismissal of the federal claims. See *United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*.

Plaintiffs assert that two contracts were breached: the written franchise with LMS, of which BMCD was a "successor-in-interest" as argued by Vincent, and an oral agreement between Vincent, BLM, LMS and BMCD "which was reduced to writing". The oral promise "reduced to writing" upon which plaintiffs rely, is the statement made by M. H. Dale, Vice-President of BLM at the Triumph National Dealer Council Meeting June 6, 1972, as later reflected in the written minutes of the council, that "we see no reason why a good dealer's franchise should not continue whoever the distributor might be."

Regarding **[**67]** the written contract, plaintiff contends that language in the franchise with respect to automatic termination did not foreclose recovery for breach of contract. [50] We have held, indeed, that the **[*455]** Dealers' Act claim was not thereby defeated. And we are prepared to accept the contention that the provisions quoted in the margin would not relieve the franchiser and those acting under it from the consequences of any antecedent breach of the contract under state law. No breach as such, however, is indicated by the record except to the extent that a violation of the Dealers' Act Per se would accomplish it.

[68]** Plaintiff argues that at least LMS' contract with Vincent was breached at the time of the LMS-BMCD exchange. On the contrary, the exchange as such does not appear to have affected that contract, being in recognition of it as we have already observed. The claim of interference with prospective business advantage also must fail, unless violation by any of the appellees of either the Dealers' Act or the antitrust laws established such a claim Ipso facto, given a contract presupposing good faith compliance.

Nor can we agree that the statements of Dale, an employee of BLM and LMS, concerning the renewal of a "good dealer's" franchise was a misrepresentation meeting the classic tests of a fraud claim. [51] **[**69]** If we assume that there is indication on the record that the representation was one of present intention that might furnish the foundation, if false, of a claim for fraud, [52] there yet is no indication that, considered in context, it was false or incompatible with good faith belief when made. [53]

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[50] This agreement shall be deemed canceled, without further action by the Distributor (LMS) in the event of termination or cancellation of the Distributor's Distribution Agreement with (BLM) or upon the withdrawal for any reason of the right of the Distributor to purchase (Triumphs) and resell the same within the area within which the Dealer is located. The Dealer acknowledges that all of his rights under this Agreement are subordinated to, and conditioned upon the continuance of, the ability of the Distributor to supply the Dealer with the Products.

[51] Q. If any of the above events occur would the present dealer organization retain their franchise or would it revert to the privately owned distributor?

A. We see no reason why a good dealer's franchise should not continue whoever the distributor may be.

The council requested that in order to retain the Triumph dealer body's confidence a moratorium was (sic) declared on the appointment of new Triumph dealers. The Council also requested that in the event that any Triumph dealer now operating under a Zone should find himself operating under a private distributor after the rationalization was complete that British Leyland would retain control of Triumph dealer appointments and cancellations for a period of two years after the date of such distribution change.

British Leyland agreed that the matter would be given consideration. (Record pp. 00380-81.)

[52] *Kuffel v. Seaside Oil Co., 11 Cal.App.3d 354, 90 Cal.Rptr. 209 (1970)*; *Restatement (Second) Torts 530* (1977); 4 Witkin, Summary of California Law: Torts (8th Edition 1975) at p. 2717.

[53] The colloquy at the Triumph National Dealer Council Meeting of June 6, 1972 (prior to the last renewal of Vincent's franchise by LMS), from which plaintiff has abstracted the phrase on which it relies, also reveals in context that a change in distributorships would be possible, and that the statement was a general one with reference to the national situation.

Plaintiff's primary state law contention, as we understand it, is that the contract between Vincent and LMS had as an implied condition the undertaking of good faith and fair dealing on the part of the franchiser. There is an implied covenant, it is argued, that neither party would do anything to deprive the other of the benefits of the contract, and to do everything that the contract presupposed would be done to accomplish its purposes and benefits. The same implied condition, says Vincent, would require good faith in the renewal of the franchise. **[**70]** Clearly nonrenewal in bad faith and in violation of the Sherman Act and the Dealers' Act, Vincent argues, breached the implied covenant of good faith.

It is manifest that aside from the Dealers' Act and federal antitrust laws no breach of contract or deprivation of contract rights under state law has been shown. We have difficulty in perceiving how the Automobile Dealers' Act and the federal antitrust laws could be deemed so assimilated by state law as to become independent bases for state contract claims with seeming vesting in state courts of the jurisdiction which the federal statutes grant exclusively to the federal courts.

This is not to say, however, that some circumstances constituting violation **[*456]** of the Dealers' Act or federal antitrust laws may not also support pendent contract claims, depending upon state law applications. But we have been left largely in the dark concerning the California authorities bearing upon breaches of implied covenants of good faith and fair dealing. The district court gave no reason for dismissing the pendent claims, and the parties' briefs make little or no argument on the subject other than to cite to their memoranda below which in **[**71]** appellees' case are not even a part of the designated record. And we have no argument at all before us on how state law meshes with federal law in this area. This record, to say the least, is not satisfactory for definitive treatment here.

Since the federal claims must be tried, and the state claim for alleged breach of the implied covenant relied upon by plaintiff in any event will involve little, if any, additional evidence, we remand that claim also for an explicit determination by the district court of its validity and merit in the light of California law.

III. DISCOVERY COSTS

As to the cross-appeal, we find no abuse of discretion on the part of the district court in refusing to tax against plaintiffs the costs that cross-appellants incurred in making copies of depositions and defense counsel's travel and sustenance expense in connection with depositions. The statute does not specifically address this problem, but defendants construe together the two sections touching upon it [54] as authorizing the award of the additional costs claimed. If this were to be assumed, the requested award still would be discretionary. In view of the determined invalidity of summary judgment on the **[**72]** principal issues of the case, however, the particular point has become moot for the present. Further consideration no doubt will be given by the district court to this and related questions in the new context in which they finally will be presented.

We have intended to express no view of the merits upon trial.

AFFIRMED as to the dismissal of all claims against Sherman and Satori and the pendent state claims against all defendants except for alleged breach of an implied covenant of good faith and fair dealing; otherwise REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

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[54] *28 U.S.C. §§ 1821*, ***1920 (1976)***.

Juneau Square Corp. v. First Wisconsin Nat'l Bank

United States District Court for the Eastern District of Wisconsin

July 31, 1979

Civ. A. No. 72-C-533

Reporter

475 F. Supp. 451 *; 1979 U.S. Dist. LEXIS 10700 **; 1979-2 Trade Cas. (CCH) P62,952; 4 Fed. R. Evid. Serv. (Callaghan) 1099

JUNEAU SQUARE CORP., et al., Plaintiffs, vs. FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al., Defendants.

Core Terms

plaintiffs', new trial, mortgage, prejudicial, instructions, witnesses, parties, closing argument, conspiracy, deposition, financing, restraint of trade, cross-examination, defendants', questions, instruct a jury, hearsay, motion for a new trial, foreclosure, unduly, juror, defense counsel, Sherman Act, excluding, reasons, alleged error, competitors, anti-trust, memorandum, exhibits

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

15 U.S.C.S. § 1 of the Sherman Act provides in relevant part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN2[] **Relief From Judgments, Motions for New Trials**

A timely motion for a new trial is addressed to the sound discretion of the trial court.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN3[] Relief From Judgments, Motions for New Trials

Fed. R. Civ. P. 61provides that: No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial unless refusal to take such action appears to the court inconsistent with substantial justice. The question of whether error is "harmless" is to be resolved in the context of the individual case. Where it appears that error in no way influenced jurors or had but a slight effect upon them, the verdict and judgment are to be affirmed. Under *rule 61*, a new trial should not be granted unless the court finds that refusal to take such action is inconsistent with substantial justice.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Sherman Act, Claims

In order to recover under the antitrust laws, a plaintiff must show "antitrust injury," that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Merely showing that one was a competitor of the defendants and was injured is not sufficient to show an antitrust violation under the Sherman Act. Plaintiffs must also establish an injury to competition. Evidence showing that "the effect upon competition in the market-place was substantially adverse" is also required.

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

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN5[] Jury Trials, Jury Instructions

It is fundamental error to give instructions which are hopelessly confusing and which fail "to provide even the barest legal guideposts to aid the jury in rationally reaching a decision."

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

Evidence > ... > Procedural Matters > Objections & Offers of Proof > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Timeliness

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN6[] Objections & Offers of Proof, Objections

Fed. R. Evid. Rule 103(a) provides: Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Evidence > ... > Lay Witnesses > Opinion Testimony > Helpfulness

Evidence > ... > Testimony > Lay Witnesses > General Overview

Evidence > ... > Lay Witnesses > Opinion Testimony > General Overview

Evidence > ... > Lay Witnesses > Opinion Testimony > Personal Perceptions

HN7[] **Opinion Testimony, Helpfulness**

In order to offer opinion testimony by lay witnesses, *Fed. R. Evid. 701* provides that the witness' opinion must be (1) based on personal knowledge; and (2) must be helpful to the trier of fact.

Evidence > ... > Examination > Cross-Examinations > General Overview

Evidence > ... > Testimony > Examination > General Overview

Evidence > Types of Evidence > Testimony > Presentation of Evidence

HN8[] **Examination, Cross-Examinations**

Fed. R. Evid. 611(a) provides: The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Counsel: [1]** George P. Kersten and E. Campion Kersten, Kersten & McKinnon, Milwaukee, Wis., for plaintiffs.

W. Donald McSweeney and John J. Voortman, Schiff, Hardin & Waite, Chicago, Ill., for First Wisconsin and Marshall-Michigan defendants.

James A. Urdan and William A. Stearns, Quarles & Brady, Milwaukee, Wis., for Aetna defendants.

Opinion by: WARREN

Opinion

[*454] MEMORANDUM AND ORDER

The plaintiffs commenced this action for treble damages under Section 4 of the Clayton Act, *15 U.S.C. § 15*, alleging that the defendants violated *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2* and *Section 7* of the Clayton Act, *15 U.S.C. § 18*.

Subsequently, summary judgment was granted in favor of the defendants on the claim arising under *Section 7* of the Clayton Act. The first jury trial in this case commenced on May 3, 1976. At the conclusion of plaintiffs' case, the Court granted defendants' motions for directed verdicts on the monopoly claims asserted under *Section 2* of the Sherman Act. The Court also granted the motion for directed verdict filed on behalf of the Aetna Casualty & Surety Company.

The remaining claims the restraint of trade violations asserted under *Section 1* of the Sherman **[**2]** Act were submitted to the **[*455]** jury at the close of the evidence. [1] The jury returned its verdict in favor of the plaintiffs on October 1, 1976. The jury found that the First Wisconsin defendants [2] and Marshall-Michigan Company, Inc. conspired to unreasonably restrain trade in the leasing, development, construction and operation of office rental space, and in the financing for the development of office buildings. The Aetna Life Insurance Company was the only defendant not found to be a member of the conspiracy. Judgment was duly entered on October 26, 1976.

[3]** Following the entry of judgment, various post-trial motions were filed with the Court. On July 29, 1977, after extensive examination and analysis of the facts and evidence presented, the Court granted the motion of the First Wisconsin defendants and defendant Marshall-Michigan Company, Inc. for a new trial in the interests of justice. The Court denied plaintiffs' motion for a new trial as to *Aetna Life Insurance Company. Juneau Square v. First Wisconsin National Bank of Milwaukee, 435 F. Supp. 1307 (E.D.Wis.1977)*.

On March 20, 1978, a second jury trial commenced which lasted until June 15, 1978. On June 19, 1978, the jury returned a verdict in favor of the defendants. The jury found that the defendants did not enter into a contract, combination, or conspiracy with any other person which unreasonably restrained trade or commerce in the leasing of office rental space in the central business district of Milwaukee. On November 3, 1978, the Court entered judgment in this action.

On November 13, 1978, plaintiffs filed a motion for a new trial on all issues pursuant to *Rule 59 of the Federal Rules of Civil Procedure*. In support of their motion for a new trial, plaintiffs allege that the **[**4]** Court committed numerous prejudicial errors with respect to jury instructions, evidentiary rulings and other trial management decisions.

In order to facilitate an orderly discussion of plaintiffs' grounds for a new trial, the Court will address these grounds, under the following groupings, as utilized by the plaintiffs:

(1) Alleged instructional errors.
(2) Alleged errors in rulings on evidence.
(3) Alleged errors in trial management.

HN2[] A timely motion for a new trial is addressed to the sound discretion of the trial court. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940)*; *Schybinger v. Interlake S.S. Co., 273 F.2d 307 (7th Cir. 1959)*.

HN3[] *Rule 61 of the Federal Rules of Civil Procedure* provides that:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice.

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[1] ***HN1***[] *Section 1* of the Sherman Act, *15 U.S.C. § 1* provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

[2] The First Wisconsin defendants consist of the First Wisconsin Corporation and its wholly-owned subsidiaries the First Wisconsin National Bank of Milwaukee, the First Wisconsin Development Corporation, and the Marshall-Wisconsin Company, Inc.

The question of whether error is "harmless" is to be resolved in the context of the individual case. Where it appears **[**5]** that error in no way influenced jurors or had but a slight effect upon them, the verdict and judgment are to be affirmed. *International Merger & Acquisition Consultants, Inc. v. Armac Enterprises, Inc., 531 F.2d 821 (7th Cir. 1976)*. See, also *Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*.

Thus, under *rule 61*, a new trial should not be granted unless the court finds that refusal to take such action is inconsistent with substantial justice. *International Merger & Acquisition Consultants, Inc. v. Armac Enterprises Inc., supra* ; *Everett v.* ***[*456]*** *Southern Pacific Co., 181 F.2d 58 (9th Cir. 1950)*.

ALLEGED INSTRUCTIONAL ERRORS

Plaintiffs argue that the Court erred in instructing the jury that the antitrust laws were enacted "for the protection of competition, not competitors" and that the plaintiffs were required to show actual injury to competition.

The following instruction on restraint of trade was given by the Court:

> The anti-trust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing **[**6]** of office rental in the central business district of the City of Milwaukee. (Tr. 10,578) [3]

The first sentence of this instruction is a direct quote from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, which adopted the phrase, "competition, not competitors" from *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The Court's instruction was not a misstatement of the law.

HN4[] In order to recover under the antitrust laws, a plaintiff must show "antitrust injury," that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra at 499, 97 S. Ct. at 697*.

Merely showing that one was a competitor of the defendants and was injured is not sufficient to show an antitrust violation under the Sherman Act. Plaintiffs must also establish an injury to competition. **[**7]** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*; *Magnus Petroleum Co., Inc. v. Skelly Oil Co., 599 F.2d 196 (7th Cir. 1979)*; *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977)*; *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc., 443 F. Supp. 639 (N.D.Fla.1977)*, *Aff'd, 594 F.2d 114 (5th Cir. 1979)*. As the court stated in *Magnus Petroleum Co., Inc. v. Skelly Oil Co., supra at 204*, evidence showing that "the effect upon competition in the market-place was substantially adverse" is also required.

Contrary to plaintiffs' assertions, this instruction did not add another element to be proved by plaintiffs. A reading of the instructions as a whole shows that the Court specifically set forth the three elements that plaintiffs were required to prove by a preponderance of the credible evidence. These elements were:

(1) that the defendants contracted, conspired or combined to restrain commerce;
(2) that such restraint was unreasonable;
(3) that as a direct and proximate result of such a conspiracy to restrain trade, the plaintiffs suffered an injury to their business or property. (Tr. 10,571-10,572)

The Court also instructed the jury as to the **[**8]** question of proof of harm to the general public immediately after the challenged instruction on competition. The Court stated that: "A restraint (of trade) is unreasonable if it tends or is reasonably calculated to prejudice the public interest." (Tr. 10,578)

Plaintiff also argues that they were deprived of any opportunity to argue to the jury with respect to the challenged instruction because the Court decided to insert this "competition, not competitor's" language from defendants' proposed instruction 19A after the close of final arguments.

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[3] Transcript citations, unless otherwise indicated, are to the transcript of the second trial which commenced on March 20, 1978.

At the beginning of the final day of argument, the Court informed the parties that it was withholding its decision of defendants' proposed instruction 19A and taking it under advisement. The Court gave serious consideration to the position of both parties and ultimately concluded that language **[*457]** from this instruction should be included in the final instructions given to the jury. Plaintiffs did not request that the Court rule on this proposed instruction prior to completion of their closing argument, although they did object to the instruction when the Court announced its decision.

The case cited by plaintiffs to support its position **[**9]** on this question, *Frederic P. Wiedersum Associates v. National Homes Construction Corp., 540 F.2d 62 (2d Cir. 1976)*, is clearly distinguishable from the facts of this action. In Wiedersum, the court refused to inform the parties of any of the instructions it intended to give the jury, even though defense counsel requested the court to do so. Certain defense contentions about issues in the case were rejected by the court during the trial, but the court then instructed the jury on these contentions. Furthermore, the court gave totally inconsistent and conflicting instructions and failed to winnow out the requested instructions which it intended to adopt from those which it intended to reject.

Under these circumstances, the Second Circuit Court of Appeals granted a new trial, noting that ***HN5***[] it is fundamental error to give instructions which are hopelessly confusing and which fail "to provide even the barest legal guideposts to aid the jury in rationally reaching a decision." *Id. at 66*, quoting *McNello v. John B. Kelly, Inc., 283 F.2d 96, 102 (2d Cir. 1960)*.

In the present case, the Court finds that its augmenting of the restraint of trade instruction after the close of final arguments **[**10]** did not fundamentally change the instruction or constitute prejudicial error requiring a new trial. See, *Garland v. Material Service Corp., 291 F.2d 861, 863 (7th Cir. 1961)*.

After careful consideration, the Court concludes that its restraint of trade instruction, taken in context, was not erroneous but a correct statement of the law. The addition of the "competition, not competitors" language after the close of final arguments did not constitute prejudicial error.

Plaintiffs contend that the Court erred in instructing the jury that it was irrelevant whether various acts of the defendants violated laws other than the antitrust laws. Plaintiffs argue that the wrongfulness of specific acts done to accomplish a trade restraint is relevant in evaluating the defendants' conduct to ascertain whether a conspiracy exists and to determine whether the restraint of trade is reasonable.

In its instructions, the Court advised the jurors:

> During the course of the trial reference has been made to acts on the part of the various defendants and other persons that the plaintiffs claim were done as a part of a conspiracy to restrain trade, so as to injure plaintiffs in their business or property. **[**11]** You are to consider these acts, if you find they were indeed done by the defendants only if you also find that they were done in the course of and in furtherance of a conspiracy to violate the anti-trust laws by unreasonably restraining trade. Whether or not these acts were violative of laws other than the anti-trust laws is irrelevant. If any of the defendants have committed any other wrongs and I do not suggest whether they have or have not, you should not consider the character of these acts under laws other than the anti-trust laws as I have defined and explained them in these instructions. (Tr. 10,586-10,587)

In this instruction, the Court explained to the jury that only those allegedly illegal acts done by the defendants in the course of and in furtherance of a conspiracy to violate the antitrust laws could be considered. Whether any of these acts also violated principles of tort law was not, in and of itself, determinative of an antitrust violation. Merely because a defendant's acts may have constituted a tort does not automatically make that defendant's acts violative of the Sherman Act.

This is what the Court instructed the jury. Such instruction was not erroneous.

[12]** Plaintiffs also argue that they were entitled to have this instruction on the illegality **[*458]** of defendants acts as part of their theory of the case. It is clear that plaintiffs are entitled to have their theory of the case presented to the jury. *Florists Nationwide Telephone Delivery Network v. Florists Telegraph Delivery Assn., 371 F.2d 263 (7th Cir. 1967)*.

However, the Court gave the substance of the parties theories when it outlined the contentions of each of the parties at the outset of the jury instructions. (Tr. 10,556) Plaintiffs also argued their theories to the jury regarding the defendants' allegedly illegal conduct during closing argument.

The Court's instructions were geared to guiding and aiding the jury in its evaluation of the vast amount of evidence presented. Plaintiffs' and defendants' theories of the case were set forth by the Court. Accordingly, the Court finds that it did not err in its instruction concerning the alleged illegal or unreasonable acts of the defendants.

Plaintiffs assert that the Court erred in failing to give plaintiffs' requested instruction 16 regarding unfair competition as a per se violation of the Sherman Act. Plaintiffs state that **[**13]** the per se illegality of using unfair and illegal methods to destroy a competitor is well-established in case law, citing *Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 (1st Cir. 1932)*; Cert. denied, *286 U.S. 552, 52 S. Ct. 503, 76 L. Ed. 1288 (1932)* and related cases.

One problem with plaintiffs' position is that the Court considered and rejected plaintiffs' per se theories in the first trial and no new judicial authority has been presented to change the Court's earlier decision. In its prior decision, the Court explained that the per se theory announced in Pick-Barth has never been approved by the Supreme Court nor has it gained acceptance in most circuits. The Court also pointed out that, in light of *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974)*, there is some doubt as to whether the Pick-Barth rule is still good law. See, *Juneau Square v. First Wisconsin National Bank of Milwaukee, supra at 1319*.

Recent case law has also criticized the per se rule set forth in Pick-Barth. See, *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256 (8th Cir. 1978)*; *Northwest Power Products, Inc. v. Omark Industries, Inc., 576 **[**14]** F.2d 83 (5th Cir. 1978)*; *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc., supra.*

Moreover, the Supreme Court, in its recent decision in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, expressed reluctance to extend per se rules under *Section 1* of the Sherman Act. In light of the foregoing, the Court finds that it did not err in refusing to instruct the jury about unfair competition as a per se violation of the Sherman Act.

Plaintiffs argue that Aetna should have been included in the new trial and that the Court should not have instructed the jury that "you may not find that Aetna Life Insurance Company was a member of the alleged conspiracy." (Tr. 10,575) Plaintiffs state they should have been permitted to prove and argue that Aetna had been used and manipulated by the other defendants. The Court precluded this evidence by written order of March 22, 1978 on the ground that such an assertion would require an amendment of the pleadings.

Plaintiffs contend that their third amended complaint was improperly construed by the Court, "a fair reading of which leaves ample room for proof of control or manipulation of Aetna by the defendants." **[**15]** (Plaintiffs' brief in support of motion for a new trial. p. 8).

A reading of this complaint does not show allegations of use and manipulation of Aetna. Furthermore, to allow plaintiffs leave to amend this complaint after the commencement of the second trial and over five years after the initiation of this action would not have served the interests of justice.

With respect to the exclusion of Aetna from the second trial, *Rule 59(a) of the Federal Rules of Civil Procedure* specifically authorizes the granting of a new trial **[*459]** as to "all or any of the parties and on all or part of the issues."

The jury in the first trial found that Aetna was not a member of the conspiracy. In denying plaintiffs' motion for a new trial with respect to Aetna, the Court found that the verdict was not against the weight of the evidence. The Court noted, among other considerations, that the record contained no evidence of any communication between Aetna and the First Wisconsin defendants during the relevant period, much less an agreement to restrain competition and that there was no evidence indicating that Aetna was even aware of First Wisconsin's interest in the development during much of the **[**16]** relevant period. The Court also found that there were substantial business justifications for Aetna's subsequent refusal to continue financing the project. See, *Juneau Square v. First Wis. National Bank of Milwaukee, supra at 1326*.

The Court's rulings on evidence and its instruction relating to Aetna were in keeping with the Court's prior decision. The Court allowed plaintiffs to introduce certain evidence pertaining to Aetna but refused to permit plaintiffs to relitigate Aetna's involvement in the alleged conspiracy.

The Court concludes that it did not err in instructing the jury regarding Aetna and in precluding proof and argument that Aetna was controlled or manipulated by the other defendants.

Plaintiffs challenge the Court's mortgage foreclosure law instructions, alleging that it was erroneous in its overall impact and failed to provide the jury with a fair and accurate standard for evaluating the conduct of the parties.

Plaintiffs specifically object to the particular aspects of the Court's instruction dealing with the operation of acceleration clauses and extensions of time to cure defaults. Plaintiffs also assert that the instruction ignored the equitable character of the **[**17]** procedure and the considerable latitude vested in the Court in foreclosure actions.

The Court instructed the jury in part as follows:

> The general purpose of a mortgage is to provide a security for payment of a debt or performance of an obligation. Thus, if a borrower is not able to pay the amounts due, the lender can look to the value of the property mortgaged to obtain payment. The law permits mortgages to be bought and sold and this right to transfer ownership of a mortgage is also important to its value. When a mortgage is in default, several things may occur. Holders of defaulted mortgages may grant the property owner additional time in which to discharge his obligations under the mortgage, but such extensions are entirely voluntary, are not required by law and may be made subject to any conditions the mortgage holder wishes to impose in order to protect its interest. If such an agreement is not made, the holder of the mortgage must invoke the aid of the Court to enforce the provision of it, of this mortgage agreement. The mortgagee is authorized by law to foreclose on that mortgage and requires the property owner to either one, pay the full amount of the debt immediately **[**18]** if the mortgage so provides or two, relinquish to the holder of the mortgage all rights in the mortgaged property.
> If the failure to pay real estate taxes constitutes a default under the terms of a mortgage, and the mortgagee is entitled to payment of the full amount of the mortgage upon default, payment of the real estate taxes would not bar the mortgagee from maintaining a foreclosure action. A foreclosure suit is a legal proceeding supervised by a court. Rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and the debtor. If the judge finds that the property owner has defaulted on the mortgage, he will enter judgment in favor of the mortgage holder. The law allows the party against whom the judgment was entered to redeem his property by paying the amount of the judgment within one year. If the property is not redeemed, the mortgage holder may then have the real estate sold at a sheriff's sale in order to recover the debt due it. (Tr. 10,587-88)

[*460] The statement that extensions of time to discharge an obligation under a mortgage are voluntary and "not required by law" is not erroneous. Such extensions are **[**19]** not required by law and may, as the Court stated, be made subject to any conditions the mortgage holder wishes to impose. The operation of acceleration clauses was also correctly presented to the jury.

Contrary to plaintiff's contentions, the Court did not ignore the equitable considerations in a foreclosure action. Rather, the Court stressed that "rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and debtor." (Tr. 10,588)

After carefully examining its instruction on mortgage foreclosure law, the Court concludes that the instructions, as a whole, accurately and unbiasedly set forth the applicable law. The instruction provided the jury with a fair and accurate standard for evaluating the conduct of the parties.

Plaintiffs argue that the Court erred by unduly emphasizing their burden of proof in giving the "equal hypothesis" instruction and by thereafter giving the "inference upon inference" instruction.

The following "equal hypothesis" instruction was stated to the jury:

> If from the evidence you cannot determine whether the allegations have been proved or not proved then your verdict should be for the defendants. (Tr. 10,560)

[20]** Plaintiff relies on *South East Coal Co. v. Consolidated Coal Co., 434 F.2d 767 (6th Cir. 1970)* to support its position that this instruction was redundant, confusing and should have been omitted. The district court in the South East Coal Co. case did not give the equal hypothesis instruction and the defendant appealed on this and other grounds. The court of appeals stated that the trial judge should have directed a verdict if he believed that the evidence on both sides was equal in weight. The court then explained:

> It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contraproposition, the plaintiff has not met his burden of proof. *Id. at 777*.

The Court finds the "equal hypothesis" instruction was not erroneous.

With respect to the "inference upon inference" instruction, the Court told the jurors:

> A "reasonable inference" is defined as a process of reasoning whereby from the facts otherwise admitted **[**21]** or established by the evidence in the light of your common knowledge and experience, a reasonable and logical conclusion may be drawn that a certain fact is true. A reasonable inference is, therefore, to be thoroughly distinguished from a mere guess or conjecture. The law does not permit speculation. Moreover, on the basis solely of one inference so drawn a further inference may not be drawn.
> In other words, you may not pile inference on inference, but may draw an inference only from facts or circumstances which you find to have been established by a preponderance of the evidence. (Tr. 10,561-62)

Taken in context, this instruction was not erroneous. It explained to the jury the distinction between reasonable inferences and mere speculation and correctly stated that inferences must be drawn from a factual basis. Plaintiffs' motion for a new trial on this ground must be denied.

ALLEGED ERRORS IN RULINGS ON EVIDENCE

Plaintiffs challenge various evidentiary rulings of the Court and assert that these alleged errors necessitate the granting of a new trial.

HN6[] *Rule 103(a) of the Federal Rules of Evidence* provides:

> **[*461]** Error may not be predicated upon a ruling which **[**22]** admits or excludes evidence unless a substantial right of the party is affected, and
> (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Plaintiffs state that the Court erred in prohibiting plaintiff Jack Moertl, Jack Cisco, and Richard Krauss from testifying to the reasons given by sources of financing for declining to finance Juneau Square East. Plaintiffs argue that Moertl should have been allowed to testify to the reasons given to him by Mr. Tishmann for the loss of the Cooper-Horwitz financing and to the reasons given by Cisco for loss of the New York Life Insurance Co. (New York Life) financing. According to plaintiffs, Krauss should have been permitted to testify to the reasons given him by Faulkner of New York Life for the loss of the New York Life financing and similar testimony by Cisco should also have been allowed.

[23]** One of the primary reasons for the Court's decision to grant a new trial in this case in 1977 was that hearsay evidence prejudicial to the defendants had erroneously been admitted into evidence over defendants' strenuous objections. In particular, the Court cited the fact that Moertl was permitted to testify in the first trial about a conversation he had with Cisco about the loss of New York Life financing.

In this testimony, Moertl characterized a conversation he had with Cisco who was repeating a conversation he had with some unidentified person. This testimony clearly involved multiple levels of hearsay and was properly excluded by the Court in the second trial.

The testimony of Krauss and Cisco similarly involved conversations with persons who were repeating statements made to them by other sources. This is clearly hearsay and inadmissible. The fact, as plaintiffs assert, that each of the proposed witnesses were either spokesmen for the financial institutions involved or received the information from such spokesmen does not change the fact that they were repeating information received from another who received it from still another source.

This testimony sought to be introduced **[**24]** was clearly hearsay and would have been highly prejudicial to the defendants. The Court properly excluded this proposed testimony.

Contrary to plaintiffs' contentions, the Court did not require witnesses to change facts or testimony to accommodate any unrealistic sequence of events caused by the Court's excluding the above-described testimony. No error was committed in this regard.

Plaintiffs argue that Warren Stringer should have been allowed to give his opinion about the validity of Metropolitan Life Insurance Company's (Metropolitan) expressed reasons for refusing to finance Juneau Square East. Plaintiffs offered to prove through Stringer that, after several months of work on a financing package for Juneau Square, he received a letter setting forth "stereo-typed boiler plate" reasons for the turndown of the loan. Stringer stated that there was some other reason for the turndown, but he did not know what it was. However, he said the reason given "was not the genuine reason." (Tr. 2838-39)

Rules 701 and *702 of the Federal Rules of Evidence* set forth criteria for the lay opinion and expert opinion testimony. ***HN7***[] In order to offer opinion testimony by lay witnesses, *rule 701* provides **[**25]** that the witness' opinion must be (1) based on personal knowledge; and (2) must be helpful to the trier of fact. See Weinstein, Evidence P 701(02) p. 701-10 (1978).

[*462] Stringer's proposed testimony did not meet this criteria and, therefore, was properly excluded by the Court.

Plaintiffs challenge various evidentiary rulings relating to Marshall-Michigan, including the exclusion of various portions of the depositions of Donald E. Boerema, Charles Pinto, and William Clark.

The Court has examined the trial transcript and its prior rulings, excluding certain sections of these depositions from the trial. Many of the sections excluded contained hearsay, speculation or lacked adequate foundation. The Court finds that these portions of the deposition testimony of Boerema, Pinto and Clark were properly excluded from the trial.

Plaintiffs challenge the Court's ruling on the Marshall-Michigan letter to Juneau Square tenants. As previously determined, whether an action violates principles of tort law is not, in and of itself, proof of a violation of ***antitrust law***. The Court finds that it did not err in failing to instruct the jury that the letter sent by James Huber on behalf of **[**26]** Marshall-Michigan to Juneau Square was tortious.

Furthermore, the Court was not inconsistent in deciding that Judge Robert Landry's decision should be, excluded and in refusing to strike Huber's testimony regarding his rationale for sending the letter to the tenants. (Tr. 7856-61) Judge Landry's dicta regarding the procedure utilized by Marshall-Michigan was not relevant to this action and was prejudicial to the defendants. On the other hand, the Court reaffirms its position that Huber's thoughts and intentions at the time he drafted the tenant's letter is relevant with respect to his motivation. (See Tr. 7861)

The Court concludes that it did not err in its rulings regarding the Marshall-Michigan letter to tenants.

Plaintiffs assert that the Court's restrictions on plaintiffs' cross examination of John Sann was extremely prejudicial. Certain questions about documents were excluded by the Court because the witness had never seen the documents, and because questions about the documents were not raised during direct examination. (See *Rule 611(b) of the Federal Rules of Evidence.*)

After due consideration, the Court concludes that it did not err in setting certain limitations on the **[**27]** cross examination of Mr. Sann.

The Court also concludes that it was not in error to prevent plaintiff Moertl from testifying that the reason given to him by Aetna's attorney, James Urdan, for Aetna's entry of foreclosure judgment on January 4, 1972 was that Marshall-Michigan had entered its judgment the preceding day. Urdan could have been called as a witness by plaintiffs. In addition, the question of Aetna's decision to enter foreclosure judgment was not raised by plaintiffs when Urdan testified on behalf of the defendants. Finally, Aetna's rationale for entering its foreclosure judgment was not relevant to the issues in the second trial.

Plaintiffs contend that they should have been allowed to introduce evidence on the circumstances for the formation of Wil-Ten Associates. The Court considered plaintiffs' arguments at trial and declined to admit the evidence, stating that the evidence did not have sufficient probative value "that would justify the influence for which plaintiff would obviously be offering it." (Tr. 608)

The Court has reexamined its decision and finds that it did not err in excluding these prejudicial statements about the rational for the formation of Wil-Ten Associates.

[28]** The Court excluded plaintiffs' exhibits 491 and 533, which listed First Wisconsin's real estate holdings and Northwestern Mutual Life Insurance Company's (NML) real estate holdings in Milwaukee's central business district, respectively.

Plaintiffs argue that the size and power of these companies in the relevant market had an obvious bearing on the existence of a conspiracy and on the issue of the reasonableness of the restraint of trade. The **[*463]** Court is not persuaded by plaintiffs' position. The fact that First Wisconsin and NML are large corporations with extensive real estate holdings in the central business district does not, of itself, support plaintiffs' allegations of conspiracy.

After careful consideration of the evidence and arguments of the parties, the Court finds that these exhibits were properly excluded. Even though the exhibits were inadmissible, plaintiffs were not foreclosed from all inquiry about these property listings and the relationship between NML and First Wisconsin. Plaintiffs had an opportunity to examine Richard Holscher on the First Wisconsin's real estate holdings (Tr. 5378-71) and Donald Mundt on the NML listings (Tr. 3893-96). Other exhibits **[**29]** pertaining to NML were introduced into evidence. See Px 523-532 and 537-544.

The Court, therefore, concludes that it did not err in excluding the exhibits listing the real estate holdings of First Wisconsin and NML.

Plaintiffs challenge various Court rulings relating to the New York Life financing. Specifically, plaintiffs state the Court erred in (1) excluding certain testimony of Moertl, Krauss and Cisco; (2) in its ruling on deposition and prior trial testimony of New York Life witnesses; (3) in excluding certain questioning of Edward Rose; (4) in excluding from evidence portions of plaintiffs' exhibit 408 and the handwritten notations on plaintiffs' exhibits 383 and 419; and (5) its evidentiary rulings relating to First Wisconsin's credit report to New York Life.

The Court has previously concluded that it did not err in excluding the testimony of Moertl, Krauss and Cisco regarding the alleged reasons for New York Life's turndown of the Juneau Square loan.

With respect to the deposition and prior testimony of the New York Life witnesses, the Court finds it did not commit prejudicial error warranting a new trial in refusing to permit certain testimony. To advise the jury that **[**30]** much of the questioning of the New York Life witnesses during their depositions was conducted by David Beckwith of Foley & Lardner would have been unduly prejudicial, in addition to being irrelevant to the issues in this action. The Court had a similar problem with plaintiffs' exhibit 422, the Martindale-Hubbell listing showing that Foley & Lardner represented New York Life as of 1971.

The Court concludes its rulings on these questions were not erroneous so as to require the granting of a new trial.

Plaintiffs sought to impeach Rose's testimony to the effect that First Wisconsin's unfavorable credit report to New York Life was not a factor in the May 19, 1971 decision of New York Life to refuse financing and had not been discussed at this committee meeting. Handwritten notations on plaintiffs' exhibit 419, the committee brief of the meeting, indicate that the credit report had been discussed.

In his testimony, Rose stated he did not know who made the handwritten notations or when they were made (Tr. 8634-8639). In addition, the handwriting had not previously been identified. The Court therefore concluded that Rose could not be questioned on the contents of these notations.

Upon **[**31]** reconsideration, the Court finds that this ruling was not erroneous and plaintiffs are not entitled to a new trial on this ground.

The Court properly excluded the handwritten notations on plaintiffs' exhibits 383 and 419. The requirements of the business records exception to the hearsay rule, *Rule 803(6) of the Federal Rules of Evidence*, were not met in this instance. No testimony was presented about the identity of the writer of the notes nor did anyone testify that these notations were made in the course of New York Life's regularly conducted business and were a regular practice of the company.

With respect to plaintiffs' exhibit 408, the Lutz-Duncan memorandum, this memorandum was to be utilized to support plaintiffs' theory that the First Wisconsin defendants were attempting to interfere with the New York Life loan application.

[*464] In the first trial in this action, the Court granted a new trial in part because of the hearsay evidence of a highly prejudicial nature contained in this memorandum. The Court stated that several levels of hearsay were found in the memorandum and concluded that the "lack of trustworthiness and the prejudicial nature of this memorandum are **[**32]** self-evident." *Juneau Square Corp. v. First Wis. Nat'l. Bank, supra at 1324*.

After careful consideration of plaintiffs' arguments, the Court declines to change its earlier ruling. The Court finds that the memorandum contains prejudicial hearsay and was properly excluded by the Court.

According to plaintiffs, the basic accusation made in First Wisconsin's credit report to New York Life was that First Wisconsin was involved in the construction lending on Juneau Square and found that proceeds were not being used as indicated. Three witnesses were offered by defendants to justify this statement: Austin Lett, John Dickens and Alfred Little, author of the report. Only Little testified in person at the trial.

Dickens's prior trial testimony was read to the jury because he was unavailable as a witness pursuant to *Rule 804(a)(4) of the Federal Rules of Evidence* (Tr. 6412-16). Plaintiffs do not challenge the propriety of the Court's decision on this ground.

However, plaintiffs state that the Court should have required that the entire deposition testimony of Lett be read to the jury.

HN8[] *Rule 611(a) of the Federal Rules of Evidence* provides:

> The court shall exercise reasonable control over **[**33]** the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The Court exercised its discretion and allowed the parties to decide their trial tactics and the best way to present their evidence. The Court did not err in refusing to order that the entire Lett deposition be read into evidence in sequence.

Plaintiffs assert that they were allowed inadequate time to cross-examine Little and that the Court improperly quashed their subpoena of Little. Little, who had been waiting to be called to testify for two days, was finally called to the stand on Friday, May 26, 1978 at 4:26 P.M. The Court split the remaining time between plaintiffs and defendants.

During their cross-examination, plaintiffs were able to ascertain the source of Little's belief that Juneau Square had used funds for purposes other than had been indicated to the bank. Plaintiffs also were able to elicit the admission that if this underlying report was incorrect, then his statement to New York Life was **[**34]** also incorrect.

Plaintiffs then subpoenaed Little at the close of his testimony and defendants moved to quash the subpoena.

In ruling on this motion, the Court noted that the time constraints were, in part, necessitated by the extensive cross-examination of a prior witness, and that the Court had indicated to plaintiffs that they should consider curtailing this cross-examination. Nevertheless, the cross-examination of Sann continued until 4:25 P.M. (Tr. 8179).

Prior to deciding the motion to quash, the Court questioned Little, a Florida resident, who indicated it would be "very inconvenient" for him to return the following week. The witness also professed an inability to add anything further to the statements he had already made. (Tr. 8174-8177). In light of all these factors and the Court's uncertainty as to the validity of the service of the subpoena, the Court granted the motion to quash the subpoena (Tr. 8179-80).

After careful consideration, the Court now finds that plaintiffs were not unduly prejudiced by the time limitations and that the Court did not err in quashing plaintiffs' subpoena.

[*465] ALLEGED ERRORS IN TRIAL MANAGEMENT

Plaintiffs contend that certain other **[**35]** decisions of the Court were highly prejudicial to the plaintiffs and necessitate the granting of a new trial in the interests of justice. Specifically, plaintiffs list the Court's time restrictions on the trial and closing arguments, the limitations placed on the cross-examination of certain witnesses and the alleged misconduct of defense counsel and defense witness Harold Shapiro.

A. Time Restrictions

The second trial in this case commenced on Monday, March 20, 1978, at 2:00 P.M. Court recessed for the day at 6:45 P.M., after a jury of six plus four alternates had been selected. The Court blocked out some twelve weeks of its trial calendar for this trial. Plaintiffs had thirty-four days of actual trial time and the defendants had twenty days of trial time. Plaintiffs were allotted five hours for closing argument, including rebuttal, while the defendants had four hours for their closing argument. The plaintiffs request for a minimum total of six hours for argument was denied by the Court. (Tr. 10,149)

Plaintiffs assert that these time constraints denied them the opportunity to present their claims completely and fairly. Plaintiffs point out that defendants were permitted extensive **[**36]** cross-examination of witnesses called by plaintiffs but identified with the defendants and that they were required to read irrelevant portions of depositions counterdesignated by the defendants. In addition, defendants were allegedly permitted extensive voir dire. In the opinion of plaintiffs, all of this combined to further shorten their already too limited trial time.

The Court was very aware of the complexity of the case and the great quantity of evidence to be presented. These factors were taken into consideration in blocking out some three months for the trial. Two days were set aside for closing arguments.

The Court also recognized its responsibility to parties to other litigation pending before the Court. Considering the crowded dockets of the courts, the Court has a responsibility to exercise reasonable control over the amount of trial time allotted to litigants. Affording parties unlimited amounts of trial time prejudices other litigants before the Court who must then wait extra months before their cases come to trial. These factors must also be considered and were considered by the Court.

During the entire three months of trial, the Court handled its regular schedule of **[**37]** status reports, pretrial and final pretrial conferences, arraignments, and sentencings. Hearings on temporary restraining orders and preliminary injunctions were also scheduled as the need arose. To allow plaintiffs additional time for closing arguments would have cut into the Court's time allotted to other pending cases or necessitated the extension of closing argument to a third day. Under the Court's time schedule, each side's argument could be presented in one trial day. The Court did not err in restricting time for closing arguments and in setting very reasonable time limitations for the trial.

Furthermore, the Court finds that it did not err in requiring plaintiffs to read deposition designations and the counterdesignations by the defendants or in permitting defendants to conduct voir dires on revisions of plaintiffs' damage exhibit. Such decisions are discretionary with the Court and, in these instances, were designed to further the orderly presentation of the evidence. These decisions were not prejudicial to plaintiffs so as to necessitate a new trial.

In summary, the Court is not persuaded by plaintiffs' arguments that the time constraints prevented plaintiffs from fairly **[**38]** and fully presenting their case. The Court set aside a substantial amount of time for this trial with minimum interruptions. The amount of time was not unreasonably short, and the five hours allotted to plaintiffs for closing arguments did not unfairly prejudice the plaintiffs.

Therefore, the Court finds that the time constraints placed on the parties were reasonable **[*466]** in light of all the facts and circumstances and did not deny plaintiffs a fair trial in this case.

B. Plaintiffs' Cross-Examination of Witnesses

Plaintiffs also assert that they were unduly prejudiced when the Court limited the cross-examination of James Huber and George F. Kasten. Plaintiffs sought to question Huber about a matter outside the scope of his direct examination and the Court properly excluded this line of questioning. *Rule 611 of the Federal Rules of Evidence.* (See Tr. 7663-7672)

Plaintiffs wanted to confront Kasten with the deposition testimony of Holscher which allegedly contradicted Kasten's testimony. The Court did permit plaintiff to introduce the Holscher deposition excerpt later in the day at the end of Kasten's testimony. Under the circumstances, the Court finds that plaintiffs were **[**39]** not unduly prejudiced so as to be entitled to a new trial on this issue.

C. Alleged Misconduct of Witness and Defense Counsel

Plaintiffs assert that the alleged misconduct of defense counsel, Peter Baugher, and of Harold Shapiro, a witness identified with the defendants, took place when candy was obtained from a juror while the Court, court staff, plaintiffs' counsel and the other defense counsel were engaged in conferences at the side bar.

According to plaintiff John Spoden, he personally observed Baugher obtaining candy or other snack food from a juror on two separate occasions during the trial. The first incident occurred when plaintiff Moertl was testifying and the second while Shapiro was testifying on April 12, 1978. Spoden also observed on April 12, 1978, that Shapiro made comments to the jury and obtained candy from a juror. (Spoden Affid. P 2.)

When the Court was informed of these activities, the Court indicated it would instruct the jury about the candy problem. The Court also admonished Shapiro not to take any additional candy from any juror. (Tr. 2478)

Plaintiffs' counsel at the time asked that Shapiro be "admonished or requested from here on in not to do any other **[**40]** activity of that type" and that the bailiff monitor the jury box area during sidebar conferences. (Tr. 2476) Plaintiffs did not move for a mistrial at the time.

Plaintiffs state in their reply brief that plaintiffs' counsel did not become aware until after the trial that one of the defense counsel had repeatedly obtained candy from a juror. Had they known about this, plaintiffs assert, they would have asked for a mistrial or public admonishment of defense counsel.

In his affidavit, however, plaintiff Spoden states he observed defense counsel taking candy from a juror on two occasions, the last on April 12, 1978. Thus, plaintiffs had notice of defense counsel's activities at the time the Court instructed the jury about this type of conduct.

The Court did not condone these occurrences but, instead, took steps to correct the problem. Moreover, the Court finds that these occurrences were not unduly prejudicial to plaintiffs and do not alone warrant the granting of a new trial.

D. Other Alleged Prejudicial Errors

Plaintiffs also cite in their brief several other errors allegedly committed by the Court during the presentation of evidence. With respect to the testimony of James Liek, **[**41]** the Court finds that his testimony was admissible and of probative value.

The Court also did not erroneously rule and comment upon plaintiffs' counsel's presentation or upon the reference to Arthur Anderson in the plaintiffs' damage presentation. Nor did the Court attempt to enhance the credibility of certain defense witnesses by asking friendly and rehabilitating questions. Rather, the Court's questions were designed to obtain clarification of issues or to elicit further explanation of a particular point.

Plaintiffs further assert that the exclusion of plaintiffs Spoden and Moertl **[*467]** and their wives from the courtroom during the cross-examination of defense witness Huber was unduly prejudicial and erroneously suggested to the jury that these plaintiffs had engaged in some misconduct.

The Court is not persuaded by this argument. Plaintiffs Moertl and Spoden were only excluded for the few hours of the cross-examination of Huber because they were to be called as rebuttal witnesses and might be testifying as to the same transaction as Huber. Moreover, these plaintiffs were only excluded after the Court granted plaintiffs' motion to exclude Sann from the courtroom during the **[**42]** balance of Huber's testimony. (Tr. 7647-7651) Therefore, plaintiffs' motion for a new trial on this ground is denied.

Contrary to plaintiffs' contentions, the Court did not take an unduly restrictive view of the business records exception to the hearsay rule and other rules of evidence to the detriment of plaintiffs. Rather, the Court properly applied the rules of evidence fairly and impartially during the course of the trial.

In their post trial motion, plaintiffs also allege other errors warranting a new trial, although these grounds were not specifically addressed in their brief. Plaintiffs allege that defendants' attorneys, in their opening statement and closing argument, made numerous erroneous assertions of law and fact not supported by the record, thereby substantially prejudicing plaintiffs. The Court has examined the record and finds that the defendants' opening statement and closing argument to the jury were not prejudicial to the rights of plaintiffs.

With respect to the other grounds for a new trial, the Court has considered plaintiffs' arguments and finds that no error prejudicing the rights of the plaintiffs was committed.

In conclusion, the Court finds, after careful **[**43]** examination, that the alleged errors in the trial of this action with respect to jury instructions, evidentiary rulings, and other trial management decisions, were basically fair to both sides and were not unduly prejudicial to plaintiffs so as to require the granting of a new trial in the interests of justice. Moreover, the Court is convinced that the cumulative effect of the trial time restrictions and the alleged errors of the Court are not of sufficient substance and magnitude to warrant ordering a new trial.

Ultimately, the Court has the duty to see that there is no miscarriage of justice. Only if the Court is convinced that there has been, should it set aside the jury's verdict.

In this case, the Court has exhaustively examined the testimony and evidence presented and has carefully considered the arguments of plaintiffs in support of their motion for a new trial. In the final analysis, the Court finds that no miscarriage of justice occurred and that the interests of justice are served by upholding the jury's verdict in this action. Accordingly, the Court hereby orders that plaintiffs' motion for a new trial must be and is hereby denied.

Mannington Mills, Inc. v. Congoleum Indus.

United States Court of Appeals for the Third Circuit

June 5, 1979, Argued ; August 1, 1979, Decided

No. 78-2431

Reporter
610 F.2d 1059 *; 1979 U.S. App. LEXIS 12782 **; 203 U.S.P.Q. (BNA) 81 ***; 1979-2 Trade Cas. (CCH) P62,790

MANNINGTON MILLS, INC., Appellant v. CONGOLEUM INDUSTRIES, INC., Appellee

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (D.C. Civil No. 74-1668)

Core Terms

license, patent, licensee, manufacture, antitrust, sales, license agreement, rights, patentee, infringement, discovery, termination, district court, favored, letter agreement, conspiracy, royalty, antitrust claim, foreign country, monopoly, terms, foreign patent, restrictions, settlement, domestic, summary judgment, Sherman Act, customers, documents, invention

LexisNexis® Headnotes

Contracts Law > Contract Interpretation > General Overview

HN1[] **Contracts Law, Contract Interpretation**

Where separate writings are made as part of a single transaction relating to the same subject matter, they may be read together as one agreement, and where the interdependence between the two documents is strong, the absence of an express incorporation clause is not decisive.

Patent Law > Statutory Bars > Abandonment & Forfeiture Bar > Abandonment

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

Patent Law > ... > Defenses > Estoppel & Laches > Elements

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

HN2[] **Abandonment & Forfeiture Bar, Abandonment**

In order to establish a license by estoppel, four elements must be proven: (1) infringement; (2) knowledge by the patent owner of the infringement; (3) conduct of the patent owner which misleads the infringer into believing that the patent owner has abandoned his patent or acquiesced in the infringement; and (4) reliance by the infringer on such conduct.

Patent Law > ... > Defenses > Estoppel & Laches > Elements

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

HN3[] **Estoppel & Laches, Elements**

A patentee has no duty to bring an action against an alleged infringer during the pendency of another infringement action on the same patent, and when the infringer has notice of the pending action, he may not rely upon any resulting delay as a basis for a claim of estoppel.

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

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

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

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

When a non-patentee manufacturer agrees with one or more of its dealers or distributors to terminate a competing distributor, that agreement is subject to antitrust scrutiny.

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

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

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be. When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

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

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

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

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

HN6[] **Practices Governed by Per Se Rule, Boycotts**

Where the purpose and effect of a non-patentee manufacturer's agreement with one or more of its dealers or distributors to terminate a competing distributor is to fix prices or to enforce a group boycott, the agreement is per se illegal. In other cases, rule of reason analysis may be appropriate.

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

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

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

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN7[] **Ownership & Transfer of Rights, Assignments**

The grant of a patent of invention under *35 U.S.C.S. § 154* confers upon the successful patentee the right to exclude others from making, using, or selling the invention throughout the United States for a term of 17 years. *35 U.S.C.S. § 154*. The purpose of that grant of a limited monopoly is to provide an incentive for private enterprise to devote resources to innovative research, to make the investments required to put new inventions into practice, and to make the benefits of the invention available to a wider public.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

Where a license restriction results primarily in benefits for the licensees rather than the patentee, the anticompetitive restriction cannot be justified as a subsidy for the patentee's inventive activity. In such cases, there is no sound reason to immunize the patentee's conduct from antitrust scrutiny.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN9[] **Ownership & Transfer of Rights, Licenses**

A patentee's termination of a licensee, in concert with competing licensees, is not entitled to an antitrust exemption.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN10[] **Private Actions, Remedies**

Summary judgment in antitrust cases is not favored. It follows that the grant of summary judgment before an antitrust plaintiff has been given a full opportunity for discovery on his claim may be reversible error.

Counsel: Frederick W. Rose, Newark, N. J., Michael M. Maney, Michael Winger (argued), Robert M. Hayes, New York City, Richard T. Laughlin, Kearny, N. J., for appellee; Young, Rose & Millspaugh, Newark, N. J., Sullivan & Cromwell, New York City, of counsel.

John N. Bain, Carella, Bain, Gilfillan & Rhodes, Newark, N. J., Norman Polovoy (argued), Joseph M. Fairbanks, Weinberg & Green, Baltimore, Md., for appellant.

Judges: Before ALDISERT, GIBBONS and VAN DUSEN, Circuit Judges.

Opinion by: GIBBONS

Opinion

[*83]** **[*1061]** OPINION OF THE COURT

Plaintiff Mannington Mills, Inc. (Mannington) appeals from a final judgment (1) dismissing, after a full trial to the court, its contractual and equitable claims to sales licenses under certain foreign patents held by defendant Congoleum Corporation (Congoleum), and (2) granting summary judgment on seven counts of its amended complaint sounding in antitrust. Only two counts of the antitrust claim are pressed on this appeal. We affirm the district court's dismissal of Mannington's license claims, and the grant of summary judgment on its claim that **[**2]** Congoleum arbitrarily and discriminatorily denied it access to unpatented know how in violation of § 2 of the Sherman Act. We think, however, that Mannington's allegation that Congoleum conspired with certain of its foreign licensees to terminate Mannington's foreign sales licenses states a claim on which relief may be granted under § 1 of the Sherman Act. Because Mannington has not yet had an adequate opportunity to conduct discovery on the factual issues relevant to that allegation, we reverse the grant of summary judgment on the conspiracy claim. [1]

I. FACTS

The facts are stated here as found by the district court. [2] Mannington is a New Jersey corporation which has for a number of years manufactured chemically embossed **[**3]** vinyl floor covering at a plant in Salem, New Jersey. Congoleum also manufactures chemically embossed vinyl tile. Prior to 1966, chemically embossed vinyl tile was manufactured and sold in the United States and foreign countries by Congoleum, Mannington, and other companies, including the Ruberoid Corporation (now GAF Corporation) and the Armstrong Cork Co. In that year two United States patents covering the manufacture and use of embossed vinyl products were issued to Congoleum, which immediately commenced infringement actions against Mannington, Armstrong and Ruberoid. Congoleum now holds similar patents in 26 foreign countries.

Some months after the filing of its infringement action Congoleum sent to Mannington a draft License Agreement and Litigation Settlement. Serious settlement negotiations began in the spring of 1968. In order to protect its competitive position as against any firms subsequently **[**4]** licensed under the Congoleum patents, Mannington sought from the outset to include in the proposed license agreement a most favored licensee clause. Congoleum's proposed second draft of the domestic License Agreement contained such a clause, which Mannington redrafted in the form which appeared in the executed agreement. The parties simultaneously negotiated a separate Letter Agreement concerning the terms of additional licenses from Congoleum to Mannington to sell the patented product in foreign countries. A preliminary draft of that agreement was submitted to Mannington in April, 1968, and in May, Congoleum informed Mannington of those countries in which it would be licensed to sell.

On May 21 and 22, 1968, Congoleum and Mannington respectively executed three agreements in settlement of the pending litigation: the License Agreement and Litigation Settlement (License Agreement), a Letter Agreement (Letter Agreement) regarding Mannington's license rights in foreign **[*1062]** countries, and an Agreement not to Appeal a certain decision of the New Jersey Superior Court. The last document is not at issue here.

[*84]** The grant clause of the License Agreement [3] **[**6]** gives the licensee under **[**5]** the patent rights the right to make, use, and sell the licensed products in the United States, its territories and possessions. The term "Patent Rights" is defined in Paragraph 1(a) of the Agreement as "rights under (i) the Letters Patent set forth in SCHEDULE "A', (ii) all extensions and reissues thereof." Schedule A lists only the two United States patents. The Agreement defines "Licensed Products" as any floor covering covered under the "Patent Rights." The License Agreement provides for a royalty of six and one-half percent of the net sales price of all Licensed Products made and used or made and sold under the Agreement, and is terminable only for cause or at the end of the life of the patents.

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1 Prior appeals in other related cases growing out of the same dispute between Mannington and Congoleum were before this court in *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)*, and *Mannington Mills, Inc. v. Congoleum Industries, Inc., 577 F.2d 727 (1978)* (mem.).

2 The opinion of the district court on the license claims is reported at 197 U.S.Pat.Q. 145 (D.N.J.1977).

3 The grant clause reads as follows:

LICENSOR hereby grants to LICENSEE under the PATENT RIGHTS, subject to the terms, conditions and limitations hereof, a non-exclusive right and license to

(i) make and use, and

(ii) make and sell

said LICENSED PRODUCTS in the United States, its territories and possessions.

Paragraph 16 of the Agreement contains the most favored licensee clause sought and drafted by Mannington. [4] Finally, the License Agreement specifies that it is to be construed and interpreted under New York law.

The Letter Agreement provides in relevant part that Mannington is licensed to sell United States manufactured "Licensed Products" as defined in the License Agreement in twenty listed foreign countries. [5] The foreign sales licenses are subject to revocation by either Congoleum or Mannington "at any time upon giving the other party at least six months' written notice." The Letter Agreement contains no provision comparable to the most favored licensee clause of the License Agreement.

[7]** In 1970, Congoleum and the GAF Corporation settled their pending infringement suit. Congoleum granted GAF make, use, and sell licenses, under the United States patents for the United States and its territories and possessions, and under its foreign patents for 26 foreign countries. The settlement was embodied in two documents: a License Agreement and Litigation Settlement (the GAF License) and a Manufacturing Agreement. The terms of the GAF domestic and foreign licenses were more favorable than those of the Mannington licenses in several respects. The GAF royalty rate was five percent, one and one-half percent lower than Mannington's. GAF was given the right to sell in six additional foreign countries in which Mannington was not licensed: Canada, Australia, New Zealand, Japan, Ireland, and Holland. Moreover, unlike the foreign licenses granted to Mannington, GAF's foreign licenses were terminable only for cause. Two other provisions of the GAF license are relevant to this action: paragraph 4, [6] the grant clause, **[*1063]** and paragraph 13(b), [7] a covenant not to sue the licensee or its customers. The Manufacturing Agreement gives GAF the right to manufacture the patented **[**8]** product in all the foreign countries of licensed sale after January 1, 1974.

[9]** On May 27, 1970, in compliance with the most favored licensee clause of the License Agreement, Congoleum's President, Harry **[***85]** F. Pearson, sent a letter to Mannington offering the more favorable terms of the GAF License relating to United States patents. Pearson offered, Inter alia, the five percent royalty rate, and paragraphs 4(a) and 4(c) of the GAF License. No mention was made of paragraphs 4(b) or 13(b) of the GAF agreement, of patent rights in the six foreign countries where Mannington had not been granted rights, or of the terms of the foreign Manufacturing Agreement. On July 1, 1970, Congoleum sent Mannington's counsel a copy of the GAF License. Mannington's representatives were not sent a copy of the Manufacturing Agreement and did not learn of its existence until a week before trial.

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4 LICENSOR agrees that should it hereafter grant a license to a third party under the PATENT RIGHTS to make and use or sell the LICENSED PRODUCTS on more favorable terms or conditions than those extended to LICENSEE under this agreement, then LICENSEE shall be entitled to such more favorable terms and conditions as of the time they are or become effective as to such third party and for so long as they shall continue to be so effective.

5 Argentina, Austria, Belgium, Brazil, Chile, Colombia, France, West Germany, Greece, India, Israel, Mexico, Pakistan, Peru, Philippines, Spain, Sweden, Switzerland, Turkey, and Venezuela.

6 4. (a) LICENSOR hereby grants to LICENSEE under the PATENT RIGHTS, subject to the terms, conditions and limitations hereof, a non-exclusive right and license to make, use or sell LICENSED PRODUCTS throughout the United States of America, its territories and possessions.

(b) LICENSOR hereby grants to LICENSEE a non-exclusive license to sell, under all Foreign PATENT RIGHTS, LICENSED PRODUCT(S) manufactured by LICENSEE under paragraph 4(a) hereof.

(c) The rights and licenses granted under paragraphs 4(a) and (b) shall run with all subsequent resales of LICENSED PRODUCTS as such or as components of another assemblage, e.g., mobile homes.

7 LICENSOR and LICENSEE agree that LICENSEE'S floor coverings identified in Stipulated Facts 55 through 75 of Appendix A of the Final Pretrial Order in the CONGOLEUM INFRINGEMENT LITIGATION shall bear at this time the royalty rate stated in paragraph 5, and LICENSOR agrees that LICENSEE may continue to make, use and sell such floor coverings pursuant to the provisions of this Agreement and LICENSOR covenants not to sue LICENSEE with respect to the manufacture, use or sale of such floor coverings or LICENSEE'S customers with respect to the use or resale of such floor coverings, provided that a royalty is paid to LICENSOR under the terms of this agreement for such floor coverings.

On July 15, 1970, Mannington and Congoleum met to discuss the more favorable terms of the GAF License. Mannington was represented by its President, H. Arthur Williams, its patent counsel, Thomas Cifelli, and its general counsel, George Doub. Congoleum was represented by its President, Pearson, its patent counsel, Richard T. Laughlin, and its general counsel, Ralph M. Jerskey. Mannington **[**10]** wished to obtain expanded foreign license rights, particularly in Canada. Without such rights, Mannington feared that it would be unable to compete effectively with GAF and Armstrong, both of which were selling in Canada. At the meeting, Mannington expressed its desire for Canadian license rights and took the position that under P 16 of the License Agreement it was entitled to the more favorable foreign license rights granted to GAF. Congoleum rejected that argument on the ground that the most favored licensee clause applied only to license rights under the United States patents.

The sense of the July 15 meeting was expressed in a letter agreement of July 17, 1970 (hereinafter License Agreement Amendment). The License Agreement Amendment modified the License Agreement by incorporating, with two exceptions not here relevant, the terms which Congoleum had offered by its letter of May 27, 1970. Because Mannington and Congoleum could not agree as to the effect of the most favored licensee clause on foreign license rights, the License Agreement Amendment expressly stated that the parties' concurrence in the modification of the license as provided therein was not to be construed as **[**11]** a relinquishment by either party of its position on that clause. In a cover letter to the signed copies of the License Agreement Amendment, Williams stated his hope that the July 15th meeting had laid the groundwork for "possible future agreement" on the Canadian licensing issue, and said that he would like to hear from Pearson if Pearson had "any change in (his) thoughts regarding the Canadian situation."

Several times in the summer or early fall of 1970, Pearson and Williams met privately, and Williams again raised Mannington's claim that it was entitled to expanded foreign sales rights. Pearson indicated that he would not consider granting of additional rights to Mannington until the then pending litigation against Armstrong was settled.

On November 5, 1970, Williams placed a call to Pearson. Pearson was unavailable, and Williams spoke instead with Laughlin. **[*1064]** Williams told Laughlin that he had just lost one Canadian distributor, and that he was expecting a visit that day from another distributor whose business he wanted to keep. He asked if Congoleum would alter its refusal to grant Mannington license rights in Canada. Laughlin suggested that Mannington offer **[**12]** to pay a higher royalty rate on its Canadian sales. Williams then indicated that Mannington would have to go ahead and sell in Canada. Laughlin responded that it was okay with him, but obliquely implied that Congoleum would sue for infringement and would not give Mannington any priority with respect to such litigation. A contemporaneous memorandum by Williams describes his conversation with Laughlin as follows: "a licensing agreement will be reached between Congoleum Industries and the Armstrong Cork Company, and because of our poor position in Canada, Dick Laughlin has agreed to more-or-less close his eyes to any transactions we have in the meantime in Canada."

Subsequently, Williams reported the substance of the November 5 conversation to Cifelli, who called Laughlin to inquire if Congoleum had changed its position with respect to expanded foreign sales rights. Laughlin indicated it had not. In January 1971, Williams met with Pearson and renewed his request for expanded foreign sales rights. Pearson reiterated his position that he would not grant additional rights during the pendency of the Armstrong litigation, but stated that he believed that settlement was imminent.

In **[**13]** November or December 1970, Mannington recommenced sales in Canada. In its quarterly royalty report to Congoleum made in February 1971, Mannington disclosed royalties of $ 7,098 generated from sales for shipment to Canada at the premium rate of six and one-half percent, and it tendered payment in that amount. By **[***86]** letter of February 25, 1971, Pearson wrote to Williams to inform him that the one and one-half percent royalty premium paid on Canadian sales would be returned. Pearson stated:

> We have no present plan to grant any additional licenses for sale in Canada under our chemical embossing patents. In view of this, I am instructing our Treasurer to refund to Mannington Mills, Inc. the amount of Mannington's recent royalty payment in excess of five percent.
>
> As indicated to you previously, we have this matter under continuous consideration and if there is any change in the policy, we will be in touch with you.

Congoleum subsequently returned the royalty premium to Mannington. Thereafter, Mannington reduced the royalty paid on Canadian sales to five percent, but until July, 1972 it continued to report Canadian sales separately.

During 1971, in accord with the **[**14]** License Agreement, the accounting firm of Arthur Andersen & Co., acting as agent for Congoleum, reviewed Mannington's records. Arthur Andersen's report to Congoleum dated May 13, 1971, stated that: "We were informed by Mannington personnel that Mannington is presently negotiating to obtain the right to sell license products in certain foreign jurisdictions, however, the License Agreement has not been amended." This comment was cleared by Mannington. The worksheets of the Arthur Andersen accountant responsible for the review also contain a report of a discussion with Mannington's comptroller, as follows: "Amendment to agreement not clear on sales to foreign customers. Mannington wants right to sell foreign (;) Congol. has not said yes or no for this minor amt Mannington felt better to pay 61/2% (old rate). Per (Mannington's comptroller) Congoleum later returned check and agreed to accept 5%. . . ."

After the execution of the Letter Agreement in May 1968, and despite the fact that it was not formally licensed to do so, Mannington continued to sell the patented product through distributors in Australia and New Zealand. Congoleum learned of Mannington's Australian sales in 1969, **[**15]** and its New Zealand activities in 1970. Although Mannington had ceased to sell in Canada as part of the 1968 settlement negotiations, it recommenced sales there with Congoleum's **[*1065]** knowledge in November or December 1970. In addition, Mannington commenced sales in Japan in 1972. Congoleum learned of these activities in the same year. Congoleum took no action against Mannington's infringing foreign sales until July 1974.

By letter of July 25, 1974, Congoleum notified Mannington of its intent to terminate the Letter Agreement, effective January 31, 1975, and thereby to revoke all Mannington's foreign license rights. Further, Congoleum advised Mannington that it was aware that Mannington was selling in countries not covered by the Letter Agreement and that commencing September 1, 1974, it would take action to protect its patent rights in those countries. The district court found that Congoleum cancelled Mannington's foreign license rights because of the receipt of increasing numbers of complaints about Mannington's infringing conduct from its licensees, and because Congoleum feared that those licensees would commence to sell in areas where they were not licensed if Mannington **[**16]** were permitted to infringe with impunity. Congoleum now has infringement actions pending against Mannington in Canada, New Zealand, Australia, and Japan. [8]

The original patent infringement action by Congoleum against Armstrong Cork was decided in Congoleum's favor in February 1972. [9] Two related trials involved patent misuses and the use of a new chemical in the embossing process took place in 1973 and 1974. [10] **[**17]** Appeals of the trial on the infringement questions extended to early 1975. [11] In March 1976, on the eve of a trial on damages, a settlement was reached whereby Armstrong paid $ 35 million in damages and accepted an injunction. No license was ever issued to Armstrong.

II. PROCEEDINGS BELOW

Mannington brought this suit in October 1974, seeking declaratory and injunctive relief to compel the continuation of its foreign license agreement with Congoleum, as well as license rights in the six additional foreign countries in

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8 See *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1290 (3d Cir. 1979)*.

9 **[***87]** *Congoleum Indus., Inc. v. Armstrong Cork Co., 339 F. Supp. 1036 (E.D.Pa.1972)* (upholding the validity of Congoleum's U.S. Patents).

10 *Armstrong Cork Co. v. Congoleum Indus., Inc., 399 F. Supp. 1141 (E.D.Pa.1975)* (declaratory judgment that Armstrong's process using a new chemical infringes on the U.S. Patents). *Congoleum Indus., Inc. v. Armstrong Cork Co., 366 F. Supp. 220 (E.D.Pa.1973)* (denying motion to reopen record to consider evidence of new embossing technique, and finding that Congoleum had not misused its patents).

11 *Congoleum Indus., Inc. v. Armstrong Cork Co., 510 F.2d 334* (3d Cir.), Cert. denied, ***421 U.S. 988, 95 S. Ct. 1991, 44 L. Ed. 2d 478 (1975)***.

which license rights had been granted to GAF. The plaintiffs relied alternatively upon: (1) the most favored licensee clause of the License Agreement; (2) an alleged oral license from Congoleum to Mannington; (3) a license "implied in fact" from the conduct of the parties; (4) a license by estoppel; and (5) §§ 2 and 7 of the Sherman Act.

The district court ordered the severance of the license and antitrust claims for purposes of discovery and trial. The parties had extensive discovery and a full trial to the court on the license claims. On November 11, 1977, the district court entered an order denying plaintiff's contractual and equitable claims to license rights in all respects, and granting an **[**18]** interlocutory declaratory judgment on the license claims in favor of Congoleum.

On January 30, 1978, Mannington filed an amended antitrust complaint, which renewed its request for injunctive relief and for the first time sought treble damages for violations of §§ 1 and 2 of the Sherman Act. Several separate violations were alleged. On January 13, 1978, Mannington commenced discovery on the antitrust issues by serving on Congoleum written interrogatories and requests for production of documents. These documents focused on the relationship between Congoleum and its foreign licensees. On February 17, 1978, Congoleum objected to most of the requests as irrelevant. A motion to compel discovery **[*1066]** was filed on March 9, and was granted on March 27, 1978. In April 1978, Congoleum turned over some 8,000 documents to Mannington. On April 24, at a pretrial hearing, the district court directed Mannington to proceed with discovery on the antitrust claim.

On May 11, 1978, Mannington filed notices to take depositions on the antitrust issues from ten present or former officers and employees of Congoleum, seven of whom had been deposed during the license phase of the case. Congoleum **[**19]** moved on May 12 for a protective order as to those seven, arguing that Mannington had had full discovery as to them during the license phase of the case. On May 15, Congoleum moved for summary judgment on Mannington's antitrust claims. Mannington and Congoleum agreed to postpone the hearing on the motion for a protective order until after the district court had ruled on the summary judgment motion.

On July 24, 1978, after a hearing, the district court, after oral argument, granted Congoleum's motion for summary judgment in its entirety, thus mooting Congoleum's pending motion for a protective order. Judgment was entered on all claims on August 29, 1978, and this appeal followed.

III.

A. The License Claims

On appeal, Mannington first contends that under the most favored licensee clause of the License Agreement it is entitled to the more favorable foreign sales rights contained in Congoleum's subsequent license to GAF. Specifically, Mannington claims that it has the right to sell in the six additional nations where GAF was licensed to sell and that its foreign licenses, like those granted to GAF, should be terminable only for cause.

The district court rejected this contention **[**20]** on two grounds. First, it held that the License Agreement and the Letter Agreement were not "integrated" documents, and that the License Agreement's most favored licensee clause therefore could not apply to the foreign sales rights granted in the Letter Agreement. Alternatively, it held that because the scope of the most favored licensee clause is limited to the terms of licenses which were granted under Congoleum's United States patents, the clause did not extend to GAF's foreign sales licenses, which were granted under Congoleum's foreign patents. Because it felt that the meaning of the agreement was clear, the court refused to consider extrinsic evidence of the parties' intent.

We think that the district court was in error in concluding that the License Agreement and Letter Agreement could not be read together as a single instrument. The two documents were negotiated and executed simultaneously as part of the settlement of a single litigation. The Letter Agreement makes explicit reference to the terms of the License Agreement. Moreover, the subject matter of the agreements, while not identical, is closely related. On several important issues, the Letter Agreement is unintelligible **[**21]** without reference to the License Agreement, which contains the royalty provisions applicable to both domestic and foreign licenses, as well as the definition of "Licensed Products" applicable to both agreements. These instruments therefore fall within the rule that ***HN1***[] where separate writings are made as part of a single transaction relating to the same **[***88]** subject matter, they may be read together as one agreement. [12] *Schlossman's, Inc. v. Radcliffe, 3 N.J. 430, 435, 70 A.2d 493, 495 (1950)*; *General Elec. Credit Corp. v. Castiglione, 142 N.J.Super. 90, 360 A.2d 418, 424 (LawDiv.1976)*. Moreover, given the strong indications of interdependence between the two documents, the absence of an express incorporation clause is not decisive. *American Express Co. v. Rona Travel Service, Inc., 77 N.J.Super. 566, 187 A.2d 206 (Ch.Div.1962)*.

[22]** **[*1067]** Even if the two agreements are read together, however, it is evident that the rights granted by Paragraph 16 of the License Agreement do not extend to the terms of the foreign licenses granted in GAF's License Agreement. Paragraph 16 entitles Mannington to most favored licensee treatment only with respect to licenses granted to a third party "under one or more of the PATENT RIGHTS." Those patent rights are expressly defined in the Agreement as rights under Congoleum's United States patents. The protections of the most favored licensee clause thus extend to the terms of the foreign sales licenses granted to GAF only if those licenses can in any meaningful sense be said to have been granted "under" Congoleum's United States patents. It is clear that they cannot. Congoleum's United States patents give it no legal power to limit foreign manufacture, use or sale of the patented products. See *Deepsouth Packing Co. v. Laitram, 406 U.S. 518, 524, 531, 92 S. Ct. 1700, 32 L. Ed. 2d 273 (1972)*. The power to grant restrictive foreign sales licenses to GAF must therefore flow from Congoleum's legal right as patentee to limit the manufacture, use, and sale of the patented product **[**23]** in the country of license. Thus the foreign sales licenses granted to GAF can only have been granted "under" Congoleum's foreign patents, and the most favored licensee clause does not extend to them.

In an effort to create an ambiguity, Mannington argues that, as a practical matter, GAF's right to sell arises at least in part under the United States patents, since it is under those patents that GAF's domestic manufacturing license was issued. Without a domestic license to manufacture, Mannington argues, GAF would have no product to sell in those foreign countries where it was licensed under the Letter Agreement. Therefore, it argues, GAF's foreign sales rights must arise under the United States patents. This contention is factually unfounded, since GAF is licensed to manufacture under Congoleum's foreign patents as well, and therefore need not depend on its United States manufacturing rights for access to the patented products. But even if Congoleum were able, as a practical matter, to prevent the foreign sale of the patented product by terminating GAF's domestic license agreement, that fact would not be decisive. For Paragraph 16 makes the relevant consideration not the source **[**24]** of the licensee's supply of the patented product, but the source of Congoleum's power to grant the license. In the case of GAF's foreign licenses, that power can only have arisen under the foreign patents.

Mannington next contends that under the most favored licensee clause it is entitled to the benefits of Paragraph 13(b) of the GAF License. That Paragraph provides, in pertinent part:

> LICENSOR agrees that licensee may continue to make, use and sell such floor coverings pursuant to the provision of this agreement, and LICENSOR covenants not to sue LICENSEE with respect to the manufacture, use or sale of such floor coverings or LICENSEE'S customers with respect to the use or resale of such floor coverings, provided that a royalty is paid to LICENSOR under the terms of this agreement for such floor coverings.

Mannington reads this covenant not to sue as conferring upon GAF, and upon GAF's customers, freedom to sell the patented product in any foreign country without fear of an infringement action whether or not GAF is licensed to sell in that country. Extension of this right to Mannington and its customers would, it argues, entitle it to continued foreign sales rights. **[**25]** As the district court pointed out, however, the covenant not to sue applies only to sales made "pursuant to the provision of the agreement." It must be construed as subject to, and no broader than, the express grant of domestic and foreign sales rights in Paragraphs 4(a) and 4(b) of the GAF License. Thus it cannot be read as establishing the principle that sales in violation of the license agreement are not subject to an infringement action, and Mannington may not claim the benefit of that principle under Paragraph 16, even with respect to its domestic licenses. Moreover, as we noted **[*1068]** above, insofar as the protections of Paragraph 13(b) extend to sales made pursuant to sales licensees granted "under" foreign patents, Paragraph **[***89]** 16 is in

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[12] The License Agreement expressly provides that New York law governs the construction and interpretation of the agreement. The parties have stipulated, however, that New York and New Jersey law are identical on all issues relevant to this appeal.

any event inapplicable. GAF's covenant not to sue therefore cannot be read to authorize foreign sales by Mannington or its customers in countries where it is not licensed to sell.

Mannington also argues that Congoleum's conduct gave rise to an irrevocable license by estoppel to sell in all foreign countries license to GAF. Congoleum counters that the doctrine of license by estoppel is inapplicable to licenses granted under foreign patents, **[**26]** which should be governed by foreign law. The district court did not determine the applicability of foreign law to the estoppel claim because it concluded that even under domestic law Mannington was entitled to no relief. We agree.

HN2[] In order to establish a license by estoppel, Mannington was required to prove four elements:

(1) infringement;

(2) knowledge by the patent owner of the infringement;

(3) conduct of the patent owner which misleads the infringer into believing that the patent owner has abandoned his patent or acquiesced in the infringement; and

(4) reliance by the infringer on such conduct.

Minnesota Mining & Mfg. Co. v. Berwick Indus., Inc., 373 F. Supp. 851, 869 (M.D.Pa.1974), *Aff'd, 532 F.2d 330 (3d Cir. 1976)*. After trial, the district judge ruled that Mannington had failed to prove that it was at any time actually misled into believing that Congoleum had abandoned its patent or acquiesced in its infringement by Mannington. He therefore declined to determine whether the other three elements of an estoppel were present.

There is ample record evidence to support the conclusion that Mannington was at all times aware that Congoleum **[**27]** had not abandoned its patent. Between May 1970, and mid-1971, Mannington on numerous occasions sought expanded foreign license rights. Each time it was rebuffed by Congoleum. The text of the July 17, 1970, License Amendment Agreement, the cover letter to that agreement, Williams' internal memorandum of November 5, and the Arthur Andersen report and worksheets all indicate that Mannington was aware that Congoleum had not acceded to its request for increased foreign license rights, and that it did not intend to entertain Mannington's request for extended rights until after the conclusion of the Armstrong litigation.

On this appeal, Mannington concedes that the district court's findings are sufficient to support the conclusion that Mannington never believed that Congoleum had "abandoned" its patents. But it argues that those findings will not support its further holding that Mannington did not believe that Congoleum had "acquiesced" in Mannington's infringement. Mannington relies principally upon Congoleum's failure to bring an infringement action against it until July 1974, more than four years after Congoleum first learned of Mannington's infringing sales. But it is undisputed **[**28]** that until 1976 Congoleum was engaged in a series of infringement actions against Armstrong. ***HN3***[] The general rule is that a patentee has no duty to bring an action against an alleged infringer during the pendency of another infringement action on the same patent, and that when the infringer has notice of the pending action, he may not rely upon any resulting delay as a basis for a claim of estoppel. *Advanced Hydraulics, Inc. v. Otis Elevator Co., 525 F.2d 477, 482* (7th Cir.), Cert. denied, *423 U.S. 869, 96 S. Ct. 132, 46 L. Ed. 2d 99 (1975)*; CF. Minnesota Mining & Mfg. Co. v. Berwick Indus., Inc., 532 F.2d at 334 (laches). Mannington's conceded awareness of the Armstrong litigation was sufficient to put it on notice that Congoleum had not acquiesced in its infringing conduct.

B. The Antitrust Claims

Mannington advances two antitrust claims on appeal. The first is that, while Congoleum's foreign manufacturing licensees **[*1069]** regularly were invited to purchase know-how with their manufacturing license, Congoleum arbitrarily and unreasonably refused to sell to Mannington certain unpatented know-how relevant to the manufacture of the patented product. We seriously doubt that **[**29]** an arbitrary or discriminatory unilateral refusal to deal by a lawful monopolist is actionable under § 2 of the Sherman Act. See 3 P. Areeda & D. Turner, ***Antitrust Law*** P 736 (1978). We need not decide that issue here, however, for the summary judgment record demonstrates that Congoleum's refusal to license know-how to Mannington was not arbitrary. None of the foreign manufacturing licensees who received know-how had any prior manufacturing experience at the time that their know-how licenses were issued. In contrast, Mannington, like GAF, had been manufacturing the patented product for a number of years prior to its acceptance of a Congoleum license. There was thus a substantial and undisputed difference between **[***90]** Mannington and those foreign licensees who received know-how with their manufacturing licenses. Mannington's claim that Congoleum's denial of know-how was arbitrary or unreasonable therefore fails.

Mannington's conspiracy claim requires closer scrutiny. As stated in the complaint, that claim is that Congoleum conspired with one or more of its foreign licensees to cancel Mannington's foreign sales licenses. As spelled out in greater detail at hearings in the district **[**30]** court, [13] the claim was (1) certain of Congoleum's foreign licensees had complained about Mannington's excessive competition and had threatened to terminate their own licenses unless Mannington's foreign licenses were revoked, and (2) that in response to that threat, Congoleum had agreed to terminate Mannington's foreign licenses.

[31]** The district judge granted summary judgment, ruling that the plaintiff's complaint did not state a claim under § 1 of the Sherman Act and that the summary judgment record did not contain evidence sufficient to create a material issue of fact as to the existence of a conspiracy. [14]

The lower court's holding that a valid antitrust claim had not been stated was based exclusively upon Congoleum's status as a patentee. The **[**32]** court stated that "(a) patentee may grant one, many, or no licenses under its patent," and may, if it chooses, "grant . . . an exclusive license effectively an agreement not to license any competitors under the patent," without violating the Sherman Act. While noting the absence of any case directly on point, the district judge apparently reasoned that this policy of deference to a patentee's licensing decisions should extend to protect the termination of a licensee undertaken at the request of a competing licensee or licensees.

We recognize that promotion of the policies that underlie the federal patent laws may on occasion require that the application **[*1070]** of normal antitrust principles to patent license restrictions be moderated or withheld entirely. On the facts alleged in this case, however, we think that the antitrust exemption created by the district court extends more broadly than is necessary to that end. We conclude that the complaint stated a cause of action under the Sherman Act.

HN4[] We start with the settled proposition that when a non-patentee manufacturer agrees with one or more of its dealers or distributors to terminate a competing distributor, that agreement **[**33]** is subject to antitrust scrutiny. *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Cernuto, Inc. v.*

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[13] THE COURT: I have five licensees out each with six months or 90 days termination clauses exercisable at mutual option or my option. Four guys come to me and say that this guy Jones is killing us, you've got to get him out of the market or we are going to have to stop making widgets and go into growing peaches. And you are making more money off the four of us than off of him because he's cheaper, undersells some way.

I say to you, today I will shut him off and I turn the faucet.

You have any real problem with that?

(COUNSEL FOR CONGOLEUM): That may well be a violation.

THE COURT: Off the top of my head I don't have any problem with that. That's what Mr. Bain alleges you did with respect to the 22 foreign countries.

Am I right?

(COUNSEL FOR MANNINGTON): That's correct.

THE COURT: I'm glad I finally understand what the plaintiff is claiming.

[14] The district court's holding that Mannington's conspiracy claim failed as a matter of law would, if correct, provide an independent ground for affirming the judgment below. Thus the concurring opinion's suggestion that our discussion of the antitrust issue is advisory is incorrect. To the contrary, unless we were to decide the antitrust issue, our decision of the discovery issue would violate the settled principle that a federal court is not normally empowered to declare, for the government of future cases, principles or rules of law which cannot affect the result in the case before it.

United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979). As we pointed out in Cernuto, dealer inspired terminations may pose serious anticompetitive risks not presented by a manufacturer's unilateral refusal to deal:

> **HN5**[] When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be. . . . When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. . . . However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, **[**34]** level.

[*91]** 595 F.2d at 168. **HN6**[] Where the purpose and effect of such a termination is to fix prices, Cernuto, Inc. v. United Cabinet Corp., 595 F.2d at 168-69, or to enforce a group boycott, United States v. General Motors Corp., 384 U.S. 127 at 145, 86 S. Ct. 1321, 16 L. Ed. 2d 415, the agreement is Per se illegal. In other cases rule of reason analysis may be appropriate. Compare Cernuto, 595 F.2d at 168-69 With Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (En banc), Cert. denied, *439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)*. See also Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 142 (3d Cir. 1978).

The issue then is whether Congoleum's status as a patent monopolist immunizes this otherwise actionable conduct from antitrust attack. Resolution of that question requires us to weigh the potential injury to competition from conduct of the kind alleged by Mannington against the risk that the application of antitrust sanctions will frustrate the purposes of the patent system. Our analysis suggests that application of antitrust principles to this conduct would materially encourage competition without posing any serious threat to patent policy.

[35]** **HN7**[] The grant of a patent of invention confers upon the successful patentee "the right to exclude others from making, using, or selling the invention throughout the United States" for a term of seventeen years. 35 U.S.C. § 154. The purpose of that grant of a limited monopoly is to provide an incentive for private enterprise to devote resources to innovative research, to make the investments required to put new inventions into practice, and to make the benefits of the invention available to a wider public. See P. Areeda, Antitrust Analysis P 403 (2d ed. 1974); Turner, The Patent System and Competitive Policy, 44 N.Y.U.L.Rev. 450, 451-54 (1969).

Vertical restrictions imposed upon licensees by a patentee, like those imposed by a non-patentee upon its distributors, may often be useful, and perhaps even essential, to the patentee's effort to maximize the monopoly income to which the patent grant entitles him. See W. Bowman, Patent and **Antitrust Law**: A Legal and Economic Appraisal 54-57 (1973); Baxter, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L.J. 267, 313 (1966). It might therefore be argued that to encourage inventive activity all anticompetitive **[**36]** license restrictions which **[*1071]** increase the patentee's net income should be immunized from antitrust scrutiny. But there is a consensus among those who have considered the question that, in view of the substantial uncertainties inherent in the process of developing and patenting a new invention, any incremental increase in patentee income that might result from permitting licensing schemes that would otherwise violate the antitrust laws would be unlikely to effect a patentee's initial decision to invest in innovative activity. P. Areeda, Supra, P 404(f) at 429; Turner, Supra, 44 N.Y.U.L.Rev. at 458-60, 463; Gibbons, Price Fixing in Patent Licenses and the **Antitrust Law**, 51 U.Va.L.Rev. 273, 276-77 (1965); Furth, Price-Restrictive Patent Licenses Under the Sherman Act, 71 Harv.L.Rev. 815, 829 & n.35 (1958).

Perhaps more persuasively, it has been argued that overly restrictive antitrust review of patentee licensing practices might lead a patentee to license less widely than he might otherwise do, or indeed, not to license at all. P. Areeda, Supra, P 411; L. Sullivan, Antitrust P 183 (1977); Turner, Supra, 44 N.Y.U.L.Rev. at 463-64; Gibbons, Domestic Territorial Restrictions **[**37]** in Patent Transactions and the Antitrust Laws, 34 Geo.Wash.L.Rev. 893, 894-95 (1965); Furth, Supra, 71 Harv.L.Rev. at 830. But cf. Baxter, Supra, 76 Yale L.J. at 352-53. Less widespread licensing could lead to decreased use of the patented product, less present competition for the patentee, and reduced competition in the patented product after the expiration of the patent. L. Sullivan, Supra ; Turner, Supra, 44 N.Y.U.L.Rev. at 464. Exclusive licenses, the type of restrictive arrangement relied upon by the district court, have been defended on this ground. See P. Areeda, *Supra, P 411 at 447 n.76*. It would appear that neither patent nor antitrust policy would in the long run be served by prohibiting restrictions necessary to promote wider use of the patented product.

But restrictive licensing practices may also have significant anticompetitive effects. Some licensing policies may serve as a mask for collusive conduct on the part of competing licensees. In such cases, important antitrust policies may be threatened. See *Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852 (1940)*; *United States v. United States Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, **[**38]** 92 L. Ed. 746 (1948)*; L. Sullivan, *Supra, P 184*; Turner, Supra, 44 N.Y.U.L.Rev. at 450; Furth, Supra, 71 Harv.L.Rev. at 830-33; Cf. Buxbaum, Restrictions Inherent in the Patent Monopoly; A Comparative Critique, 113 U.Pa.L.Rev. 633, 648-51 (1965). ***HN8***[] Where the license restriction results primarily in benefits for the **[***92]** licensees rather than the patentee, the anticompetitive restriction cannot be justified as a subsidy for the patentee's inventive activity. See Baxter, Supra, 76 Yale L.J. at 313-14. In such cases, there is no sound reason to immunize the patentee's conduct from antitrust scrutiny. "(T)he patent statute is not seriously encumbered by prohibiting the misuse of a patent as a cosmetic to cover a cartel." L. Sullivan, *Supra, P 184 at 534*.

Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852 (1940), while not directly in point, illustrates the risks inherent in a patent licensing scheme run for the benefit of licensees. Ethyl held patents on a fluid gasoline additive containing tetraethyl lead. The company licensed gasoline refiners to manufacture and sell gasoline containing the patented product. At the next level of the distribution chain, **[**39]** Ethyl licensed jobbers to sell the patented product. Refiners were allowed to sell gasoline only to jobbers licensed by Ethyl. Ethyl conducted regular inquiries into the "business ethics" of licensed jobbers to determine "whether they (maintained) the marketing prices" prevalent in the industry, *309 U.S. 436 at 454, 60 S. Ct. 618, 84 L. Ed. 2d 852* and discharged those not meeting the required standard. Refiners licensed by Ethyl accounted for 88% Of all gasoline refined in the country; 11,000 of 12,000 gasoline jobbers in the nation were Ethyl licensees.

The Court found that "by the leverage of its licensing contracts resting on the fulcrum of its patents, (Ethyl) has built up a combination capable of use, and actually **[*1072]** used, as a means of controlling jobbers' prices and suppressing competition among them." This scheme was invalid under the settled rule barring attempts by the patentee to control the resale price of the patented product. *Bauer & Cie v. O'Donnell, 229 U.S. 1, 16-18, 33 S. Ct. 616, 57 L. Ed. 1041 (1913)*.

A second basis for the Court's decision, however, reflects an understanding of the relationship between the patent statute and antitrust policy similar **[**40]** to that outlined above. Justice Stone wrote:

> The extent to which appellant's dominion over the jobbers' business goes beyond its patent monopoly, is emphasized by the circumstances here present that the prices and market practices sought to be established are not those prescribed by appellant-patentee, but by the refiners. Appellant neither owns nor sells the patented fuel nor derives any profit through royalties or otherwise from its sale. It has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first.

309 U.S. at 458-59, 60 S. Ct. at 626. **[**41]** In short, the Court believed that a principal evil of the restrictive licensing scheme was that it provided little or no reward to the patent monopoly, while permitting non-patentee refiners to benefit from the existence of a retail price cartel. Cf. W. Bowman, Supra, at 186-89. See also *In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127, 1136 (5th Cir. 1976)*, Cert. denied, *433 U.S. 910, 97 S. Ct. 2976, 53 L. Ed. 2d 1094 (1977)* (allocation by patentee of royalty benefits to licensee not protected by patent policy); *United States v. American Linen Supply Co., 141 F. Supp. 105, 113 (N.D.Ill.1956)*.

A second line of cases, more closely in point, illustrates the suspect status of patent license restrictions designed to reduce competition at the licensee level and operated for the benefit of competing licensees. In *United States v. Besser Mfg. Co., 96 F. Supp. 304 (E.D.Mich.1951)*, *Aff'd, 343 U.S. 444, 72 S. Ct. 838, 96 L. Ed. 1063 (1952)*, the patent holders on a concrete block making machine granted licenses to Stearns and Besser, the two dominant firms in the machine manufacturing industry. The licenses provided that no further licenses would be granted under the patents **[**42]** without the consent of both licensees. The court held as follows:

> We believe that the contract under question goes further than is necessary to protect the patent monopoly of Gelbman and Andrus. It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents. The contract even gives Stearns and Besser the power to restrict competition present and future by requiring their joint consent before licensing others. **[***93]** It is this combination requiring collective action that primarily invalidates the agreement. We believe it clear that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated. For what other reason would Besser or Stearns want the consent of the other before approving a licensee suggested by the patentees? And where it is apparent, as it is here, that the contract is to eliminate competition, it must be held illegal.

96 F. Supp. at 311. Accord, *United States v. Krasnov, 143 F. Supp.* ***[**43]*** *184, 199-202 (E.D.Pa.1956)*, *Aff'd, 355 U.S. 5, 78 S. Ct. 34, 2* ***[*1073]*** *L. Ed. 2d 21 (1957)*; *United States v. Singer Mfg. Co., 205 F. Supp. 394, 430 (S.D.N.Y.1962)*, Rev'd on other grounds, *374 U.S. 174, 83 S. Ct. 1773, 10 L. Ed. 2d 823 (1963)* (dictum) ("The Court has clearly condemned a restriction requiring the consent of the non-exclusive licensee before the patentee may grant a license to another."); Frost, Restrictions on Fields of Use and Territories, 42 Antitrust L.J. 633, 636-37 (1973).

Applying these principles, we think that ***HN9***[] a patentee's termination of a licensee, in concert with competing licensees, is not entitled to an antitrust exemption. Where a patentee's license restrictions are imposed vertically upon the licensee, in pursuit of the patentee's own marketing strategy, that circumstance suggests that the patentee's licensing decision is in fact directed toward the legitimate exploitation of the patent monopoly. Cf. *Cernuto, 595 F.2d at 168*. By parity of reasoning, it also may be taken as indicating that the restrictions thus imposed are among those significant to the patentee's initial decision whether to license the manufacture or sale of the patented invention. **[**44]** Where the patentee's anticompetitive conduct is undertaken after a number of non-exclusive licenses have been granted and in concert with competing licensees, however, there is a greater risk that the restriction is designed not to reward the patent monopoly, but to increase the licensee's reward. Similarly, the risk that the patentee's power is being used to assist in the policing of a horizontal agreement among licensees is sharply increased. Id.; *United States v. Besser Mfg. Co., 96 F. Supp. at 311*. As Ethyl and Besser Manufacturing demonstrate, the patent system has no interest in permitting the patentee's monopoly to be used as a screen for the maintenance of a horizontal cartel at the licensee level. We think, in contrast, that the likelihood that antitrust regulation of such terminations will impair the monopolist's legitimate reward or lead him to license more restrictively is remote.

Because the threat to antitrust policies is substantial, and the likelihood of injury to patent policy remote, we conclude that the fact that Congoleum is a patentee does not justify a special antitrust exemption for the conduct alleged here. On this scant record, we express no view on whether **[**45]** this case should be judged by the rule of reason or by a Per se rule. That determination should await fuller development of the evidence on remand. Finally, we express no view on the possible interaction between foreign patent policy and the extraterritorial application of the American antitrust laws. See *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)*.

The district judge also ruled that the record contained insufficient evidence of a conspiracy to survive a summary judgment motion. While Mannington contests that holding on appeal, we think that on the record before the court that ruling was correct, since the materials filed in opposition to the motion did not show a material issue of fact as to the existence of a conspiracy.

Mannington also argues, however, that the district judge acted prematurely by ruling on the summary judgment motion before Mannington had had fair opportunity to depose the officers and employees of Congoleum regarding the existence of an agreement between Congoleum and its licensees. We agree. ***HN10***[] Summary judgment in antitrust cases is not favored. *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7* ***[**46]*** *L. Ed. 2d 458 (1962)*; *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d at 165* & n.2. It follows that the grant of summary judgment before an antitrust plaintiff has been given a full opportunity for discovery on his claim may be reversible error. See *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290-98, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*.

Congoleum suggests that the failure to permit Mannington to depose its officers on the antitrust issue was, in effect, harmless error, since Mannington was collaterally estopped by the district court's findings in the license case from relitigating the issue of the reasons for the license termination. There, it will be recalled, the court found **[*1074]** that the termination had been undertaken unilaterally by Congoleum to prevent a revolt by its European licensees. The district court correctly rejected this argument, holding that since the reason for the license termination was not "fully litigated and necessary to the judgment" in the license action, his findings **[***94]** there did not collaterally estop Mannington from claiming that a conspiracy had occurred. *Haize v. Hanover Ins. Co, 536 F.2d 576, 579 (3d Cir. 1976)*; Restatement **[**47]** (Second) of Judgments § 68 and Comment c. (Tent.Draft No. 1, 1973). The district court then ruled, however, that "the discovery and trial cross examination during the license phase of this litigation was conducted with sufficient motivation to determine the circumstances of that cancellation that that record may be considered on summary judgment." In our view, that conclusion amounted to an acceptance of Congoleum's collateral estoppel argument in a different form. If the conspiracy issue was not litigated or necessary to the judgment in the earlier action, there was no incentive to conduct full discovery on that issue. Moreover, in view of the bifurcation of discovery on the antitrust and licensing claims, it would appear that Congoleum might successfully have resisted discovery on the antitrust issues during the first phase of the case. We therefore reject the trial court's view that the discovery afforded Mannington in the license phase of the case was adequate to permit resolution on summary judgment of Mannington's antitrust claims.

Congoleum also contends that Mannington waived its right to discovery on the antitrust claims by failing to pursue discovery when it had an **[**48]** opportunity to do so. But the events in the district court show no dilatory conduct on Mannington's part. Mannington first sought the documents relevant to its conspiracy claim (and necessary, as well, to effective deposition of the alleged conspirators) on January 13, 1978. Congoleum strenuously resisted the request for documents, and did not turn them over until mid-April 1978, after the court had ordered their production. After obtaining the permission of the judge to proceed with discovery on the conspiracy claim, Mannington noticed the depositions of the ten Congoleum officials on May 11. As to seven of these officers, that request was immediately opposed by a motion for a protective order. Simultaneously, Congoleum filed its motion for summary judgment.

As evidence of dilatory conduct, Congoleum points to Mannington's agreement to postpone the hearing on the issuance of the protective order until the July 24, 1978 hearing on the motion for summary judgment, and its failure to depose the three officers for whom protective orders were not sought during the period between May 15 and July 24. So far as appears, the postponement of the hearing on the motion for a protective **[**49]** order until July 24 avoided an extra hearing day and allowed simultaneous briefing of the relevant issues, thus working to the advantage of the court and the litigants. Until the court ruled on that motion, Mannington was barred from proceeding with any discovery against the seven officers and employees of the defendant who had been directly responsible for the defendant's licensing program during the period at issue, and whose testimony was therefore most important in determining the circumstances of the termination. Moreover, given the large number of claims pressed by Mannington, and the relationship between the scope of the claims asserted and the scope and expense of discovery, Mannington was surely justified in deciding to postpone further discovery of the three more peripheral figures as to whom no order was sought until the district judge had pared down the case by ruling on the motion for summary judgment. Under these circumstances, Mannington cannot be said to have waived its right to discovery on the antitrust claim.

Since Mannington's alleged conspiracy cause of action states a valid antitrust claim, and since it has been denied the opportunity for full discovery on **[**50]** that charge, the order granting summary judgment on that claim must be reversed.

[*1075] IV. CONCLUSION

The portion of the district court's order dismissing the contractual and equitable claims to foreign patent licenses and the claim alleging a discriminatory denial of know-how will be affirmed. That part of the order which granted summary judgment on plaintiff's alleged antitrust conspiracy is reversed and the cause will be remanded for further proceedings consistent with this opinion.

Concur by: ALDISERT

Concur

ALDISERT, Circuit Judge, concurring.

I join the majority opinion except the extensive discussion contained in Part III (B), Maj. Op. at 1069-1073, of whether Mannington stated a valid antitrust claim. The sole issue properly presented in that section is whether the court erred in granting summary judgment on the conspiracy issue. We hold that while the district court did not err in determining that the record before it contained insufficient evidence of a conspiracy to withstand an adverse summary judgment motion, it did err in ruling on the summary judgment motion before Mannington had fair opportunity to depose Congoleum officers and employees on the possible existence **[**51]** of an illegal agreement between **[***95]** Congoleum and its licensees. We reverse only to permit reasonable discovery to go forward.

Until faced with a genuine case or controversy established by a record, I would not meet the question whether an antitrust violation in this case can be made out, notwithstanding the impressive academic commentary relied upon by the majority. To acknowledge the possibility that upon remand appellant Might be able to find support for its antitrust claim is one thing. It is quite another thing, however, to discuss at great length, on the basis of an incomplete record, what the possible result in this case should be. Unlike the majority, Maj. Op. at 1069 n.14, I think our pronouncement here should be based on specific facts; until we have the facts, any comment which does more than acknowledge the possibility of antitrust violation upon proof of an illegal conspiracy between appellee and its licensees is simply advisory.

Moreover, although I note that summary judgment "should be used sparingly in Complex antitrust litigation," *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962)*; *Cernuto, Inc. v. United **[**52]** Cabinet Corp., 595 F.2d 164, 165 n.2 (3d Cir. 1979)* (emphasis added), this does not mean that district judges should hesitate to grant summary judgment in appropriate antitrust cases. The Supreme Court long ago rejected the argument suggesting "that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations. . . ." *First National Bank v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*. A plaintiff is never "entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *Id. at 290, 88 S. Ct. at 1593*.

Although there is a tendency to wrap antitrust litigation in the tinsel and glitter of esoterica, the governing legal precepts are not too sophisticated; complexities usually emerge only when an innovative plaintiff or government prosecutor contrives a factual pattern to fit a given precept. Thus, over a vigorous dissent by Judge Freedman, this court, in banc, upheld a grant of **[**53]** summary judgment in *Tripoli Co. v. Wella Corp., 425 F.2d 932* (3d Cir.), Cert. denied, *400 U.S. 831, 91 S. Ct. 62, 27 L. Ed. 2d 62 (1970)*. Speaking through Judge Gibbons, we noted that "(e)ven in an antitrust case a party must . . . come forward with affidavits setting forth specific facts showing that there is a genuine issue for trial." *Id. at 935*; *Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1080 (3d Cir. 1978)*.

N. Am. Soccer League v. Nfl

United States District Court for the Southern District of New York

August 2, 1979

78 Civ. 4560-CSH

Reporter
1979 U.S. Dist. LEXIS 10637 *; 28 Fed. R. Serv. 2d (Callaghan) 107

NORTH AMERICAN SOCCER LEAGUE, et al, Plaintiffs, against NATIONAL FOOTBALL LEAGUE, et al, Defendants.

Core Terms

documents, contracts, television, soccer, pages, confidential information, television network, full text, in camera, attorney-client, cross-ownership, communicated, inspection, privileged, discovery, appears, reveals, advice, games, ban

Opinion by: **[*1]** HAIGHT

Opinion

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

The Court's Memorandum Opinion and order of July 24, 1979 directed that certain documents, concerning which discovery disputes had arisen, be submitted for examination in camera. Counsel have responded with commendable promptness.The Court's rulings follow.

(1) The letter of Edward Bennett Williams, Esq., dated July 11, 1978 to comissioner Rozelle. The NFL resists discovery of the full text of this letter on the basis of the attorney-client privilege. Having examined the letter, I conclude that the privilege does not apply, and the full text must be produced.

Mr. Williams, although an attorney, was not writing to Commissioner Rozelle in that capacity, but rather as owner of the Washington Redskins, an NFL team. Recognizing that distinction, the NFL argues that the Williams letter is nevertheless privileged, because it reveals the substance of an opinion as to the validity of the cross-ownership ban, rendered by Covington & Burling, who unquestionably were counsel for the NFL, retained to advise the NFL on the point of ***antitrust law*** which forms the subject matter of the present suit.

the claim of privilege **[*2]** must be rejected for two reasons. First, the Williams/Rozelle letter, an internal communication within the hierarchy of the NFL, constitutes a restatement of an attorney's legal advice, which reflects or reveals such advice. As such, the communication does not fall within the attorney-client privilege. *United States v. International Business Machines, 71 F.R.D. 376, 378 (S.D.N.Y. 1976)*.

Alternatively, the opinion rendered to the NFL by Covington & Burling, as revealed in the Williams letter, does not in turn reveal any confidential information communicated by the NFL to Messrs. Covington as counsel. All that appears from the Williams letter, in respect of the NFL's communications with Messrs. Covington, is that

Commissioner Rozelle told Messrs. Covington about the cross-ownership ban and asked for an opinion as to its validity. Opinions of counsel are privileged only to the extent that they are based upon, and consequently reveal, information furnished by the client in confidence. *Herbert v. Lando, 73 F.R.D. 387, 398-399 (S.D.N.Y. 1977)*, and cases there cited. No such revelation of confidential information arises out of the Covintton opinion, as revealed and discussed in **[*3]** the Williams letter; and the Williams letter accordingly falls outside the privilege.

To the extent that the NFL objects to production of the Williams letter on the basis of relevance, the objection is overruled.

(2) NFL television contracts. The NASL had sought to discover all NFL television contracts entered into since January 1, 1965. The Court directed inspection of the television contracts in camera in order to determine whether, as suggested by the NASL, the contracts might contain clauses which placed restrictions upon the ability of the television network to broadcast professional soccer games. Counsel for the NFL have produced documents pertinent to the NFL's contractual arrangements with the three leading television networks: NBC, CBS and ABC. The documents cover the years 1970 through 1981. No production appears to have been made in respect of years prior to 1970. As for the years 1970 through 1981, the documents appear to be complete, except for a letter agreement dated October 7, 1977 between the NFL and ABC, referred to and incorporated in ABC's letter to the NFL of October 15, 1977 but not produced.With one exception, the documents submitted to the Court for **[*4]** inspection omit the schedules setting forth the prices which the networks were to pay for the privilege of telecasting the games.

I have examined all the documents produced, and find no reference to soccer, or any other provisions which might lead to evidence admissible on the issues in this case. Accordingly the documents need not be produced. In order to preserve the plaintiffs' rights on appeal, the television contracts and related documents forwarded to the Court with Messrs. Sullivan & Cromwell's letter of Jurly, 30, 1979 will be marked "Court Exhibit 1" and lodged with the Clerk under seal.

As noted, the production of documents does not appear to be complete. However, I will accept an affidavit of counsel asserting (if that be the fact) that neither the October 7, 1977 letter between ABC and the NFL, nor the documents prior to 1970 contained any reference to soccer.

(30) The NASL Stategic Plan. According to Messrs. Weil, Gotshal's letter to the Court of July 31, 1979, and the other papers on the motion, much of this document has been produced to the NFL. The pages remaining in dispute are pp. 179-184, relating to palyer relations; and pp. 232-523, giving particulars **[*5]** as to the response of NASL clubs to a questionnarie distributed by the NASL Planning Committee.

Having examined those pages, I conclude that they bear sufficiently upon pertinent economic and marketing questions to require their production. The NASL ius accordingly directed to forward copies of these pages to counsel for the NFL forthwith.

The litigation will proceed in conformity with this opinion. It is so Ordered.

[Amalgamated Clothing & Textile Workers Union v. J. P. Stevens & Co.](#)

United States District Court for the Southern District of New York

August 3, 1979

No. 77 Civ. 5444-CSH

Reporter
475 F. Supp. 482 *; 1979 U.S. Dist. LEXIS 10604 **; 101 L.R.R.M. 3110; 86 Lab. Cas. (CCH) P11,528; 21 Empl. Prac. Dec. (CCH) P30,288; 1979-2 Trade Cas. (CCH) P62,923

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, Plaintiff, against J. P. STEVENS & CO., INC., Defendant.

Core Terms

employees, antitrust, textile, anti trust law, allegations, Tugboat, cause of action, organizations, bargaining, labor law, cases, Sherman Act, conspiracies, commerce, inducing, Towing, antitrust claim, interstate, exemption, plants, rights

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > General Overview

HN1[] **Collective Bargaining & Labor Relations, Federal Preemption**

The National Labor Relations Act of 1935 (NLRA), *29 U.S.C.S. § 151 et seq.*, and the Labor Management Relations Act of 1947 (LMRA), *29 U.S.C.S. § 141 et seq.*, establishes a national policy favoring collective bargaining, forbids various employer practices and labor practices as unfair, and sets up the National Labor Relations Board (NLRB) as the enforcement agency. The NLRB has exclusive competence over any activity "arguably subject" to § 7 or § 8 of the NLRA, a concept pre-empting state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the NLRA.

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

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

HN2[] **Private Actions, Standing**

Unions are in the business of representing employees. A union has standing to assert a claim that an antitrust conspiracy involving employers damages its ability to attract members.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Exemptions & Immunities, Labor**

Where restraint upon commercial competition in the marketing of goods or services is missing, a union cannot invoke the Sherman Act in complaining of obstruction of its organizational and representational efforts.

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

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

HN4[] **Pleadings, Heightened Pleading Requirements**

While a private person, not himself an officer of the state, may be proceeded against under *42 U.S.C.S. § 1983* if he is a willful participant in joint activity with the state or its agents, the plaintiff must in order to state a cause of action specifically identify the public officials concerned, and, as to such officials, specifically allege their personal involvement in the acts complained of. Conclusory or vague complaints, limited to general allegations of deprivation, are insufficient unless amplified by specific instances of misconduct.

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

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

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

HN5[] **Jurisdiction, Subject Matter Jurisdiction**

42 U.S.C.S. § 1983 provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Civil Rights Law > General Overview

HN6[] **Pleadings, Heightened Pleading Requirements**

The action may be maintained under *42 U.S.C.S. §§ 1985*, *1986*, only if plaintiff alleges some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Counsel: **[**1]** Arthur M. Goldberg, Gen. Counsel, Amalgamated Clothing and Textile Workers Union, New York City, Szold, Brandwen, Meyers & Altman, New York City, Alan G. Blumberg, Ezra N. Goodman, Richard G. Liskov, David N. Kaye, New York City, of counsel, for plaintiff.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City, Jay Topkis, Gerald D. Stern, Howard S. Veisz, Jamie B. W. Stecher, New York City, of counsel, for defendant.

Opinion by: HAIGHT

Opinion

[*484] MEMORANDUM OPINION AND ORDER

Plaintiff Amalgamated Clothing and Textile Workers Union ("ACTWU") brought this action in continuance and escalation of the prolonged struggle between defendant J. P. Stevens & Co., Inc. ("Stevens") and plaintiff and its predecessor unions. Until now the battlefields have been the National Labor Relations Board ("NLRB"), and circuit courts of appeal asked to enforce NLRB rulings against Stevens or punish Stevens for contempt. [1.] ACTWU now invokes the antitrust laws and the civil rights laws and prays, in aid of its efforts to organize Stevens' employees, for declaratory and injunctive relief, as well as treble, compensatory, and punitive damages. Stevens has moved to dismiss the complaint for lack **[**2]** of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. The motion is granted and the complaint dismissed.

I.

ACTWU's complaint states six causes of action. The first two are pleaded under the Sherman Antitrust Act, *15 U.S.C. §§ 1-7*, and the Clayton Act, *15 U.S.C. § 12 Et seq.*, jurisdiction in this Court being founded upon *15 U.S.C. § 15* and *28 U.S.C. § 1337*. The third, fourth, fifth and sixth causes of action are said to arise under the civil rights laws, *42 U.S.C. § 1983* (third cause), *§ 1985* (fourth cause), *§ 1986* (fifth cause), and all of them collectively (sixth cause); jurisdiction is alleged under *28 U.S.C. § 1343*.

Reserving the civil rights causes of action for later discussion, we analyze under **[**3]** this heading the antitrust allegations.

[*485] For the first cause of action, PP 2-5 of the complaint describe ACTWU, its predecessor unions, and the union's present size and structure. Paragraph 2 alleges that ACTWU "is engaged in the trade or business of an international union"; the action is said to be brought on its own behalf and on behalf of its members.

Paragraphs 6-8 describe Stevens as a Delaware corporation maintaining its principal offices within this district, and engaged in the interstate commerce of manufacturing, processing and selling textile goods and products.

Paragraphs 9 and 10 describe the efforts of ACTWU and its predecessors, "for many years" and currently, to organize Stevens' non-supervisory employees and obtain collective bargaining agreements for them, as well as for employees of other textile companies.

Paragraphs 11 and 12 allege that Stevens, "other textile manufacturers and processors and others" have opposed and resisted these efforts, and that Stevens, in furtherance of such opposition and resistance, has engaged in unlawful combinations and conspiracies in restraint of trade.

[1.] For historical summaries, see *NLRB v. J. P. Stevens & Co., Inc., 563 F.2d 8, 13 (2d Cir. 1977)*, Cert. denied, ***434 U.S. 1064, 98 S. Ct. 1240, 55 L. Ed. 2d 765 (1978)***; *J. P. Stevens & Co., Inc. v. Jackson, 99 LRRM 2827, 2828 n.2* (N.D.Ga.1978).

Paragraph 13 describes, without naming, [2] those persons or entities **[**4]** with whom Stevens is alleged to have combined and conspired. They are said to consist of other textile manufacturers; national and local trade and industry associations; employer-supported groups of employees; non-textile employers and businesses in areas where Stevens operates plants; chambers of commerce and similar organizations in such areas; state and local development authorities in such areas; local and state governmental officials and agencies in such areas; and "other persons and entities which are presently unknown to plaintiff."

Paragraph 14 describes the acts, generally and without specifics, allegedly committed by Stevens and its co-conspirators. The allegations, stripped of certain verbiage, describe the following kinds of behavior:

(a) Fixing or limiting wages and working conditions by means of agreements between competing textile companies.

[5]**

(b) Discharging, harassing or discriminating against employees who support ACTWU's efforts.

(c) Committing violations "of the national labor laws" in order to obstruct ACTWU from its organizational and representational activities, and of preventing ACTWU members from their activities, such violations of the labor laws including improper interrogation, surveillance, harassment, and improper procedures in connection with elections to have ACTWU designated as the bargaining representative of the employees.

(d) Refusing to hire and "blacklisting" employees and others who support ACTWU.

(e) Causing or inducing other employers, both within and without the textile industry, to refuse to hire and to "blacklist" employees and persons who support ACTWU.

(f) Discharging or refusing to hire relatives, friends and family members of employees who support ACTWU.

(g) Causing or inducing other employers, both within and without the textile industry, to discharge or refuse to hire relatives, friends and family members of employees who support ACTWU.

(h) Causing or inducing banks, lending and credit organizations, landlords, employers' insurance **[**6]** carriers and their representatives, and business men to discriminate against or refuse to deal with ACTWU, or employees who support ACTWU, their relatives, friends and family members.

(i) Causing or inducing officials and agencies of local and state government to discriminate against such employees, their relatives, friends and family members, with respect to governmental **[*486]** relief and welfare benefits and programs.

(j) Working in concert with chambers of commerce, development authorities, trade and employer associations, and other organizations, to prevent the development of unionized industry in the areas where Stevens operates its textile plants.

(k) Causing or inducing the formation of the J. P. Stevens Employees Educational Committee, whose fundamental goal is to obstruct ACTWU's efforts.

(l) Obtaining financial and other support for the J. P. Stevens Employees Educational Committee from competing textile manufacturers and other anti-union employers and textile and industrial trade associations.

(m) Causing, inducing and encouraging the formation of other employer-supported groups of textile industry employees with goals similar **[**7]** to that of the J. P. Stevens Employees Educational Committee.

(n) Refusing to negotiate in good faith with ACTWU for collective bargaining agreements where ACTWU has been designated as bargaining representative.

(o) Closing or threatening to close textile plants where ACTWU has been designated as bargaining representative, or where it appears that ACTWU would be so designated if free elections were allowed to be held.

(p) Abusing the judicial and administrative process by prolonged, frivolous, and contemptuous resistance to requirements of law.

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[2] The only exception is J. P. Stevens Employees Educational Committee, alleged to be "an employer supported organization of Stevens employees." P 13(c).

(q) Inciting and exploiting racial discord within textile plants and their communities, with the intent of intimidating and harassing black employees who support ACTWU's efforts, and inciting white employees to oppose those efforts.

(r) Exchanging information, discussing and agreeing upon tactics to be followed to oppose ACTWU's efforts.

(s) Developing a common scheme or plan pursuant to which these acts were committed, and are being committed.

(t) Committing other acts in furtherance of said combinations and conspiracies, presently unknown to ACTWU.

Paragraph 15 alleges that, **[**8]** by reason of these unlawful acts of Stevens and its co-conspirators, ACTWU and its members have been injured in their business and property. ACTWU alleges damages arising out of its unlawful prevention and restraint from its right to organize and represent employees in the textile industry. Various injuries are alleged on behalf of the ACTWU members, arising out of the wrongful acts previously alleged. Treble damages are requested on behalf of all such interests, pursuant to *15 U.S.C. § 15*.

The second cause of action realleges the allegations of PP 1 through 15, and further alleges that Stevens' unlawful acts, in violation of the antitrust laws, are continuing and will continue unless enjoined, in consequence of which ACTWU alleges that it is entitled to injunctive relief pursuant to *15 U.S.C. § 26* (Complaint, PP 17-20).

II.

The ACTWU and Stevens have, until now, battled each other up and down the halls of the NLRB. That is where Stevens says they should remain. ***HN1***[] The National Labor Relations Act of 1935, *29 U.S.C. § 151 Et seq.* ("NLRA"), and the Labor Management Relations Act of 1947, *29 U.S.C. § 141 Et seq.* ("LMRA"), established national policy favoring collective bargaining, **[**9]** forbade various employer practices and labor practices as unfair, and set up the NLRB as the enforcement agency. The NLRB has exclusive competence over any activity "arguably subject" to § 7 or § 8 of the *National Labor Relations Act, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*, a concept restated in *Motor Coach Employees v. Lockridge, 403 U.S. 274, 292, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971)* as pre-empting state and federal court jurisdiction "to remedy conduct that is arguably protected . . . **[*487]** or prohibited by . . . the Act." Stevens relies, in part, on this principle in moving for dismissal of the complaint.

ACTWU responds, correctly, that neither Garmon nor Lockridge involved antitrust claims, as the case at bar is said to do. The interaction of antitrust policy and labor policy, described by one commentator as "intrinsically incompatible," [3.] has generated considerable litigation. Many cases arise when a company raises the sword of ***antitrust law*** against a union, and the union parries with the shield of labor law. This has been the greatest area of involvement of the Supreme Court, whose leading decisions **[**10]** are *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*; *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)* (a criminal antitrust charge initiated by the government); *Allen Bradley Co. v. Electrical Workers Local 3, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*; *Ramsey v. United Mine Workers, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64 (1971)*; and *Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*. In each of these cases, an employer, an affected company, or the government (as in Hutcheson) contended that union activity violated the antitrust laws. The decisions turned, in the main, upon the Court's perception of the "labor exemption" from the antitrust laws, deriving either from such statutory exemptions as appear in legislation [4.] or the

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[3.] St. Antoine, Connell: ***Antitrust Law*** at the Expense of Labor Law, 62 Va.L.Rev. 603, 604 (1976).

[4.] Section 6 of the Clayton Act, *15 U.S.C. § 17*, states in effect that labor is not an article of commerce and that the antitrust laws should not forbid labor organizations. Section 20, *29 U.S.C. § 52*, limits the federal courts' injunctive powers and lists certain union activities which are not to be regarded as violative of United States law. Further declarations of the freedom of employees to organize, and limitations upon the federal courts' injunctive powers in labor disputes, appear in the Norris-LaGuardia Act, *29 U.S.C. §§ 101-110*, 113-115.

"nonstatutory exemption" conferred by Court decisions in recognition of "the strong labor policy favoring the association of employees **[**11]** to eliminate competition over wages and working conditions." Connell, Supra, 421 U.S. at 622, 95 S. Ct. at 1835. These "labor exemption" cases are lucidly reviewed in Sullivan, Handbook of the Law of Antitrust (1977), at pp. 723-731. Out of the welter of opinions generated by these cases, Professor Sullivan distills an overall approach:

> "In their totality **[**12]** these cases suggest both an analytical stance and an objective: to reconcile labor and antitrust policy where possible and, where not, to weigh claims of each and give way to the stronger." *Id. at 729*.

The task, he acknowledges, is a difficult one. The Second Circuit has said that the accommodation of the conflicting federal antitrust and labor law policies presents "a troublesome and unruly issue." *Commerce Tankers v. National Maritime Union of America, 553 F.2d 793, 801 (2d Cir. 1977)*, quoting Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U.Chi.L.Rev. 659 (1965). See also Comment, Labor vs. Antitrust: An Inherent Congressional Quandary, 44 Brooklyn L.Rev. 821 (1978).

While the cited cases appear prominently in the briefs of the parties in the case at bar, they deal, as has been noted, with antitrust charges being made against unions. We are here presented with a union's charge that a company is violating the antitrust laws. Not surprisingly, this situation has arisen far less frequently.

At the outset, I reject Stevens' contention that ACTWU lacks standing to make the claim. While board chairmen and company presidents of the early years of **[**13]** this century might have had difficulty in thinking of labor union organizers as fellow businessmen, it is now well settled that: ***HN2***[] "Unions are in the business of representing employees." *Tugboat, Inc. v. Mobile Towing* ***[*488]*** *Company, 534 F.2d 1172, 1176 (5th Cir. 1976)*. Hence, as that case holds, a union has standing to assert a claim that an antitrust conspiracy involving employers damages its ability to attract members. I am aware of no Supreme Court or Second Circuit decisions to the contrary, and hold on the authority of Tugboat, Inc. that ACTWU has sufficient standing to survive a motion to dismiss the complaint. [5.]

[14]** We come, then, to Stevens' primary attack on the sufficiency of the antitrust claim. ACTWU argues that the § 6 Clayton Act labor exemption redounds only to the benefit of labor, and cannot be availed of by an employer. I accept that principle, but it does not meet Stevens' primary argument, which is that the allegations in ACTWU's complaint, taken as true on this motion to dismiss, simply do not state a cause of action within the antitrust laws. That contention is sound.

In Apex Hosiery, Supra, members of a union took forcible possession of a plant, impeding shipments destined for interstate commerce. The employer sued the union for restraint of trade in violation of the Sherman Act. The Supreme Court affirmed dismissal of the complaint on the basis of lack of jurisdiction under the antitrust laws, stating *310 U.S. at 495-497, 60 S. Ct. at 993-994*:

> ". . . this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases **[**15]** like the present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way."

[5.] If the case were to continue, other questions of standing might arise, such as that of the ACTWU to claim individual damages on behalf of its members. A possible solution, assuming the existence of a problem, would be the intervention of individual employees as plaintiffs, and the certification of the suit as a class action. Because the complaint must be dismissed on other grounds, this subject need not be further pursued.

These principles still obtain; and they serve to explain the survival of the union's antitrust complaint in Tugboat, Inc., Supra, upon which ACTWU places heavy reliance. Two towing companies, Tugboat, Inc. and Mobile Towing Co., were competitors in the tugboat services market in Mobile Bay. The plaintiff union, Seafarers International, and another union, the International Organization of Masters, Mates and Pilots, were contesting the right to represent the workers in the local tugboat industry. Seafarers invoked the antitrust laws against Tugboat, Inc. and its rival union. The Fifth Circuit reversed dismissal of the complaint; the Court of Appeals' analysis of the claim is central to the decision:

> "The essence of the claims in both of these actions is that Tugboat, Inc., conspired with members of Masters, Mates, and Pilots, a union whose local the owners of Tugboat, Inc., allegedly **[**16]** dominate, to restrain trade in the local towing industry by unfairly obtaining labor costs far cheaper than those available to Mobile Towing Co. . . . As alleged, the conspiracy between Tugboat and Masters, Mates, and Pilots allowed Tugboat to prevent Seafarers from organizing Tugboat's employees thus allowing Tugboat to avoid the higher wages and larger crews called for in Seafarer's agreement with Mobile Towing. By reducing costs, Tugboat would be able to run Mobile Towing out of business and monopolize the market. The question for this court is whether the unions or their members may argue that these practices violate the antitrust laws and entitled them to relief."

Clearly, therefore, the facts in Tugboat, Inc. presented a form of "restraint upon commercial competition in the marketing of goods or services" held in Apex Hosiery to **[*489]** be an essential element of an antitrust claim. [6.]

[17]** ***HN3***[] Where that element is missing, a union cannot invoke the Sherman Act in complaining of obstruction of its organizational and representational efforts. *United Brick & Clay Workers v. Junction City Clay Co., 158 F.2d 552 (6th Cir. 1946)*, which cites and follows Apex, is squarely in point. The plaintiff union was the national organization of workers in the brick and clay industry. The union charged several clay companies, an alleged strike-breaking concern, and other parties with conspiracy to impede and thwart its representational efforts. The Court of Appeals affirmed dismissal of the complaint, holding that the NLRB had exclusive jurisdiction of the union's claims. The antitrust claim did not alter that result:

> "The acts described in the petition do not come within the purview of the Sherman Antitrust Act, for they do not allege the imposition by appellees of any form of restraint upon commercial competition in the marketing of

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[6.] The other cases relied upon by ACTWU are similarly distinguishable. *Carpenters District Council v. United Contractors Association of Ohio, Inc., 484 F.2d 119 (6th Cir. 1973)*, *Modified, 539 F.2d 1092 (6th Cir. 1976)*, and *International Association of Heat and Frost Insulators and Asbestos Workers v. United Contractors Association, Inc., 483 F.2d 384 (3rd Cir. 1972)*, *Modified, 494 F.2d 1353 (3rd Cir. 1974)*, represented, as characterized by the Court in East Central Ohio Building and Construction Trades Council v. Landmark, Inc., (N.D.Ohio, April 26, 1977), an effort by the defendants "to lessen competition by organizing and directing a "sham' union." East Central, slip op. at 5. Thus in the International Association case, the complaint alleged that "an object of the illegal combination and conspiracy is to prevent the Unions from representing for collective bargaining purposes employees of the members of the Association and thus to obtain A competitive advantage over employer parties to collective bargaining arrangements with the Unions . . ." *483 F.2d at 387* (emphasis added). In East Central, the defendants were charged with comparable monopolistic objectives, albeit by a different device. East Central distinguished *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of America, 431 F.2d 1004 (5th Cir. 1970)*, upon which Stevens relies in the case at bar, because the complaint in Prepmore alleged only a conspiracy to "injure the union and destroy its operations . . ." *431 F.2d at 1006*. The Court in East Central observed that in Prepmore, "there was apparently no allegation that the offending employer conspired to monopolize or otherwise restrain trade." Slip op. at 6. But the allegations in the complaint at bar mirror those of Prepmore, since their essential thrust is that Stevens, in conspiracy with others, seeks to frustrate the union. Relying upon Apex, Supra, and subsequent Supreme Court authority, the Fifth Circuit said in Prepmore :

"There is no indication, however remote, of a conspiracy or combination on the part of Prepmore and Blue Bell to restrain competition in the marketing of Prepmore's goods. In sum, the allegations of the first count of the counterclaim do not rise to the level of alleging a restraint of the type to which the Sherman Act is directed. *Apex Hosiery Co. v. Leader, supra.* It follows that the district court did not err in dismissing the count." *431 F.2d at 1007*.

See also *United Brick & Clay Workers v. Junction City Clay Co., 158 F.2d 552 (6th Cir. 1946)*, Infra.

> goods or service. *Apex Hosiery Co. v. Leader, 310 U.S. 469, 493-500, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A.L.R. 1044*." *158 F.2d at 554*.

The Second Circuit applied Apex in *Kennedy v. Long Island Railroad Company, 319 F.2d 366* (2d Cir.), Cert. denied, **[**18]** *375 U.S. 830, 84 S. Ct. 75, 11 L. Ed. 2d 61 (1963)*, in which the plaintiff union challenged on Sherman Act grounds a "strike insurance" pact entered into by a number of railroads, which supplied a limited amount of funds to roads hit by a certain limited class of strikes. Affirming dismissal of the complaint, Chief Judge Kaufman said in part:

> "Even were we to assume that the strike insurance plan in some way was the "cause' of an interruption in interstate commerce, the Supreme Court has clearly stated that "the Sherman Act * * * does not condemn all combinations and conspiracies which interrupt interstate transportation,' *Apex Hosiery Co. v. Leader, 310 U.S. 469, 486, 60 S. Ct. 982, 84 **[*490]** L. Ed. 1311, 128 A.L.R. 1044 (1940)*, and that "the end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services,' *310 U.S. at 493, 495, 501, 512, 60 S. Ct. at 1002*. Surely it cannot be said that the instant form of railroad cooperation in combatting the risks of labor unrest effects an unnatural **[**19]** and anticompetitive regulation of the pricing, supply, or distribution of goods or services. Appellants urge, however, that the price of labor is artificially manipulated whenever a railroad is permitted to avail itself of the proceeds of strike insurance. The answer lies in the clear language of section 6 of the Clayton Act, *15 U.S.C. § 17*: "The labor of a human being is not a commodity or article of commerce.' As an outstanding scholar in the field of labor law has noted: "No one seriously suggests that antitrust policy should be concerned with the labor market per se.' Cox, "Labor and the Antitrust Laws A Preliminary Analysis,' 104 U. of Pa.L.Rev. 252, 254 (1955)." *319 F.2d at 373*.

That proposition of Professor Cox quoted by the Second Circuit in Kennedy that antitrust policy is not "concerned with the labor market per se" is echoed by the Supreme Court's latest decision in Connell, Supra, in which the union activity in question (striking in successful effort to force a number of general contractors to agree to subcontract work only to subcontractors which had current collective bargaining agreements with the union) was held the proper basis of a federal antitrust suit: **[**20]**

> ". . . because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wage and working conditions." *421 U.S. at 635, 95 S. Ct. at 1841*.

These authorities are dispositive, and require dismissal of the antitrust claims. The claims alleged "arguably" fall within the labor laws; indeed, a number of them virtually parrot statutory definitions of unfair labor practices. The antitrust laws do not furnish a remedy, since ACTWU's allegations, taken separately or in concert, do no more than complain of efforts to impede its activities as a union, entirely unaccompanied or uncomplicated by any element of monopolistic effect upon competition in the marketplace for goods or services. As such, the allegations do not rise to the level of an antitrust violation; and in consequence there is no basis to depart from the rule of Garmon and Lockridge, Supra.

I fully appreciate the difficulties ACTWU has encountered in bringing Stevens, that "notorious recidivist," [7.] to book by appealing to the labor laws and the NLRB. The union's frustration and desire to strike out in other directions are equally **[**21]** understandable. Recognizing that Stevens' miserable record of noncompliance with NLRB and court orders "raises grave doubts about the ability of the courts to make the provisions of the federal labor law work in the face of persistent violations," *NLRB v. J. P. Stevens & Co., Inc., Supra, 563 F.2d at 25-26*, the problem may not legitimately be solved by reference to another body of law which is simply not applicable. To use a homely analogy: I may, as a tenant, be harassed and frustrated by the inadequacies and inattention of my landlord; and I may have found the law of landlord and tenant, and the special courts relating to them, inadequate fully to redress my

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[7.] *NLRB v. J. P. Stevens & Co., Inc., Supra, 563 F.2d at 13*, quoting Bartosie and Lanoff, Escalating the Struggle Against Taft-Hartley Contemnors, 39 U.Chi.L.Rev. 255, 256 n.4 (1972).

grievances; but that does not justify my requesting the district attorney to prosecute the landlord under a penal law whose provisions do not apply to the facts of my situation.

[22]** So here, if the federal labor laws permit Stevens to flout them with impunity, the remedy must lie in a revision of those laws by the Congress.

[*491] The first and second causes of action, alleging violations of the antitrust laws, will be dismissed.

III.

Even if the NLRB were not lurking in the background, ACTWU's causes of action based upon the civil rights statutes are legally insufficient.

The third cause of action (PP 21-25) purports to state a claim under *42 U.S.C. § 1983*, the provisions of which are set out in the margin. [8] *Section 1983* applies only to persons who deprive citizens of their rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . ." Stevens itself, of course, does not operate under color of state law. While the complaint alleges that Stevens conspired with local and state officials, and other authorities acting under color of law, no specifics whatsoever are given, in respect of name, date, place, or nature of the activity complained of. The pleading is entirely deficient under the law of this Circuit. ***HN4***[] While a private person, not himself an officer of the state, may be proceeded against under **[**23]** *§ 1983* if "he is a willful participant in joint activity with the State or its agents," *United States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157, 16 L. Ed. 2d 267 (1966)*, the plaintiff must in order to state a cause of action specifically identify the public officials concerned, and, as to such officials, specifically allege their personal involvement in the acts complained of. *Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964)*; *Koch v. Yunich, 533 F.2d 80 (2d Cir. 1976)*; *Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975)*; *Colon v. State of New York Division of Human Rights, 354 F. Supp. 343 (S.D.N.Y.1973)*, *Aff'd, 498 F.2d 1396 (2d Cir. 1974)*; *Black v. United States, 534 F.2d 524 (2d Cir. 1976)*; *Buck v. Board of Elections of City of New York, 536 F.2d 522 (2d Cir. 1976)*. Conclusory or vague complaints, limited to general allegations of deprivation, are insufficient "unless amplified by specific instances of misconduct." *Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977)*.

[24]** Ordinarily I might grant ACTWU leave to amend its complaint. However, under Garmon and Lockridge, Supra, the NLRB has exclusive jurisdiction over the claims against Stevens. See n.10, Post. No leave to amend will be granted.

ACTWU's fourth and fifth causes of action are based upon *42 U.S.C. §§ 1985* and *1986*, respectively. Under the rule of *Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)*, ***HN6***[] the action may be maintained under these sections only if plaintiff alleges "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." The only animus alleged in the case at bar is that of an employer and its alleged co-conspirators against a union and its members, because of the union activities. [9] **[**25]** In *Moshlak v. American Broadcasting **[*492]** Co. 423 F. Supp. 774, 778 (S.D.N.Y.1976)*, Judge Lasker of

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8. ***HN5***[] The statute provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

9. The fourth and fifth causes of action re-allege the allegations of PP 2-15 of the complaint. Paragraph 14(q) alleges, as certain of the acts complained of:

"Inciting and exploiting racial discord and tensions within textile plants and the communities where they are located with the intent, purpose and effect of (i) intimidating and harassing black employees who support ACTWU's organizational and representational activities and (ii) inciting white employees to oppose ACTWU's organizational and representational activities; . . ."

this Court gave short shrift to a labor union's contention that its members fell within those particular, discriminated-against classes contemplated by the Supreme Court in Griffin, and so do I. See also *Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226 (5th Cir. 1977)*. [10.]

The sixth and final cause of action reiterates the alleged unlawful acts of Stevens in violation of the civil rights acts, and prays for injunctive relief. The third, fourth and fifth causes of action, invoking the civil rights acts, having fallen for the reasons stated, [11.] the sixth cause of action falls with them.

CONCLUSION

The Clerk of the Court is directed to enter judgment in favor **[**26]** of the defendant, dismissing the complaint with prejudice and without costs.

It is So Ordered.

While there are references in this paragraph to the color of employees, the thrust of the claim is plainly that of unfair labor practices committed against employees of Both Races. Hence the invidiously discriminatory motivation against members of a Particular race required by Griffin v. Breckenridge is not pleaded.

[10.] Moshlak and Bova also hold that to the extent the employees have viable claims against their employers, they must be submitted to the NLRB. Bova at 228; *Moshlak at 778*. While these cases arose within the context of *§ 1985*, their rationale is equally applicable to claims under *§ 1983*. The civil rights acts may not be used to undermine the enforcement machinery devised by Congress for labor disputes.

[11.] By this I mean both the infirmities in the civil rights causes of action as pleaded, and the exclusive competence of the NLRB.

People v. Roth

County Court of New York, Trial Term, Nassau County

August 10, 1979

No Number in Original

Reporter
100 Misc. 2d 542 *; 419 N.Y.S.2d 851 **; 1979 N.Y. Misc. LEXIS 2502 ***; 1979-2 Trade Cas. (CCH) P62,828

The People of the State of New York, Plaintiff, v. Samuel J. Roth et al., Defendants

Core Terms

Donnelly Act, profession, exempt, fee schedule, medical profession, anti trust law, indictment

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

N.Y. Gen. Bus. Law § 340(1) declares void and illegal against public policy every contract, agreement, arrangement or combination, whereby competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained.

Governments > Courts > Judicial Precedent > Dicta

Governments > Courts > Judicial Precedent

HN2[] **Judicial Precedent, Dicta**

The considered reasoning of a court of final resort on a proposition raised by counsel and deliberately passed on by the court is not mere dicta but must be taken by the courts of inferior jurisdiction as binding.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

Historically, the New York Legislature did not intend that the medical profession be subject to the Donnelly Act, *N.Y. Gen. Bus. Law §§ 340*, *341*. The statutory language limited the act to any business or trade and the 1933 amendment that extended the act to include service was not intended to include service rendered by the professions. By virtue of the statutory language, legislative history and intent and the judicial interpretation of the act, the medical profession is exempt from the Donnelly Act.

Headnotes/Summary

Headnotes

[*1] Monopolies -- Exemption of Medical Profession from State Antitrust Laws**

The medical profession is exempt from the provisions of the Donnelly Act, the State ***antitrust law***, by virtue of the statutory language, legislative history and intent, and the judicial interpretation of the act. Accordingly, an indictment charging the individual physician defendants and the defendant association with a combination in restraint of the furnishing of services in violation of *sections 340* and *341 of the General Business Law* is dismissed; nevertheless, the resignation by certain physicians of their authorizations to treat nonemergency workers' compensation and no-fault patients based on allegedly inadequate compensation fee schedules and administrative abuses is reprehensible, notwithstanding what may be valid complaints, and, since this court is without remedy, the problem should be addressed by the Legislature.

Counsel: *Irving Anolik* for Samuel J. Roth and others, defendants, *Harvey Paticoff* for Joel Karen, defendant, *Weingard & Broudny* for Peter Ravitz and another, defendants, *O'Brien & Keefe* for Frank Oliveto, defendant, *Kostelanetz & Ritholz* and *Kase & Druker* for Seth **[***2]** Kaufman, defendant.

Robert Abrams, Attorney-General (John M. Desiderio of counsel), for plaintiff.

Le Boeuf, Lamb, Lieby & Macrae for Medical Society of State of New York, *amicus curiae*.

Kent Masterson Brown and *Mudge Rose Guthrie & Alexander* for Association of American Physicians & Surgeons, Inc., *amicus curiae*.

Andrews Davis Legg Bixler Milsten & Murray, Inc., for Private Medical Care Foundation, Inc., *amicus curiae*.

Judges: Marie G. Santagata, J.

Opinion by: SANTAGATA

Opinion

[*542] [852] OPINION OF THE COURT**

This is a motion by the defendants for an order dismissing this indictment pursuant to *CPL 210.20*.

[*543] The defendants are charged with a combination in restraint of the furnishing of services, in violation of the Donnelly Act, *sections 340* and *341 of the General Business Law*. There are eight individual physician defendants and one association defendant, Surgical Specialties Association of New York, Inc. (hereinafter SSANY).

The indictment charges the defendants, *inter alia*, with "concertedly resigning their authorizations to treat non-emergency Workmen's Compensation patients, and concertedly refusing to treat non-emergency **[***3]** No-Fault patients."

Amicus curiae briefs in support of the motion have been submitted by the Medical Society of the State of New York, the Association of American Physicians and Surgeons, Inc., and the Private Medical Care Foundation, Inc.

FACTS

The facts are substantially undisputed.

Section 13-b of the Workers' Compensation Law requires that only physicians authorized by the compensation board treat workers who are injured during the course of their employment. Fees are governed by a minimum fee schedule adopted by the board. The No-Fault Insurance Law (Insurance Law, § 678) enacted by the Legislature in 1977 adopted the minimum fee schedule of the compensation board as the maximum fee schedule to be paid to physicians for the treatment of persons injured in automobile accidents.

In 1975 many physicians who were dissatisfied with the compensation board communicated their complaints to the chairman of the board and members of the Legislature. Individual physicians resigned from the compensation panels. Their complaints included the failure of the board to answer correspondence or authorize necessary treatment; the unreasonable delays or failure to approve payment of **[***4]** fees; the requirement of duplicitous paper work and coercion in forcing them to accept inadequate fees.

The defendant physicians and others organized SSANY in 1977 with the objective of urging the modification of the compensation fee schedule and the elimination of administrative abuses from the system. As the efforts to obtain legislative action failed, the physicians concertedly agreed to resign their authorizations to treat work-related or automobile accident injuries. Over 250 physicians in the Long Island area **[*544]** became unavailable to render nonemergency medical aid to workers and accident victims. This situation prevails to this date.

The Attorney-General of the State of New York, upon learning of the numerous complaints from residents who were refused medical services, commenced an investigation. This indictment is the result of that investigation.

ISSUE

The defendants have advanced several arguments in support of this motion to dismiss the indictment.

This court will consider the only one which is necessary to its decision. It is an issue of first impression, to wit: Is the medical profession exempt from the provisions of the Donnelly Act?

CONTENTIONS

[*5]** The defendants contend that as members of a learned profession they are exempt from the provisions of the Donnelly Act. They rely on the New York Court of Appeals decision of *Matter of Freeman (34 NY2d 1)*.

The Attorney-General responds that the references to the Donnelly Act in *Freeman (supra)* **[**853]** are dicta; that the Donnelly Act is the "Little Sherman Antitrust Act" *(State of New York v Mobil Oil Corp., 38 NY2d 460*); and, therefore, this court should be guided by the holding enunciated by the United States Supreme Court in *Goldfarb v Virginia State Bar (421 U.S. 773*).

SHERMAN ACT

The Sherman Act (the Federal ***antitrust law***) does not contain a specific exemption in favor of any profession. An analysis of the judicial application of the act reveals that the courts have not created an exemption in favor of any profession. Instead, Federal courts have evaluated each case on its merits, using as a test a rule of reason to determine whether the activity was anticompetitive and an unreasonable restriction on interstate commerce, thereby constituting a violation of the Sherman Act. *(National Soc. of Professional Engrs. v United States, 435 U.S. 679, 691*; **[***6]** Handler, Antitrust-1978, 78 Col L Rev 1363, 1363-1374.)

In *Goldfarb v Virginia State Bar (421 U.S. 773, 788*, *supra)* **[*545]** the Supreme Court stated there is a heavy presumption against implicit exemptions. *(United States v Philadelphia Nat. Bank, 374 U.S. 321, 350-351*.) It gave neither blanket inclusion nor blanket exclusion to the professions, holding that the conduct of mandatory price-fixing was anticompetitive and an unreasonable restraint in interstate commerce, and therefore violative of the act. The court based its decision on the activity and not upon whether it was business, trade or profession. Because of the activity alleged herein, a concerted refusal to deal in the nature of a boycott, there is no doubt that if the Sherman Act were controlling in this case, it would mandate the denial of this motion. *(American Med. Assn. v United States, 317 U.S. 519*; *United States v Oregon State Bar, 385 F Supp 507*.)

DONNELLY ACT

The Donnelly Act, New York's ***antitrust law*** which was enacted in 1899, is a codification of prior common law and statutory law. *(Matter of Davies, 168 NY 89*.) Presently it ***HN1***[] declares void and illegal against public policy "[every] **[***7]** contract, agreement, arrangement or combination, whereby * * * [competition] or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained". (*General Business Law, § 340*, *subd 1*.)

The act does not contain a specific exemption in favor of any profession. The only judicial application of the act to the professions is *Matter of Freeman (34 NY2d 1*, *supra)* which involved the question of whether a Surrogate, in fixing a fee, was unduly influenced by a minimum fee schedule of the local bar association. One of the parties asserted that a minimum fee schedule was regulated by the Donnelly Act. The Court of Appeals ruled on that issue without considering whether the conduct was proscribed under the act but rather relying upon the distinction between the profession and a business or trade. It stated unequivocally a profession is not a business and therefore exempt from the provisions of the Donnelly Act.

In rendering its decision, it was aware of the lower court holding in *Goldfarb (355 F Supp 491*). It specifically distinguished the Federal decision, stating that the question **[***8]** presented dealt solely with the relationship of the State ***antitrust law*** to the statutory scheme for regulating the practice of law.

The court concluded that neither by statutory language, **[*546]** legislative history nor legislative intent did the Donnelly Act apply to the legal profession. It held that the legal profession was exempt from the act.

HN2[] The considered reasoning of a court of final resort on a proposition raised by counsel and deliberately passed on by the court is not mere dicta but must be taken by the courts of inferior jurisdiction as binding. The holding of the majority in *Freeman (supra)* is not dicta. *(Matter of Freeman, 34 NY2d, at p 12*, concurring opn Wachtler, J.)

[854]** The issue before this court is not distinguishable. There is no valid distinction in the interpretation of the Donnelly Act between the legal and medical professions. All the indicia of professionalism noted by the Court of Appeals clearly apply equally to medicine as to law (Education Law, arts 130, 131; *Matter of Freeman, supra, p 7*).

HN3[] Historically, the Legislature did not intend that the medical profession be subject to the act. (Report of the Special Committee to **[***9]** Study the New York Antitrust Laws of the New York State Bar Association, Section on ***Antitrust Law***, 1957.) The statutory language limited the act to any business or trade and the 1933 amendment that extended the act to include service was not intended to include service rendered by the professions. (Bennett, Recent Amendments to the Donnelly Act, 5 NY State Bar Assn Bull, 384, 389; *Matter of Freeman, supra.)*

Consequently, by virtue of the statutory language, legislative history and intent and the judicial interpretation of the act, it is concluded that the medical profession is exempt from the Donnelly Act.

This court has reviewed the rulings in *Matter of Green* (NYLJ, Feb. 23, 1978, p 14, col 2) and *Matter of Hirschorn v Attorney-General of State of N. Y. (93 Misc 2d 275*). Neither ruling involved a criminal prosecution, but rather motions by potential witnesses to quash subpoenas issued by the Attorney-General in connection with investigations under *section 340 of the General Business Law*. These cases held quite properly that an investigation by the Attorney-General into possible antitrust activity was a proper inquiry. It did not consider whether the physicians were **[***10]** subject to the provisions of the Donnelly Act and any such reference was pure dicta and not competent to overrule *Matter of Freeman (supra)*.

CONCLUSION

In this court's view, the conduct of the physicians, the **[*547]** concerted refusal to deal, is in the nature of a boycott, and reprehensible notwithstanding what may be valid complaints. *(State of New York v Horsemen's Benevolent & Protective Assn., 55 AD2d 251*.)

The concerted refusal to treat the injured and the maimed prevents those innocent victims from receiving medical care from the only ones qualified by training and education to render such care. There are no "do it yourself kits" for those requiring orthopedic, plastic or neurological treatment. The social harm inflicted is immeasurable and outweighs any individual inequities. The public is made to suffer in what is essentially an economic battle -- a fight over money, which is inconsistent with the physician's oath to humanity.

It is also important to note that an administrative agency or board cannot be permitted to function without an adequate review of grievances lodged against it.

This court is without remedy. The Legislature is not so limited. The **[***11]** problem presented is far too serious to be ignored and should be addressed without delay.

Accordingly, the omnibus motion is granted to the extent that the indictment is dismissed on the grounds that the medical profession is exempt from the Donnelly Act. In all other respects it is denied as moot.

In re Beef Industry Antitrust Litigation

United States Court of Appeals for the Fifth Circuit

August 17, 1979

Nos. 78-1817 78-1829

Reporter

600 F.2d 1148 *; 1979 U.S. App. LEXIS 12397 **; 1979-2 Trade Cas. (CCH) P62,802; 28 Fed. R. Serv. 2d (Callaghan) 39

In re BEEF INDUSTRY ANTITRUST LITIGATION; PONY CREEK CATTLE CO., INC., et al., Plaintiffs-Appellants, Musselman Ranch Co., etc., et al., Plaintiffs-Intervenors-Appellants, v. The GREAT ATLANTIC & PACIFIC TEA CO. et al., Defendants-Appellees; R. Dirk AGEE et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; MEAT PRICE INVESTIGATORS ASSOCIATION, etc., et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; Richard S. LOWE et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; A.L. BLACK et al., Plaintiffs-Appellants, v. ALBERTSON'S, INC., et al., Defendants-Appellees (two cases); CHAPARRAL CATTLE CORP., et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; Burke PETERSEN et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; Ronald BECKER et al., on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; John O. VARIAN et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., et al., Defendants-Appellees; MEAT PRICE INVESTIGATORS ASSOCIATION et al., Plaintiffs-Appellants, v. SAFEWAY STORES, INC., etc., et al., Defendants-Appellees; LITTLE RANCH CO., INC., et al., Plaintiffs-Appellants, v. The NATIONAL ASSOCIATION OF FOOD CHAINS, etc., et al., Defendants-Appellees; Ronald BECKER et al., on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellants, v. SAFEWAY STORES, INC., etc., et al., Defendants-Appellees

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

Core Terms

Brick, price-fixing, complaints, packers, retail, chains, passing-on, purchasers, prices, beef, cattle, conspiracy, cases, allegations, damages, district court, antitrust, overcharge, Shoe, slaughterers, cost-plus, indirect, sellers, suits, pleadings, formula, alleged conspiracy, oligopsony, cattlemen, monopsony

LexisNexis® Headnotes

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

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

Where actions are dismissed on the pleadings, the allegations of the complaints must be taken as true for purposes of appeal.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

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

See § 4B Clayton Act, *15 U.S.C.S. § 15b*.

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 > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN3[] **Remedies, Damages**

The Illinois Brick rule bars damage actions against alleged price-fixers by indirect purchasers.

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

HN4[] **Private Actions, Purchasers**

The use of passing-on as a defense is barred in an antitrust action.

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

HN5[] **Private Actions, Purchasers**

With few exceptions, indirect purchasers of an alleged price-fixer's product cannot maintain a treble damages action predicated on the offensive use of the theory that the price-fixer's overcharge to his customer was passed on to the plaintiffs.

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

HN6[] **Private Actions, Purchasers**

The passing-on theory of damages must be barred in those situations in which the defendant could not assert a passing-on defense against his direct purchasers.

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

HN7[] **Private Actions, Purchasers**

There is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes.

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

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

HN8[] **Amendment of Pleadings, Leave of Court**

Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as the result of rulings on a point of law handed down during the pendency of the litigation.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

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

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

HN9[] **Relief From Judgments, Altering & Amending Judgments**

Fed. R. Civ. P. 15(a) requires that leave to amend be freely granted "when justice so requires."

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

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

HN10[] **Amendment of Pleadings, Leave of Court**

The United States Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

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

HN11[] **Relief From Judgments, Altering & Amending Judgments**

Denial of leave to amend is proper when the proposed amendment would be futile.

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

HN12[] **Private Actions, Purchasers**

There is a general "cost-plus" exception to the bar against assertion of a passing-on defense, an exception defined by the policies underlying the bar.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN13[] Purchasers, Indirect Purchasers

Permitted is the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. Although the exception was intended to have a "narrow scope", any situation in which the impact of the overcharge is essentially determined in advance without reference to the interactions of supply and demand would function in the same way.

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

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

HN14[] Private Actions, Purchasers

The Illinois Brick rule has no application to claims for injunctive relief.

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

HN15[] Private Actions, Purchasers

The Illinois Brick rule does not bar suits for injunctive relief by indirect purchasers in price-fixing actions because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN16[] Clayton Act, Claims

To secure injunctive relief under § 16 of the Clayton Act, *15 U.S.C.S. § 26* plaintiffs need show only threatened loss or damage by a violation of the ***antitrust law***. To show a threat of such injury, plaintiffs would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive, or that the conspiracy reduced the demand.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] Clayton Act, Claims

Where a complaint alleges that some of the plaintiffs have purchased a product as consumers at prices affected by the alleged conspiracy, such an allegation is an adequate allegation of the injury to one's "property" within the meaning of § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

HN18[] Pleading & Practice, Joinder of Claims & Remedies

Fed. R. Civ. P. 18(a) grants plaintiffs complete freedom to join in a single action all claims that they may have against any defendants.

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

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

HN19[] Private Actions, Standing

Only those within the "target area" of an alleged antitrust conspiracy have standing to sue.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

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

HN20[] Defenses, Demurrers & Objections, Denial of Allegations

The question of standing is a preliminary one, to be answered from examination of the allegations of the complaint.

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

HN21[] Private Actions, Purchasers

The "target" of a retail price-fixing conspiracy is the retail purchaser.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Immaterial Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Redundant Matters

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN22[] Motions to Strike, Immaterial Matters

The district court has ample discretion, under *Fed. R. Civ. P. 12(f)*, to order stricken from the complaint any redundant or immaterial matter. Although unnecessary evidentiary details are usually not stricken from the complaint unless prejudicial or of no consequence to the controversy, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. See *Fed. R. Civ. P. 8(a)*. Many courts have properly stricken unnecessary evidentiary detail from pleadings.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN23[] Standards of Review, Abuse of Discretion

The district court's action in striking pleadings will not be disturbed unless it was an abuse of discretion.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

HN24[] Tolling of Statute of Limitations, Fraud

Fraudulent concealment tolls the Clayton Act's statute of limitations. To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN25[] Antitrust & Trade Law, Clayton Act

The question of when the statute of limitations began to run on a plaintiff's cause under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, is a factual one, and is therefore not determinable on a motion for summary judgment.

Antitrust & Trade Law > Clayton Act > General Overview

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

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

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

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

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

Governments > Legislation > Statute of Limitations > General Overview

HN26[] **Antitrust & Trade Law, Clayton Act**

The party moving for summary judgment on the issue of statute of limitations has the burden of demonstrating the absence of any genuine material issue of fact, and the plaintiff has no obligation to present evidence opposing the motion unless the defendants' affidavit and exhibits initially established the absence of a genuine issue.

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

Evidence > ... > Exceptions > Public Records > General Overview

HN27[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Numerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public records.

Governments > Legislation > Statute of Limitations > General Overview

HN28[] **Legislation, Statute of Limitations**

In a case involving a claim that the statute of limitations has been tolled, the means of knowledge are the same thing as knowledge itself.

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

HN29[] **Statute of Limitations, Tolling**

Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it.

Civil Procedure > Attorneys > General Overview

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

Governments > Legislation > Statute of Limitations > General Overview

Legal Ethics > Professional Conduct > Frivolous Claims & Conduct

HN30[] Civil Procedure, Attorneys

The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice but to rule that it does so as a matter of law is to compel a person to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it". *Fed. R. Civ. P. 11*. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

Evidence > Burdens of Proof > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN31[] Burdens of Proof, Ultimate Burden of Persuasion

Plaintiffs bear the ultimate burden of persuasion on a fraudulent concealment issue. The burden is a heavy one. Those who have learned of facts "calculated to excite inquiry" must inquire.

Counsel: Ben L. Krage, Kasmir, Willingham & Krage, Dallas, Tex., for Pony creek, et al.

Lowell V. Summerhays, Robinson, Guyon, Summerhays & Barnes, Salt Lake City, Utah, for Varian, et al., Chaparral Cattle Corp., et al. and Petersen, et al.

Robert R. Eidsmoe, Gleysteen, Harper, Kunze, Eidsmoe & Heidman, Sioux City, Iowa, Burt A. Braverman, Frances Chetwynd, Washington, D. C., for Lowe, et al.

Lex Hawkins, Glenn L. Norris, Hawkins & Norris, Des Moines, Iowa, John A. Cochrane, Cochrane & Bresnahan, St. Paul, Minn., for Meat Price Investigators Ass'n, et al. and Becker, et al.

James W. Witherspoon, Donald L. Davis, Witherspoon, Aikin & Langley, Hereford, Tex., for Black, et al.

Joseph M. Alioto, Steven J. Cannata, Law Offices of Joseph L. Alioto, San Francisco, Cal., for Little Ranch Co.

W. Randolph Elliott, Baker, Glast, Riddle, Tuttle & Elliott, Dallas, Tex., for intervenors Powell Cattle Co., et al.

Jess B. Hawley, Jr., Hawley, Troxell, Ennis & Hawley, Boise, Idaho, for Albertson's, Inc., Skaggs-Albertson's.

Sheldon S. Toll, Honigman, Miller, Schwartz & Cohn, Detroit, Mich., for Allied **[**2]** Supermarkets, Inc.

Benjamin M. Quigg, Jr., Stephen W. Armstrong, James J. Rodgers, Morgan, Lewis & Bockius, Philadelphia, Pa., H. Dudley Chambers, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., for American Stores Co. f/k/a Acme Markets, Inc.

Roy Lewis Shults, Mitchell, Silberberg & Knupp, Los Angeles, Cal., for Arden-Mayfair, Inc.

Sylvan Rapaport, c/o Borman's, Inc., Detroit, Mich., for Borman's, Inc.

George B. Haley, Jr., Kilpatrick, Cody, Rogers, McClatchey & Regenstein, Atlanta, Ga., Robert W. Coleman, Stalcup, Johnson, Meyers & Miller, Dallas, Tex., for Colonial Stores, Inc.

John D. Leech, Calfee, Halter & Griswold, Cleveland, Ohio, for First Nat. Stores, Inc.

David A. Rosen, Stein, Rosen & Ohrenstein, New York City, for Food Fair Stores, Inc.

H. Kenneth Kudon, Danzansky, Dickey, Tydings, Quint & Gordon, Washington, D. C., for Giant Food, Inc.

Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom, New York City, for The Grand Union Co.

Wilson W. Herndon, Strasburger & Price, Dallas, Tex., for Liaison Counsel.

Denis McInerney, Thomas F. Curnin, Cahill, Gordon & Reindel, New York City, for The Great Atlantic & Pac. Tea Co., Inc.

Theodore A. Groenke, **[**3]** Walter M. Jones, McDermott, Will & Emery, Chicago, Ill., for Jewel Companies, Inc.

Alexander E. Bennett, Norman Diamond, Washington, D. C., Wilson W. Herndon, Strasburger & Price, Dallas, Tex., for The Kroger Co.

Arnold M. Lerman, C. Loring Jetton, Jr., Wilmer, Cutler & Pickering, Washington, D. C., Jerry L. Buchmeyer, Thompson, Knight, Simmons & Bullion, Dallas, Tex., for Lucky Stores, Inc.

James F. Rill, Martin A. Rosen, Collier, Shannon, Rill, Edwards & Scott, Washington, D. C., John L. Hauer, Richard C. Levin, Akin, Gump, Hauer & Feld, Dallas, Tex., for The Nat. Ass'n of Food Chains.

Jeffrey S. Davidson, Fred H. Bartlett, Jr., Daniel Edelman, Kirkland & Ellis, Chicago, Ill., for Nat. Provisioner, Inc.

Franklin P. Auwarter, Kenneth J. Jurek, Mayer, Brown & Platt, Chicago, Ill., for National Tea Co.

Peter D. Standish, Weil, Gotshal & Manges, New York City, for Pueblo Intern., Inc.

Les J. Weinstein, Aaron M. Peck, McKenna & Fitting, Los Angeles, Cal., for Ralph's Grocery Co.

Richard W. Odgers, John B. Bates, Pillsbury, Madison & Sutro, San Francisco, Cal., W. B. West, III, William F. Carroll, Clark, West, Keller, Sanders & Butler, Dallas, Tex., for Safeway Stores, **[**4]** Inc.

Michael R. Murphy, Donald B. Holbrook, Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for Skaggs Companies, Inc., Skaggs-Albertson's.

Robert D. Paul, Goodwin, Proctor & Hoar, Boston, Mass., Stanley E. Neely, Locke, Purnell, Boren, Laney & Neely, Dallas, Tex., for The Stop & Shop Companies, Inc.

Geoffrey M. Kalmus, Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, New York City, T. L. Caudle, III, Coke & Coke, Dallas, Tex., for Supermarkets General Corp.

Michael E. Bress, Dorsey, Windhorst, Hannaford, Whitney, Halladay, Minneapolis, Minn., for Super Valu Stores, Inc.

Timothy J. Sargent, Bodkin, McCarthy, Sargent & Smith, Los Angeles, Cal., for Thriftmart, Inc.

Ronald L. Olson, Munger, Tolles & Ricker-Hauser, Los Angeles, Cal., for Vons Grocery Co.

Chester Bedell, John A. DeVault, III, Charles P. Pillans, Bedell, Bedell, Dittmar & Zehmer, Jacksonville, Fla., Charles P. Storey, John K. DeLay Jr., Storey, Armstrong, Steger & Martin, Dallas, Tex., for Winn-Dixie Stores, Inc.

Judges: Before WISDOM, HILL, and FAY, Circuit Judges.

Opinion by: WISDOM

Opinion

[*1152] These consolidated appeals involve the applicability of *Illinois Brick Co. v. Illinois, 1977, **[**5]** 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*, to sales by primary producers to middlemen at prices allegedly depressed by price-fixing at the retail level of distribution. The appeals also present other difficult questions concerning federal antitrust laws.

These appeals arise from thirteen private antitrust actions alleging that the concerted activities of the defendants violate the provisions of *§§ 1* and *2* of the Sherman Antitrust **[*1153]** Act, *15 U.S.C. §§ 1* and *2*. The complaints ask for treble damages and for injunctive relief under §§ 4 and 16 of the Clayton Act, *15 U.S.C. 15* and *26*. The plaintiffs are cattlemen, ranchers, and feeders. The defendants are twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication. [1.] The plaintiffs in the various suits charge that the retail chains combined, primarily by using the trade association and the price reporting publication, to fix at artificially low levels the prices at which beef is purchased from slaughterhouses and meat packers, and ultimately from the producers cattle ranchers and feeders. The resulting depression in wholesale prices **[**6]** to retailers, passed up the chain of distribution, reduced the prices which the plaintiffs received in selling their cattle to the packers and slaughterhouses.

The Judicial Panel on Multidistrict Litigation assigned the cases to the District Court for the Northern District of Texas, for coordinated or consolidated pretrial proceedings. *In re Beef **[**7]** Industry Antitrust Litigation, 419 F. Supp. 720* (Jud.Pan.Mult.Lit., 1976). In June 1977 the Supreme Court handed down its decision in Illinois Brick, holding that a purchaser could not maintain an antitrust damage action against a seller remote from him in the chain of distribution; rejecting, with narrow exceptions, the offensive use of "passing-on". [2.] Shortly thereafter the defendants moved for dismissal of the complaints on the ground that the plaintiffs' theory of damages (sellers suing remote purchasers) was a "pass-on" theory indistinguishable in all important respects from the theory of damages (purchasers suing remote sellers) at issue in Illinois Brick. The district court agreed with the defendants and dismissed the complaints with prejudice for failure to state claims upon which relief could be granted. The court did not file an opinion, but stated from the bench that the dismissal was based on Illinois Brick.

[8]** The main issue is whether the complaints should have been dismissed on the strength of Illinois Brick. The plaintiffs/appellants also urge that the district court erred in striking from the complaints allegations of retail price-fixing. The plaintiffs in Pony Creek Cattle Co., Inc., et al. v. The Great Atlantic & Pacific Tea Co., et al. appeal partial summary judgments granted against them on their allegation that the statute of limitations was tolled because the defendants fraudulently concealed the alleged conspiracy. We agree with the defendants-appellees that the claims for damages, as pleaded, are within the ambit of the rule of Illinois Brick. Nevertheless we reverse and remand in all thirteen cases because the complaints state claims for damages within the "cost-plus" exception to the Illinois Brick bar. We reverse the partial summary judgments entered on the issue of fraudulent concealment in Pony Creek. In the Agee and Varian cases, we reverse the district court's order striking the allegations of retail price-fixing. In addition, we hold that the complaints in all the cases state claims for injunctive relief under section 16 of the Clayton Act.

[*1154] I.

[9]** ***HN1***[] These actions were dismissed on the pleadings. The allegations of the complaints therefore are taken as true for purposes of these appeals.

The plaintiffs are all cattle ranchers or feeders or both. Cattle are bred and raised on farms, ranches, and commercial feedlots. The animals are fattened for slaughter by feeding them a concentrated ration for fast growth. Ranchers either fatten the cattle themselves or sell to or place the livestock with feeders for fattening. Most fat cattle, say the plaintiffs-appellants, are purchased by slaughterhouses and packers directly from the ranchers and

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[1.] The lawsuits involved in this appeal are: Petersen et al. v. Safeway Stores, Inc., et al.; Pony Creek Cattle Co., et al. v. The Great Atlantic & Pacific Tea Co., et al.; Lowe, et al. v. Safeway Stores, Inc., et al.; Meat Price Investigators Ass'n et al. v. Safeway Stores, Inc., et al.; Shoshone Tribe of Duckwater, et al. (formerly styled Agee, et al.) v. Safeway Stores, Inc., et al.; Black, et al. v. Acme Markets, Inc., et al.; Chapparal Cattle Corp., et al. v. Safeway Stores, Inc., et al.; Becker, et al. v. Safeway Stores, Inc., et al.; Varian, et al. v. Safeway Stores, Inc., et al.; and Little Ranch Co., et al. v. The National Association of Food Chains, et al.

[2.] "Passing-on" usually means the process whereby a middleman in the chain of distribution who has been overcharged by a manufacturer or by a producer adjusts his prices upward in sales to a lower level in the chain to reflect the overcharge. This case presents the converse of that situation. Here the passing-on was the result of alleged depressed prices fixed by retailers and imposed upon the middlemen (slaughterhouses and packers). In turn, the middlemen passed-on the undercharge, the depression in prices, to the primary producers (cattle ranchers and feeders).

feedlots, although some are purchased by the slaughterers through auction markets. The cattle are then slaughtered and most of the beef is sold as either boxed or carcass beef to retail and wholesale grocers. The large retail food chains buy most of their beef directly from slaughterers and packers. The complaints do not allege a conspiracy between the slaughterers and packers and the defendants.

The plaintiffs allege that the wholesale or carcass price of beef, the price paid by the retail chains to packers and slaughterers, is established by the large retail chains acting in concert. For **[**10]** any given week, it is alleged, the wholesale price in a given area of the United States is set by the pricing decision of the A & P or Safeway Stores, Inc. or the Kroger Co. or one of the other defendants. In antitrust jargon, each wields monopsony power in its region or, with others, oligopsony power. [3.] One designated retail chain in a given area will buy its beef in the regional wholesale market early in the week. The pricing decisions of the leading purchasers in the various regions of the nation are reported in the National Provisioner Daily Market and News Service, ("National Provisioner") or "Yellow Sheet", and thus become known to the entire wholesale beef trade. The other retail chains, it is alleged, then follow the price established by the regional leader in purchasing their requirements of beef for the period. The chains, according to the complaints, can dictate the wholesale price to the packers because they wield monopsony or oligopsony power and because the packers have no long-term storage facilities and therefore cannot withhold their product. [4.] The chains' power is augmented by their considerable cold-storage capacity: they can blunt price rallies by abstaining **[**11]** from the wholesale market and working from their stockpiles.

The price depressions thus engineered are directly "passed on" to the ranchers and feeders, according to the complaints. The plaintiffs allege that the cattlemen, like the slaughterers and packers Vis-a-vis the chains, are in no position to negotiate prices because they cannot, at least in the short term, withhold their product. A fattened steer or heifer, the complaints allege, must be sold within three weeks of the time it reaches choice grade. **[**12]** If the animal is not sold in that time it becomes over-fattened and hence less valuable. The supply of fat cattle is therefore inelastic in the short term. The cattlemen contend that they must take the price the packers quote. The packers, according to the complaints, bid prices derived directly from the Yellow Sheet (or, west of the Rockies, the Safeway) carcass price. Working from estimates of the percentage of an animal that will be carcass beef salable to the retain chains, the packers pay cattle prices based on the Yellow Sheet prices. [5.] Thus, the allegedly artificially **[*1155]** low wholesale prices established by the retail chains' combination translate directly into artificially low prices for fat cattle.

[13]** The plaintiffs do not know when this alleged conspiracy began, but contend that it has been in operation since 1963 at the latest. The food chain defendants, according to the complaints, coordinate their efforts through meetings conducted by the National Association of Food Chains. The conspirators allegedly effect their price-fixing schemes by allocating to dominant chains geographical areas in which to exercise price leadership, and by controlling or manipulating the "Yellow Sheet". The elimination of price competition is further assured by alleged agreements concerning the conspirators' respective specifications for beef. The plaintiffs charge that the chains in any given region coordinate their specifications so that the chains do not compete with each other in purchasing beef of their respective specifications.

The complaints were filed in 1975. The cattlemen charge that the scheme violates *section 1* of the Sherman Act, because it is a scheme "in restraint of trade and commerce". They also contend that the scheme was "an attempt

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[3.] We use the term "monopoly" to refer to price-fixing by sellers; "monopsony" and "oligopsony" to refer respectively, to price-fixing by a single purchaser or by a group of purchasers, that is, the retailers/defendants in this case.

[4.] Chainwide pricing decisions for a given region are made possible, according to the allegations of the complaints, by the chain's centralized buying practices. Purchases are made for an entire chain or for a large part of a chain, it is alleged, from a central location.

[5.] As explained in Paragraph 28 of the Amended and Substituted Complaint in the Meat Price Investigators Association ("MPIA ") suit:

Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

to monopolize" and had the effect of monopolizing the wholesale beef market in violation of *section 2* of the Act. The complaints also allege that **[**14]** the retail chains fix the retail price of beef to consumers. They request injunctive relief, under section 16 of the Clayton Act, and treble damages going back to the beginning of the alleged conspiracy. The Clayton Act's four-year statute of limitations would ordinarily operate to limit recovery to damages accruing within four years of the filing of the complaints. [6.] The plaintiffs, however, urged that the defendants and their co-conspirators fraudulently concealed the conspiracy from the beginning, and that the statute of limitations therefore did not begin to run until the plaintiffs discovered, in July 1974, that the alleged conspirators had indeed met to discuss the pricing of beef. [7.]

[15]** In late 1975, before the instant actions were consolidated in the Northern District of Texas, that court entered partial summary judgments in the Pony Creek case, a suit originally filed in the Northern District of Texas, dismissing with prejudice the Pony Creek plaintiffs' claims for damages that accrued prior to June 5, 1971. In December of 1976, following the consolidation of the various actions in the Northern District of Texas, the defendants filed motions for partial summary judgment on the statute of limitations issue in the remaining suits. The district court denied those motions. The Pony Creek plaintiffs filed a motion to vacate the earlier partial summary judgments entered against them, but the district court has not acted on that motion.

In June 1977 the defendants in all the cases filed a joint motion for judgment on the pleadings based on the Supreme Court's opinion in Illinois Brick. They pointed out the absence of any allegations that the plaintiffs had sold cattle directly to the defendant retail chains. The suits, they contended, were therefore barred by the general rule of Illinois Brick that only those parties who have dealt directly with members of a price-fixing **[**16]** conspiracy can maintain an antitrust action for damages against the price-fixers. The plaintiffs asked the district court to stay its ruling on the defendants' motion pending further discovery. Six months later, in December, 1977, the district court entered its order dismissing twelve of the suits for failure to state claims and striking the allegations of retail price-fixing. The court dismissed the **[*1156]** remaining case the Little Ranch case in February 1977. All the cases were dismissed with prejudice.

II.

We address first the most important issue in these appeals: Did the district court err in dismissing the appellants' claims for damages?

A.

We meet at the outset questions about the applicability of Illinois Brick to these actions. The appellants' first line of attack on the district court's decision is the bold argument that Illinois Brick simply has no application to these actions. They also urge that, assuming Illinois Brick is relevant, the decision cannot bar damage claims against the National Provisioner and the grocery chain trade association because neither is a buyer or seller of beef. In the interests of clarity, our assessment of these contentions will **[**17]** begin with a discussion of the background and rationale of the Illinois Brick decision.

HN3[] The Illinois Brick rule barring damages actions against alleged price-fixers by indirect purchasers has its genesis in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 1968, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. Hanover Shoe involved an antitrust treble-damages suit under § 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a lessee of the machinery. The plaintiff claimed damages arising from

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6. ***HN2***[] Section 4B of the Act, *15 U.S.C. § 15b*, states, in relevant part:

Any action to enforce any cause of action under *sections 15* or *15a* of this title shall be forever barred unless commenced within four years after the cause of action accrued.

7. That information was allegedly disclosed during discovery in ***Bray, et al. v. Safeway Stores, et al., N.D.Cal., 392 F. Supp. 851 (1975)***, a suit virtually identical to the instant actions brought by California cattlemen against many of the defendants in these cases.

the defendant's practice of leasing, rather than selling, the machinery, a practice that the plaintiff contended was a violation of *section 2* of the Sherman Act. The Supreme Court affirmed the trial court's refusal to permit the defendant to prove up the defense that any illegal overcharges imposed on the lessee shoe manufacturer had been passed on to that manufacturer's customers. The Court referred to a "general tendency in the law" not to trace damages "beyond the first step". *392 U.S. at 488 n.6, 88 S. Ct. 2224, n.6* (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 1918, 245 U.S. 531, 38 S. Ct. 186, 62 L. Ed. 451*). [8.] **[**19]** The Court rejected the **[**18]** defendant's argument that the general rule should admit of an exception when economic circumstances are such that the overcharge to the buyer both caused and enabled the buyer to pass on the full overcharge to his customers. The impact of the overcharge on the buyer's pricing decisions, said the Court, cannot be demonstrated with any precision in the ordinary case. *392 U.S. at 492-93*, [9.] *88 S. Ct. 2224*. Recognition of a general passing-on defense would, **[*1157]** in the Court's opinion, simply encourage defendants to attempt to establish its applicability, thus complicating and protracting many antitrust proceedings. *Id. at 493, 88 S. Ct. 2224*. The Court rejected the passing-on defense as a general matter and expressed its view that the defense should be permitted only in certain narrow circumstances when the concerns underlying its rejection in Hanover Shoe were not present. *Id. at 494, 88 S. Ct. 2224*.

Hanover Shoe barred defensive passing-on, **[**20]** ***HN4***[] the use of passing-on as a defense in an antitrust action. In Illinois Brick, the Court resolved a split of authority in the courts of appeals by ruling that, ***HN5***[] with few exceptions, indirect purchasers of an alleged price-fixer's product cannot maintain a treble damages action predicated on the offensive use of the theory that the price-fixer's overcharge to his customer was passed on to the plaintiffs. The plaintiffs were separated from the price-fixing offenders by two intervening transactions: the bricks moved from the manufacturers through subcontractors and general contractors to the consumers, carrying a four-cent-per-brick overcharge each time the brick changed hands. The court decided that if Hanover Shoe were to be followed, offensive as well as defensive use of passing-on must be barred. The Court noted that recognition of a "one-sided" limitation on a passing-on theory of damages would lead to a "serious risk of multiple liability". If offensive use of passing-on were permitted, a price-fixer could be held liable to an indirect purchaser for the amount of the overcharge passed-on to that purchaser by the price-fixer's direct customer yet, lacking a passing-on defense **[**21]** (under Hanover Shoe), would be liable to the direct purchaser, his customer, for the full amount of the overcharge. [10.] Further, the Court concluded that the rationale of Hanover Shoe had not depended on the

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[8.] Before Illinois Brick, a strong case could have been made that the Hanover Shoe decision rested primarily on the Court's perception that the middleman, and not the remote purchaser, is the likeliest enforcer of the antitrust laws. Although it is probable that Hanover, like most middlemen, passed on much of the overcharge, recognition of a passing-on defense would have reduced the incentives for middlemen to sue. Professor Posner has observed: "The choice was thus between overcompensating Hanover and underdeterring United. The Court's preference for the former is consistent with the view that the primary purpose of antitrust damage actions is to deter violations of law." R. Posner, Antitrust Cases, Economic Notes and Other Materials 149 (1974). See *Illinois Brick, 431 U.S. at 752-53, 97 S. Ct. 2061, 52 L. Ed. 2d 707* (Brennan, J., dissenting).

In Illinois Brick, however, the Court observed that the Hanover Shoe decision rested primarily on the difficulty-of-proof problem, and not on the deterrence rationale. *Illinois Brick, 431 U.S. at 720 n.12, 97 S. Ct. 2061, 52 L. Ed. 2d 707 n.12*.

[9.] Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in the company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

392 U.S. at 492-93, 88 S. Ct. at 2231.

[10.] A serious risk of overlapping liability would remain even under a rule permitting the offensive use of passing-on only in situations in which the defendant could use a passing-on defense, unless the scope of passing-on were narrowly restricted to defensive context in which passing-on was asserted in that case. The "uncertainties and difficulties in analyzing price and out-put decisions" in the real world, *431 U.S. at 731-32, 97 S. Ct. at 2068*, the "principal basis" for the Hanover Shoe holding, *Id. at 731, 97 S. Ct. 2061*, counseled rejection of offensive passing-on as well. Those same "evidentiary complexities and uncertainties" and undesirable delays would attend the effort of indirect purchasers to establish that illegal overcharges were passed on to them. *Id. at 732, 97 S. Ct. 2061*. The Court decided, therefore, that ***HN6***[] the passing-on theory of damages must be barred in those situations in which the defendant could not assert a passing-on defense against his direct purchasers. *Id. at 735-36, 97 S. Ct. 2061*.

[22]** Because Illinois Brick adopted a unified "mutuality" approach to passing-on problems we must reject the appellants' argument that Illinois Brick has no application to these suits insofar as they seek relief for violations of *Section 2* of the Sherman Act. Under Illinois Brick, the plaintiffs would be entitled to urge a pass-on theory of damages only if the defendant retail chains could use a passing-on defense to claims brought by the packers and slaughterers. Whether the plaintiffs can proceed on a passing-on theory of damages is, applying the mutuality principle, a question unaffected by their denomination of the claim. Absent exceptional circumstances, Illinois Brick and Hanover Shoe limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense.

[*1158] The appellants' most ambitious contention is that Illinois Brick is entirely inapposite to price-fixing suits brought by sellers against indirect purchasers. They point out that Illinois Brick involved purchasers who charged price-fixing by a remote seller and contend that Illinois Brick should be limited to that type of case because the harm suffered by sellers **[**23]** in cases such as this one is much greater than the harm suffered by indirect purchasers in the paradigmatic Illinois Brick -type case. Especially is this so, they urge, when, as here, the alleged price-fixing conspiracy stands like a tollgate athwart the powerful "middle position" in the beef marketing system. The cattlemen's argument, we take it, is that the serious harm flowing from monopsony or oligopsony price-fixing at a middle tier in an industry's structure outweighs the considerations, avoidance of overlapping liability and concern about complexities and uncertainties of proof, that underlay Illinois Brick concerns that the Court may have overemphasized. See The Supreme Court, 1976 Term, 91 Harv.L.Rev. 70, 221-31 (1977).

The first step in assessing this argument is to examine the claim that the harm engendered by monopsony or oligopsony pricing of the kind alleged is, as a categorical matter, greater than that engendered by monopoly pricing. We focus first on monopsony or oligopsony pricing in general, without regard to the position occupied by the price-fixing combination in the productive chain. On this point, the appellants' contentions center on the harm suffered by **[**24]** the competitors themselves the sellers. In the case of monopoly price-fixing, they say, the damaged buyer has a choice: he can refuse to buy the affected product and buy, instead, a substitute. In the monopsony or oligopsony price-fixing case, however, the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all. In their case, say the cattlemen, this means destroying fat cattle or, in the long run, cutting back production or going out of business.

We might acknowledge the difference as a general matter, but we have no reason to believe that the damage caused by the typical monopsony or oligopsony price-fixing scheme is significantly greater than that caused by the usual seller price-fixing scheme. Both types of price-fixing are attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses. [11.] **[**26]** The appellants argue that the reallocation process in the monopsony price-fixing case is inherently more likely than in the monopoly price-fixing case to cause business failures. [12.] **[**27]** Assuming this to be true, Arguendo, we do not think that this distinction is

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cases in which the incidence of overcharges could be established with certainty. That risk would arise from the risk of inconsistent factfindings in separate lawsuits by direct and indirect purchasers. Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L.Rev. 309, 319 n.43 (1978). The magnitude of that risk would vary directly with the speculativeness of the proof of the incidence of the overcharge. By narrowly limiting the use of passing-on to cases in which the overcharge can be traced with ease and certainty, see part II, B of this opinion below, the Supreme Court has all but eliminated this risk of duplicative liability.

11. See generally J. Hibdon, Price and Welfare Theory 244-53 (Monopoly pricing); 264-67 (Monopsony) (1969); K. George & J. Shorey, The Allocation of Resources 150-52 (1978).

sufficient **[**25]** to **[*1159]** warrant disparate treatment of monopoly and oligopsony for purposes of pass-on problems. If the Illinois Brick decision is grounded on a balancing of the deterrence and compensation policies of the treble-damages action against considerations of judicial economy and fairness to defendants a view of Illinois Brick that is crucial to the appellants' argument [13.] it seems to us that the Supreme Court chose to permit entire price-fixing schemes, in some circumstances, to go unremedied by private damage actions. If the Court felt that competing considerations outweigh the costs of leaving unremedied the totality of harm flowing from some monopoly price-fixing schemes, we find it difficult to believe that the incremental harm, in the form of possible business failures, that might flow from unremedied monopsony or oligopsony price-fixing schemes would tip the Court's balance in favor of enforcement in the purchaser price-fixing case. The increment is too insignificant in comparison with the total damage caused by price-fixing.

The appellants urge that the Supreme Court has recognized that conspiracies aimed at sellers are especially abhorrent. None **[**28]** of the cases they cite, however, establish anything more than the unsurprising proposition that producers damaged by anti-competitive schemes have a remedy under the antitrust laws. [14.] As support for their contention that conspiracies at the strategic middle position or "bottleneck" in an industry's structure are especially disfavored, they cite the Supreme Court's decisions in *American Tobacco Co. v. United States, 1946, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575*, and *Standard Oil Co. of New Jersey v. United States, 1911, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619*. Those decisions, it is true, recognize the seriousness of monopsony or oligopsony at the dominant middle of an important industry's productive chain, but they do not single out that situation for special treatment under antitrust laws. We cannot carve from an important antitrust rule intended to be of general application exceptions based on the sheer magnitude or impact of the particular conspiracy alleged.

[12.] In the case of monopoly price-fixing, the price-fixing generally raises the price of all goods that incorporate the product subject to the price-fixing. If the conspirators sell directly to the consuming public, the only businesses adversely affected are those in industries that supply complementary goods. If the conspirators do not sell directly to the consuming public, then the product is but an input in the production of other goods or services. By raising the cost of that input, the price-fixing conspiracy might conceivably have the effect of driving marginal firms that use the input out of the market. The likelihood of this occurring depends upon the magnitude of the cost of the input relative to the purchasing firm's total costs of production and on the elasticity of demand for the firm's product. A fifteen percent rise in the cost of beef, for example, threatens the profitability of a steakhouse far more than that of a grocery store. The impact will be greatest in the rare case of a firm that simply buys and resells only the good affected by the price-fixing conspiracy.

Most firms that sell directly to the typical monopsony or oligopsony price-fixing conspiracy, however, are in a position analogous to that of the single-product distributor who purchases his product from price-fixing conspirators. The good affected by the price-fixing conspiracy is likely to be the seller's only product or to represent a significant percentage of the seller's output. In general, the impact on a firm's revenues of a purchaser price-fixing scheme aimed at the product it sells is greater than the impact on a firm's costs of a monopoly price-fixing scheme affecting an input into the firm's product.

[13.] If Illinois Brick did not involve such a balancing, even implicitly, then the appellants' argument that the greater harm flowing from purchaser, as compared with seller, price-fixing, justifies special treatment of passing-on problems in monopsony cases loses its premise. Formally, at least, Illinois Brick involved no such balancing as suggested in the text. The Illinois Brick holding is essentially the rule of mutuality. That rule was justified almost entirely by reference to the problem of overlapping liability, and the Court's focus on the risk of overlapping liability was a result of its assumption that direct purchasers, as well as indirect, would likely sue the price-fixers. On the surface of it, then, Illinois Brick does not acknowledge that its pass-on rule involves any significant sacrifice of antitrust enforcement: in those cases in which the rule bars indirect purchasers from suing, the direct purchasers, it is assumed, will likely come to the fore.

[14.] E. g., *Zenith Radio Corp. v. Hazeltine Research, Inc., 1969, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129*; *Continental Ore v. Union Carbide & Carbon Co., 1962, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777*; *Klor's, Inc. v. Broadway Hale Stores, Inc., 1959, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741*; *Mandeville Island Farms v. American Crystal Co., 1948, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328*. The cases cited by the appellants, with the exception of Mandeville Island Farms, were cases involving monopolization or exclusionary practices, not price-fixing. None involved passing-on theories of damage.

[29]** We conclude that ***HN7***[] there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. Illinois Brick therefore speaks to the instant cases.

A final issue as to the applicability of the Illinois Brick rule concerns the appellants' cases against the National Provisioner and the National Association of Food Chains. The appellants argue that the Hanover Shoe-Illinois Brick limitations on the use of passing-on theory apply only to suits brought against firms that are in the chain of production. They theorize that the "central rationale" of the Hanover Shoe And Illinois Brick decisions is that firms dealing directly with the alleged price-fixer are likelier than firms remote in the productive chain to sue and that severe limitations on the use of passing-on theory are necessary **[*1160]** lest direct-dealing firms be discouraged from bringing suit. Because the trade publication and the trade association do not buy or sell beef at all, the argument continues, there are no firms in the beef marketing system that deal directly with these defendants. The cattlemen, the appellants **[**30]** conclude, are as likely as anyone to bring suit against those defendants.

The argument rests on a faulty premise. The Illinois Brick decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing-on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory. The complaints in these cases do so. The National Provisioner and the National Association of Retail Chains do not buy or sell beef but the appellants' complaints charge that they conspired with firms that do buy beef to fix the purchase price of boxed and carcass beef. That the trade publication and trade association defendants do not market beef does not diminish the problems of overlapping liability and uncertainty of proof posed by the use of a passing-on theory of damages. The doctrine of Illinois Brick therefore applies to the complaints against these two defendants.

B.

Having determined that the Hanover Shoe-Illinois Brick Doctrine applies to the damages claims in their entirety **[**31]** we turn to the appellants' contentions that these actions fit recognized exceptions to the bar against use of passing-on theory.

1. The Co-Conspirator Exception.

Certain of the appellants contend that the complaints in these actions, liberally construed, allege a conspiracy between the retail chains, on the one hand, and the packers and slaughterers on the other. [15.] They argue for an exception from the Illinois Brick rule for cases involving a conspiracy between the remote price-fixers and the direct-dealing intermediary.

[32]** They argue, first, that cases involving conspiracy spanning two levels in the chain of distribution fit the exception recognized in Illinois Brick for cases in which the defendant owned or controlled its customer (the middleman). *Illinois Brick, 431 U.S. at 720 n.16, 97 S. Ct. 2061, 52 L. Ed. 2d 707 n.16*. [16.] If the retail chains

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[15.] Indeed, many of the allegations strongly suggest that all the non-defendant co-conspirators adverted to in the complaints are food retailers. Paragraph 34 of the MPIA Amended and Substituted Complaint, for example, states in part:

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied . . . thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas . . . .

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale . . . .

e. . . . Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price,' and which prices are directly passed on to the beef producer.

conspired with the packers and slaughterers, they urge, the retailer can be said to have "controlled" the middleman within the meaning of footnote 16 of Illinois Brick. Market forces would have been **[*1161]** superseded in such circumstances. There would then be no indirect dealing problem, it is argued, since those selling to the packers and slaughterers would have dealt directly with the price-fixing conspiracy.

[33]** Even if proof of a multilevel conspiracy would not bring the case within the "control" exception recognized in Illinois Brick, it is urged, we should recognize a distinct exception for vertical conspiracies. The appellants argue that the defendants remote from the plaintiffs in the chain of distribution do not run the risk of double liability if it is proved that the intermediary was an equal participant in the price-fixing conspiracy, for the co-conspirator intermediary could not recover in a suit against the remote seller or purchaser. This is so, they say, because "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other". *Columbia Nitrogen Corp. v. Royster Co., 4 Cir. 1971, 451 F.2d 3, 15*. See also *Premier Electrical Constr. Co. v. Miller-Davis Co., 7 Cir. 1970, 422 F.2d 1132*, Cert. denied, 1970, *400 U.S. 828, 91 S. Ct. 56, 27 L. Ed. 2d 58*.

As the appellees point out, however, the co-conspiracy theory now urged by the plaintiffs-appellants was not set forth in the complaints. The theory **[**34]** of the complaints, both before and after the Illinois Brick decision, was that the defendants conspired to fix the prices paid to packers and that the packers simply "passed on" the price depression to cattlemen. Certain allegations in the complaints refer to unnamed co-conspirators, and the appellants now contend that the packers and slaughterers are included among those unnamed co-conspirators. Various paragraphs in the complaints refer to the unnamed co-conspirators as nondefendant food retailers. Nothing in the complaints, however, suggests that packers or other intermediaries conspired with the defendants. In their joint reply brief the appellants cite paragraph 34 of the MPIA and Becker Amended Complaints as an example of a packer conspiracy allegation. [17.] That paragraph, however, states merely that most slaughterers and packers have standing agreements with the defendant chain stores to supply fixed quantities of beef each week, and that the Yellow Sheet or "Safeway" price paid the packers sets the price that the packers pay the plaintiffs for their cattle. This is merely an allegation of passing-on, not of conspiracy. No agreement to fix prices is alleged. If the act **[**35]** of passing-on sufficed to brand the intermediary as a co-conspirator the asserted exception would wholly swallow the Hanover Shoe-Illinois Brick, rule.

The appellants urge that the district court abused its discretion by failing to give them adequate opportunity to amend their complaints, after the Illinois Brick decision, to allege a vertical conspiracy, and by denying post-judgment requests for leave to amend. We do not agree.

[36]** ***HN8***[] Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as the result of rulings on a point of law handed down during the pendency of the litigation. E. g., *Commissioner of Internal Revenue v. Estate of Donnell, 5 Cir. 1969, 417 F.2d 106*. In none of these cases, however did the district court before the entry of its dismissal order deny the plaintiffs leave to amend their complaints in light of Illinois Brick. And all plaintiffs had a reasonable opportunity to amend before the district court ruled on the

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[16.] "Another situation in which market losses have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins v. Standard Oil Co., 395 U.S. 642, 648, 89 S. Ct. 1871, 1874, 23 L. Ed. 2d 599 (1969)*; *In re Western Liquid Asphalt Cases, 487 F.2d 191*, (at) 197, 199." But "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants". The Supreme Court, 1976, 91 Harv.L.Rev. 70, 230 (1977).

[17.] That paragraph states:

Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway Price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

defendants' dismissal motions. Those motions, based on Illinois Brick, were filed on July 17, 1977, eight days after the **[*1162]** Supreme Court's decision. The district court did not rule on the motions until October, 1977. In three of the suits, the MPIA, Becker, And Petersen suits, the complaints were amended, with leave of court, after the filing of the defendants' motions to dismiss. None of those complaints, however, adequately alleged conspiracy. The plaintiffs in the remaining suits stood on the allegations of their complaints, asserting that the "unnamed" co-conspirators mentioned therein were indeed packers **[**37]** and slaughterers. Following the court's communication of its decision to the parties, an attorney for one of the plaintiffs requested that the dismissal be "without prejudice", but none of the plaintiffs attempted to amend the complaints until the Black And Pony Creek plaintiffs, After the court's December 9 entry of its order dismissing the suits with prejudice, filed motions for leave to amend.

The district court did not abuse its discretion in denying the post-judgment motions for leave to amend. ***HN9***[] *Rule 15(a) of the Federal Rules of Civil Procedure* requires that leave to amend be freely granted "when justice so requires". The Supreme Court has said that ***HN10***[] motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis, 1962, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222*. The plaintiffs have offered no credible explanation for their failure to move for leave to amend until nearly five months after the defendants moved for dismissal on the basis of Illinois Brick. [18.] Absent any apparent justification for this delay, we cannot hold that the district court abused its discretion. We emphasize, moreover, that these motions were **[**38]** made after the court's entry of the dismissal orders and after the movants had, in their legal memoranda in support of their opposition to the motion to dismiss, asserted that they stood, in regard to the co-conspiracy issue, on the allegations of their existing complaints. The plaintiffs tested the theory that their embellished allegations of passing-on were equivalent to allegations of packer complicity in the price-fixing conspiracy and lost. We have said before that

> (m)uch of the value of summary judgment procedure . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should the theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Freeman v. Continental Gin Co., 5 Cir. 1967, 381 F.2d 459, 469-70.

The Supreme **[**39]** Court in Foman also declared that ***HN11***[] denial of leave to amend is proper when the proposed amendment would be futile. *Foman v. Davis, supra, 371 U.S. at 182, 83 S. Ct. 227*. The district court's denial of the post-judgment motions was supportable on this ground as well. Amendment of the complaints to allege a vertical conspiracy would not have brought these actions within the "control" exception in Illinois Brick. In footnote 16 of Illinois Brick the Court suggested the intended scope of the "control" exception by citing the Ninth Circuit's decision in *In re Western Liquid Asphalt Cases, 1973, 487 F.2d 191*, Cert. denied, *415 U.S. 919, 94 S. Ct. 1419, 39 L. Ed. 2d 474*. In that case there was evidence tending to show that the defendants controlled their direct customers "either through acquisition of stock, or indirectly through various financial arrangements, including credit". *Id. at 195*. It has been suggested that "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . . by strong-arming direct purchasers into choosing not to sue". Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 **[**40]** Cornell L.Rev. 309, 328-29 (1978). The plaintiffs in these suits have never suggested that the grocery chains "controlled" the packers or slaughterhouses, either through stock ownership or credit arrangements. Indeed, the plaintiffs proposed to amend their complaints to allege a vertical conspiracy, **[*1163]** not to allege arrangements by which the defendants controlled the packers and slaughterhouses.

Nor do we think that allegations of conspiracy would bring these cases within an exception for suits alleging vertical conspiracy. It is true that some courts have acknowledged such an exception. E. g., *Florida Power Corp. v. Granlund, M.D.Fla., 1978, 78 F.R.D. 441*; *Donson Stores, Inc. v. American Bakeries Co., S.D.N.Y., 1973, 58 F.R.D. 481*. Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of

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[18.] The only explanation given is the Chapparal plaintiffs' lame assertion that it took a long time to divine the meaning and implications of the Illinois Brick Decision.

Illinois Brick permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect **[**41]** these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains. E. g., *Mosher Steel Corp. v. N. L. R. B., 5 Cir. 1978, 568 F.2d 436*. Because the packers are not parties to this suit, the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the Illinois Brick Court found unacceptable.

For these reasons we uphold the district court's refusal to permit post-judgment amendments to the complaints.

2. The "Cost-Plus" Exception.

The appellants urge that outright dismissal of their damage claims was error because the complaints stated good claims within the "cost-plus contract" exception in Illinois Brick.

The Supreme Court acknowledged in Hanover Shoe "that there might be situations for instance, when an overcharged buyer **[**42]** has a pre-existing "cost-plus' contract, thus making it easy to prove that he has not been damaged when the considerations requiring that the passing-on defense not be permitted in this case would not be present". *392 U.S. at 494, 88 S. Ct. at 2232*. The Court in Hanover Shoe seemed to suggest ***HN12***[] a general exception to the bar against assertion of a passing-on defense, an exception defined by the policies underlying the bar. Cases in which the middleman's customer is obligated under a pre-existing cost-plus contract to purchase a fixed quantity of goods are paradigmatic of this exception. The proof the contract itself and evidence of its performance is simple and unequivocal. [19.] Uncertainties of proof are thus avoided. The risk of overlapping liability is eliminated or reduced to the barest minimum inasmuch as the evidence is not susceptible of differing interpretations and is unlikely to be accepted in one lawsuit and rejected in another.

[43]** As we understand these cases, the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that Hanover Shoe and Illinois Brick ***HN13***[] permit the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. E. g., Note, Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages, 55 Texas L.Rev. 1445, 1454-57 (1978). "Although the Court **[*1164]** intended the exception to have a "narrow scope', any situation in which (the impact of) the overcharge is essentially determined in advance "without reference to the interactions of supply and demand' would function in the same way." Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L.Rev. 309, 331 n.93 (1978) (citations omitted). When the impact of an overcharge on a middleman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts **[**44]** in separate lawsuits. Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate that the middleman suffered no loss in volume as the result of raising the price to his customers. [20.] In the cost-plus contract case itself,

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[19.] In Hanover Shoe the Court emphasized the inadequacy of economic theory to the task of tracing the incidence of an overcharge. See note 7 Supra. In Illinois Brick the Court elaborated on the point. The Court noted that economic theory provides a formula for determining the incidence of an overcharge, but that the analysis rests on "an array of simplifying assumptions" and assumes knowledge of the elasticities of supply and demand in the relevant market. *431 U.S. at 741-42, 97 S. Ct. 2061*. The unacceptability of the assumptions and the near-impossibility of measuring the relevant elasticities renders such incidence analysis little more than a guessing game in practice, the Court seemed to suggest. The Court was concerned not so much with the complexity of such proof as with its speculative character.

[20.] In *Yoder Bros., Inc. v. California-Florida Plant Corp., 5 Cir. 1976, 537 F.2d 1347*, Cert. denied, *429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540*, a panel of this Court reversed a treble damages judgment that was erroneously reduced by recognition at trial the middleman is likely to have suffered a loss of volume and hence profits as a result of the overcharge. His higher selling price will likely have caused potential customers to forego his product. See Note, 63 Cornell L.Rev. 309, 329 n.87. The middleman's loss of volume and the indirect purchaser's absorption of the overcharge are wholly separable items of damage.

[45]** Applying these principles, we conclude that the district court erred in dismissing these actions. The dismissal, we emphasize, was on the pleadings. The question at the pleading stage is simply whether **[*1165]** the allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to **[**46]** the constructed competitive wholesale price). The packer's habitual use of predetermined formulae [21.] would enable measurement of the effect on prices

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of a passing-on defense. The Court ruled that the defense was not available because the evidence of the party asserting the defense did not demonstrate the applicability of the cost-plus exception suggested in Hanover Shoe. The Court found that the evidence did not show the effect of a price change on the direct purchaser's total sales or unit costs for a different sales volume. Under the rule of Yoder Bros., the passing-on defense is unavailable absent evidence that the direct purchaser did not suffer harm in the form of lost sales volume, even if it is proved that the direct purchaser passed on the entirety of the overcharge.

Application of the Illinois Brick mutuality principle would suggest that, because under Yoder Bros. these defendants could not assert a passing-on defense at all in a treble damages suit brought by the packers and slaughterers absent proof that the packers and slaughterers suffered no loss of volume as a result of the alleged price-fixing, the cattlemen should be barred from using passing-on theory offensively against the defendants unless they demonstrate that the packers and slaughterers suffered no loss of volume. If this is so, then the bar against use of passing-on is absolute, for it would be impossible, not simply "virtually" impossible to make such a showing. Indeed, Yoder Bros. has the effect of eliminating the passing-on defense altogether, except perhaps in the very narrow case of a pre-existing, fixed quantity cost-plus contract.

We do not believe, however, that the Yoder Bros. Court's treatment of the pass-on issue is viable after Illinois Brick. The Yoder Bros. Court's very literal reading of Hanover Shoe to require parties asserting a pass-on defense to prove that the intermediary suffered no harm whatsoever rested, we think, on its view that the private treble damage action is of "overriding importance . . . in the antitrust enforcement scheme." *Id. at 1375*. Indeed, Hanover Shoe was plausibly read, before Illinois Brick, as resting on the view that the strong policy in favor of antitrust enforcement justifies buying enforcement at the expense of overcompensating plaintiffs. See note 6 Supra. In Illinois Brick, however, the Court denigrated the importance of the antitrust enforcement rationale in the decision of Hanover Shoe and characterized the difficulty-of-proof problem as the key to Hanover Shoe. *431 U.S. at 732 n.12, 97 S. Ct. 2061 n.12*. Indeed, Illinois Brick itself demonstrated that the policy in favor of vigorous antitrust enforcement must sometimes give way in face of the risk of overpunishing antitrust violators. The Yoder Bros. panel would not have taken so niggardly a view of the passing-on defense had it had the benefit of the Illinois Brick Court's interpretation of the Hanover Shoe opinion, or had it known the implications that its decision might have for antitrust plaintiffs after Illinois Brick.

Post-Illinois Brick commentary, moreover, has generally assumed that the issue of the impact on the direct purchaser's sales volume of an overcharge should not be dispositive in a case involving the offensive use of passing-on theory. E. g., Note, Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages, 55 Texas L.Rev. 1445, 1455 n.69 (1977). See also, Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L.Rev. 309, 329 n.87 (1978).

[21.] Because these cases come up on appeal from dismissals on the pleadings, we are not concerned with the question whether packers and slaughterers in fact applied pricing formulae without deviation, or with the question whether the formulae employed were such that a change in wholesale prices in a given region had a predetermined effect on the price offered feeders in the region by the packers and the slaughterers. We must assume, for purposes of these appeals, that the plaintiffs could demonstrate that both questions are to be answered in the affirmative.

for fat cattle of changes in wholesale prices. [22] The plaintiffs have alleged the functional equivalent of cost-plus contracts.

[47]** We do not agree with the appellees that the packer pricing mechanism alleged is exactly analogous to the "fixed percentage markup" or cost-based pricing systems rejected by the Illinois Brick Court as exceptions to the passing-on rule. In Illinois Brick the Court refused to recognize an exception where middlemen "purport" to charge a fixed percentage markup. *431 U.S. at 743, 97 S. Ct. 2061*. Here it is alleged that the packers In fact engaged in formula pricing. The Court in Illinois Brick was skeptical of the plaintiffs' claims because there is evidence that firms purporting to apply fixed markups above costs in fact fit the markup to the elasticity of demand for the product or juggle cost allocations to achieve the same result. F. Scherer, Industrial Market Structure and Economic Performance 176 (1970). An intermediary, such as a contractor in Illinois Brick, who employs numerous inputs in assembling his final product might bear the larger brunt of an increase in the price of one of his inputs without leaving any evidence that he did so. It is alleged that the intermediaries in these cases determine their purchase price for fat cattle by rigid application of formulae to the **[**48]** wholesale price for carcass beef. Assuming the allegations of the complaints to be true, a packer's absorption of a loss resulting directly from a decrease in the wholesale price would be detectable from a change in his purchasing formulae or from his paying a price for fat cattle that is above the price he would have paid had he adhered to his customary formulae. It is alleged, moreover, that the packers have no reason to depart from their purchasing formulae in the short run because short term supply is, by the very nature of cattle production, highly inelastic.

[*1166] We recognize that it might be said that we are engaging in "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum". See *Illinois Brick, 431 U.S. at 744-45, 97 S. Ct. at 2074*. But the Supreme Court itself engaged in such a process in suggesting exceptions to its bar against the use of passing-on theories. If allegations of structural inelasticity of short term supply and of rigid formula pricing by intermediaries do not bring a case within the cost-plus exception for purposes of a motion to dismiss **[**49]** on the pleadings, then the cost-plus exception is a narrow one indeed, and must include only cases involving literal cost-plus contracts. [23] In light of the purposes behind the passing-on bar preventing duplicative recoveries and avoiding the uncertainties involved in the use of incidence theory the situation alleged in these complaints is the functional equivalent of the cost-plus contract case.

The appellees are correct in asserting that the proposed proof of damages is far from simple. It will require detailed proof as to individual transactions. Attention must focus on the type and grade of cattle sold, and on whether (and which) pricing formulae were used by packers in making particular purchases. The proof must be detailed and particular. But this is a complexity born of quantity. The Kinds of proof that will be involved, **[**50]** however, are not new to courts, and certainly not to antitrust courts. The cases as pleaded escape Illinois Brick only insofar as they avoid the use of general economic theory in tracing the effect of the defendants' price decisions, and only insofar as they can be proved, in the damages phase, with certainty. If, as to a particular transaction, it cannot be clearly shown that the purchasing packer applied a specific price formula, or if other details of a transaction, such as the quantity or grade of cattle, are not available, then the plaintiff cannot recover damages as to that sale. [24]

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[22] In Hanover Shoe the Court pointed out that in attempting to prove a pass-on a litigant would have to demonstrate that the intermediary would not have raised his price absent the overcharge. *392 U.S. at 493* and n.9, *88 S. Ct. 2224* and n.9. This is a causation issue. The Court's general rejection of the use of passing-on theory rested in part on its view that this issue of causation could not, except in rare cases, be resolved with adequate certainty. See note 17 Supra. If, however, an intermediary over a long period of time consistently determines his purchase price by applying a fixed formula to the price he will receive when he in turn sells, the objection based on the speculativeness of the causation evidence disappears. Our legal system routinely permits triers of fact, as indeed it must, to infer causation, or the lack of causation, from the observation of deviation Vel non from long-indulged habit or practice.

[23] That view was recently taken by the Third Circuit Court of Appeals in *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (1979)*, As amended April 5, 1979.

[24] The appellees have suggested that the plaintiffs will have to trace their cattle through the chain of production to establish that the cattle they sold to packers and slaughterhouses were in turn sold, in carcass form, to members of the alleged retail chain

[51]** We reverse the district court's dismissal orders. Because the pleadings state a case within the cost-plus exception. We emphasize that we are not ruling that these plaintiffs are entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of Hanover Shoe and Illinois Brick, the district court may and **[*1167]** should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages. Nor does our ruling imply that the plaintiffs may attempt to trace damages beyond the tier comprised of those who sell directly to the packers or slaughterers. Under the allegations of the complaint only those plaintiffs who sold directly to the packers or slaughterers that engaged in strict formula buying are entitled to maintain damage claims. The complaints do not allege that feeders or brokers "passed on" price depressions to ranchers or that they engaged in **[**52]** strict formula buying based solely on Yellow Sheet prices.

III.

The appellants also appeal the dismissal of their claims for injunctive relief on the basis of Illinois Brick. It follows from our ruling that it was error to dismiss the damage claims on the pleadings that it was also error to dismiss the claims for injunctive relief on the pleadings. Our disposition of the injunctive relief issue, however, rests on the broader ground that ***HN14***[] the Illinois Brick rule has no application to claims for injunctive relief.

We agree with the reasoning of *Mid-West Paper Prods. Co. v. Continental Group, Inc., 3 Cir. 1979, 596 F.2d 573*, As amended April 5, 1979. The court in that case ruled that ***HN15***[] Illinois Brick does not bar suits for injunctive relief by indirect purchasers in price-fixing actions because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief. An injunctive suit does not expose a defendant to monetary liability at all, much less to the risk of duplicative liability, and does not require the trier of fact to determine the incidence of the overcharge. ***HN16***[] To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs **[**53]** need show only "threatened loss or damage by a violation of the antitrust laws". *15 U.S.C. § 26*. To show a threat of such injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their cattle, or that the conspiracy reduced the packers' demand for fat cattle.

The appellees argue that injunctive relief is barred to indirect sellers or purchasers whose damage claims are barred by Illinois Brick because Illinois Brick holds that such persons are not injured within the meaning of section 4 of the Clayton Act. Section 4 and section 16, they point out, are coextensive except that section 16, unlike section 4, does not require an injury to the plaintiff's "business or property". It therefore follows, it is urged, that indirect sellers or purchasers barred from section 4 treble damages by the Illinois Brick rule are not threatened with legally cognizable injury within the meaning of section 16.

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conspiracy. If the prices allegedly established by the defendants were uniformly followed by the beef retailing industry, as the plaintiffs allege, however, tracing would be unnecessary. The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly, is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

We disagree with the recent ruling of a divided panel of the Third Circuit Court of Appeals that one who deals with a nonconspiring competitor of price-fixing firms lacks standing to sue those firms for treble damages. See *Mid-West Paper Products Co. v. Continental Group, Inc., supra* note 23, *596 F.2d 587*. That decision supports the appellants' contention, for if a person who deals directly with a nonconspiring competitor lacks standing, then an indirect purchaser from, or an indirect seller to, a nonconspiring competitor of the defendants A fortiori lacks standing. We agree with the dissent in Mid-West Paper Products that such a plaintiff satisfies the "target area" test for standing, See Part IV below, and that the injury suffered by such a plaintiff satisfies the tests for proximate causation. See *596 F.2d at 597*.

We disagree with the appellees' characterization of the Illinois Brick decision. Formally, it is true, **[**54]** both Hanover Shoe and Illinois Brick held that, with the exceptions previously discussed, the overcharged direct purchaser, and not the indirect purchaser who may ultimately bear part of the overcharge, suffers the full injury for purposes of section 4. Had those decisions even purported to rest on a divination of the original meaning of section 4 of the Act we would agree with the appellees that Illinois Brick has clear implications for injunctive actions under section 16 as well. But neither Hanover Shoe nor Illinois Brick involved statutory construction in the ordinary sense. They are judicial glosses on an old statute, predicated on contemporary policy considerations. The implications of those decisions therefore reach only as far as the policy considerations informing them.

IV.

In its December 1977 order dismissing the actions, the district court granted the defendants' motion to strike allegations of retail price-fixing from the complaints. Those allegations charged the retail chains with conspiring to set artificially high prices for beef sold to retail consumers. The plaintiffs in all the suits appeal that action.

[*1168] It was error to strike the allegations **[**55]** of retail price-fixing in the Agee and Varian complaints. [25.] These ***HN17***[] complaints allege that some of the plaintiffs have purchased beef as consumers at prices affected by the alleged conspiracy. Such an allegation is an adequate allegation of the injury to one's "property" within the meaning of section 4 of the *Clayton Act. Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*. That the allegations might have been added to the complaint in the effort to inject highly prejudicial matter into a lawsuit that is primarily based on wholesale price-fixing, as the appellees charge, is of no consequence, for ***HN18***[] *Rule 18(a) of the Federal Rules of Civil Procedure* grants the plaintiffs complete freedom to join in a single action all claims that they may have against any of the defendants. 6 C. Wright & A. Miller, Federal Practice and Procedure § 1582 (1971).

[56]** It was not error, however, to strike the retail price-fixing allegations from the remaining complaints. With the exception of the Agee and Varian complaints, none of the complaints alleged injury to the plaintiffs' business or property within the meaning of the Clayton Act. The appellants contend that they have adequately alleged injury to their businesses. They say that they intend to prove, under their allegations, that the alleged retail price-fixing conspiracy reduced consumer demand for beef, thereby derivatively reducing the retailers' and the packers' demand for the plaintiffs' fat cattle.

The appellants, however, lack standing to sue for such remote injury. ***HN19***[] Only those within the "target area" of an alleged antitrust conspiracy have standing to sue. E. g., *Jeffrey v. Southwestern Bell, 5 Cir. 1975, 518 F.2d 1129, 1131*. ***HN20***[] The question of standing is a preliminary one, to be answered from examination of the allegations of the complaint. *Yoder Bros., Inc. v. California-Florida Plant Corp., 5 Cir. 1976, 537 F.2d 1347*, Cert. denied, *429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540*. Looking to the complaints, we find allegation of retail purchases in only the Agee and Varian **[**57]** complaints. In the other complaints we find, at best, allegations under which the plaintiffs could show harm flowing derivatively from a reduction in consumer demand. ***HN21***[] The "target" of a retail price-fixing conspiracy, however, is the retail purchaser. E. g., *Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n, 1974, D.Conn., 380 F. Supp. 1382, 1386*. To recognize the non-purchasing plaintiffs as "targets" of the alleged retail price-fixing conspiracy would be to grant antitrust standing to firms and persons at every level in the chain of beef production and distribution. "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., 1972, 405 U.S. 251, 263 n.14, 92 S. Ct. 885, 891-892, 31 L. Ed. 2d 184*. Only the Varian and Agee allegations satisfy the "target area" test for standing to sue.

Shifting ground, the appellants argue that evidence of the alleged retail price-fixing conspiracy is highly relevant to their claims of monopolization and monopsony or oligopsony price-fixing at the wholesale level. The defendants' retail-level activities, they urge, **[**58]** are evidence of the defendants' monopoly power and proclivity to collude.

[25.] The Agee suit has been restyled Shoshone Tribe of Duckwater, et al. v. Safeway Stores, Inc., et al. We follow the parties' practice of referring to the case as "Agee ".

Evidence of those activities is also essential, they contend, to painting for the jury a complete picture of the alleged conspiracy and of the industry in which it operates. They contend, in short, that they simply pleaded evidence.

This is not the place or time to debate the relevance of the retail price-fixing evidence. ***HN22***[] The district court had ample discretion, under *Rule 12(f) of the Federal Rules of Civil Procedure*, to order stricken from the complaint any redundant or immaterial matter. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1382 at 807 (1969). Although unnecessary evidentiary details are usually not stricken from the complaint unless prejudicial or of no **[*1169]** consequence to the controversy, Id.; see also *Augustus v. Board of Public Instruction, 5 Cir. 1962, 306 F.2d 862*, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. See *Rule 8(a) Fed.R.Civ.P.*; 5 C. Wright & A. Miller, Supra, at 832-33. Many courts have properly stricken unnecessary evidentiary detail from pleadings. E. g., *Control Data Corp. v. International* ***[**59]*** *Business Machines Corp., 8 Cir. 1970, 421 F.2d 323*; *Commissioner of Internal Revenue v. Licavoli, 6 Cir. 1958, 252 F.2d 268*; *Mitchell v. Hart, 1966, S.D.N.Y., 41 F.R.D. 138, 143*. ***HN23***[] The district court's action will not be disturbed unless it was an abuse of discretion. E. g., *Commissioner of Internal Revenue v. Licavoli, supra, at 272*. We find here no abuse of discretion. Nor do we perceive how the plaintiffs have been harmed. The district court's order striking the pleadings does not control the issues of materiality and relevancy that govern admissibility of the evidence. E. g., *Control Data Corp. v. International Business Machines Corp., supra, at 326-27*. The plaintiffs need not plead these matters. *Schlick v. Penn-Dixie Cement Corp., 2 Cir. 1974, 507 F.2d 374*, Cert. denied, *421 U.S. 976, 95 S. Ct. 1976, 44 L. Ed. 2d 467*. "If the trial court considers these matters proper proof upon the trial, he may admit them even though not pleaded." *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers, 1942, S.D.N.Y., 3 F.R.D. 157, 159*.

V.

The plaintiffs in the Pony Creek action appeal the partial summary judgment entered against them on their claim that the defendants' **[**60]** fraudulent concealment of the alleged conspiracy tolled the four-year statute of limitations of section 4B of the Clayton Act. *15 U.S.C. § 15b*.

The Pony Creek action was filed on June 5, 1975. Unless the statute of limitations was somehow tolled, the Pony Creek plaintiffs cannot recover for damages sustained prior to June 5, 1971. They allege in their complaint that they had failed to discover their cause of action before the June 1971 commencement of the limitations period because the defendants had fraudulently concealed it from them. ***HN24***[] Fraudulent concealment tolls the Clayton Act's statute of limitations. *General Electric Co. v. City of San Antonio, 5 Cir. 1964, 334 F.2d 480*; *Rinzler v. Westinghouse Electric Corp., 5 Cir. 1964, 333 F.2d 719*. To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 4 Cir. 1976, 546 F.2d 570*; *Dayco Corp. v. Firestone Tire & Rubber Co., 6 Cir. 1975, 523 F.2d 389*.

The defendant Kroger Co. ("Kroger") **[**61]** moved for partial summary judgment on the fraudulent concealment claim. Kroger submitted with its motion evidentiary matter that, it contended, conclusively established that the plaintiffs had known, or would have known through the exercise of due diligence, of the existence of their claims before June 5, 1971. The evidence consisted of copies of numerous articles and reports published in the late 1960's in newspapers and cattle industry trade journals, together with an affidavit attesting to the authenticity of the copies. The articles and reports publicized the dissatisfaction of livestock producers with cattle prices, as well as the charges of many cattlemen that the retail chains were colluding to depress prices. Many of the articles reported the filing, in 1968, of *Bray, et al. v. Safeway Stores, et al., N.D.Cal., 392 F. Supp. 851 (1975)* a lawsuit brought by several California cattlemen against major retail chains and which involved allegations essentially identical to those of the Pony Creek complaint. The defendants' exhibits showed that the allegations of the Bray Complaint had received much publicity nationwide. The plaintiffs filed no counter-affidavits. They argued **[**62]** that the Bray lawsuit revealed no operative facts relating to their claim and that none were revealed until discovery in the Bray suit during 1973 disclosed that **[*1170]** some of the defendants had indeed discussed prices at trade association meetings.

Finding no genuine issue of material fact, and mindful of the suggestion in part 1.80 of the Manual for Complex Litigation that issues such as fraudulent concealment be determined as early as possible in complex litigation so as to define the scope of discovery, [26.] the district court granted the motion.

[63]** The Manual's salutary principle notwithstanding, ***HN25***[] the question of when the statute of limitations began to run on the plaintiffs' cause of action is a factual one, E. g., *Ciccarone v. United States, 3 Cir. 1973, 486 F.2d 253, 256*, and is therefore not determinable on a motion for summary judgment. The district court's task was simply to determine whether a genuine question was presented justifying trial, *F.R.Civ.P. 56(c)*, as the court fully recognized. The defendants, as ***HN26***[] the moving parties, had the burden of demonstrating the absence of any genuine material issue of fact, and the plaintiffs had no obligation to present evidence opposing the motion unless the defendants' affidavit and exhibits initially established the absence of a genuine issue. Advisory Committee Notes to the 1963 Amendments to *Rule 56*, 31 F.R.D. 647, 648; *Adickes v. Kress, 1970, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142*. Kroger's evidentiary showing went entirely to the issues of the plaintiffs' actual or constructive knowledge of their cause of action. The question presented, then, is whether Kroger's showing established the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, **[**64]** of their claim. [27.]

From the affidavit and exhibits it is abundantly clear that the plaintiffs knew or should have known in 1968 and 1969 of the allegations of the Bray complaint. The Bray case was widely publicized in numerous issues of numerous trade publications, including, as the district court noted, an issue of The American National Cattlemen's Association's weekly publication Beef Business Bulletin, which, according to the supporting affidavit, had at the relevant time a circulation of nearly 300,000. The Bray complaint itself was, of course, a matter of public record. It is of no **[**65]** moment that Kroger presented no direct evidence demonstrating that the plaintiffs were actually aware of the Bray case. Even assuming that the inferences of actual knowledge to be drawn from Kroger's presentation were insufficient for summary judgment purposes, the evidence was more than adequate to establish beyond doubt that reasonably diligent cattlemen in the plaintiffs' situation would have been aware, in the late 1960's, of the Bray allegations. ***HN27***[] Numerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public records. E. g., *Dayco Corp. v. Goodyear Tire & Rubber Co., 6 Cir. 1975, 523 F.2d 389, 394*; *Morgan v. Koch, 7 Cir. 1969, 419 F.2d 993, 998*; *Overfield v. Pennroad Corp., 8 Cir. 1944, 146 F.2d 889, 898*; *Pettibone v. Cook County, 8 Cir. 1941, 120 F.2d 850, 855*. ***HN28***[] In a case involving a claim that the statute of limitations has **[*1171]** been tolled, "the means of knowledge are the same thing as knowledge itself." Wood v. Carpenter, 1979, 101 U.S. (11 Otto) 135, 143, *25 L. Ed. 807*.

The plaintiffs' knowledge of the Bray complaint, however, is not As a matter of law tantamount to actual or constructive knowledge of their claim. ***HN29***[] Although **[**66]** the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather v. Neva Paperbacks, Inc., 5 Cir. 1971, 446 F.2d 338*, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. ***HN30***[] The filing by others of a similar lawsuit against the same defendants may in some

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[26.] Part 1.80 states in relevant part:

In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time and a summary judgment on some or all issues could be rendered in many cases.

Manual for Complex Litigation 80 (1977).

[27.] Kroger, of course, did not have to demonstrate the absence of triable fact issues as to the allegation that the defendants actively concealed the alleged conspiracy. If the defendants established that the plaintiffs knew or should have known of their cause of action before June 5, 1971, the running of statute of limitations would not have been tolled even had the defendants affirmatively concealed the alleged scheme.

circumstances suffice to give notice, but to rule that it does so As a matter of law is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it". *Rule 11, F.R.Civ.P.* The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless. [28.]

[67]** The leap from the plaintiffs' knowledge of the Bray complaint to actual or constructive knowledge of their cause of action therefore involves factual issues. The defendants had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit. The summary judgment evidence consisted only of a demonstration that the plaintiffs should have been aware of the Bray complaint. There is no evidence in the record suggesting that the Bray litigation turned up any verification for the allegations before June 5, 1971, or that the plaintiffs had independent access before that time to any information, beyond the Bray complaint itself, that tended to verify their suspicions. At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before June 1971 had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the absence of genuine issues of fact the partial summary judgment must be reversed.

We should **[**68]** emphasize that this ruling is dictated by the posture of the question and the nature of the defendants' summary judgment showing. ***HN31***[] The plaintiffs bear the ultimate burden of persuasion on the fraudulent concealment issue. The burden is a heavy one. Those who have learned of facts "calculated to excite inquiry" must inquire. *Clement A. Evans & Co. v. McAlpine, 5 Cir. 1970, 434 F.2d 100, 102*, Cert. denied, *402 U.S. 988, 91 S. Ct. 1660, 29 L. Ed. 2d 153*. The widely publicized Bray complaint certainly put these plaintiffs to a duty to investigate. They must demonstrate to the trier of fact that they investigated with reasonable diligence and discovered nothing that would have justified them in filing suit before June 5, 1971. Id.; see also *Dayco Corp. v. Goodyear Tire & Rubber Co., supra.* In opposing the motion for summary judgment, however, the plaintiffs were not required to make any showing unless the defendants demonstrated that no genuine issues of fact underlay the due diligence question. This the defendants failed to do.

The judgments below **[**69]** are REVERSED and the cases REMANDED for further proceedings consistent with this opinion.

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[28.] That the Bray plaintiffs eventually succeeded (in 1975) in their lawsuit is of no consequence, for the Bray action might have disclosed nothing about the alleged conspiracy before June 5, 1971.

Catalano, Inc. v. Target Sales, Inc.

United States Court of Appeals for the Ninth Circuit

August 20, 1979

Nos. 77-2221, 77-2222

Reporter

605 F.2d 1097 *; 1979 U.S. App. LEXIS 12376 **; 1979-2 Trade Cas. (CCH) P62,805

CATALANO, INC., et al., on behalf of themselves and all others similarly situated, Plaintiff-Appellants, v. TARGET SALES, INC., et al., Defendant-Appellees.

Subsequent History: **[**1]** Rehearing Denied October 23, 1979.

Prior History: Appeal from the United States District Court for the Eastern District of California.

Core Terms

beer, price fixing, terms, fixing, summary judgment, district court, retailers, anti trust law, antitrust, prices, wholesalers, per se rule, Sherman Act, anticompetitive, per se violation, rule of reason, elimination, horizontal, illegality, damages, effects

LexisNexis® Headnotes

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

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

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

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

The rationale for per se illegality in antitrust suits is that there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Particular acts, of which price fixing is one, has been held so plainly anti-competitive as to be conclusively presumed illegal. The fixing of credit terms, on the other hand, is not manifestly anticompetitive.

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

Determination of the applicability of per se illegality turns on whether the practice appears to be one that would always or almost always tend to restrict competition and decrease output, or instead one designed to increase economic efficiency and render markets more rather than less competitive.

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

HN3[] Regulated Industries, Higher Education & Professional Associations

Under the rule of reason any concerted action violates the Sherman Act, *15 U.S.C.S. § 1*, if its purpose or effect would significantly impair competition. The rule of reason 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. It requires examination of the impact of credit fixing on competitive conditions, and such an agreement can benefit competition only if it improves the operation of the market.

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

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

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

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

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

HN4[] Summary Judgment, Opposing Materials

Under *Fed. R. Civ. P. 56(c)*, the burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, the court must draw all inferences of fact against the movant and in favor of the party opposing the motion. Once it appears from the movant's papers that the motion should be granted, the opposing party must controvert the showing. All evidence and inferences are to be viewed in a light most favorable to the party opposing the motion.

Counsel: James P. Samarco, Fresno, Cal., William L. Riley, Orrick, Herrington, Rowley & Sutcliffe, Jack B. Owens (argued), San Francisco, Cal., for plaintiffs-appellants.

G. Richard Doty, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., J. Wallace Upton, Kimble, MacMichael, Jackson D. Upton, Fresno, Cal., Ted R. Frame, Frame & Courtney, Coalinga, Cal., for defendants-appellees.

Judges: Before WALLACE and SNEED, Circuit Judges, and BLUMENFELD [*], District Judge.

Opinion by: SNEED

Opinion

[*1098] Plaintiffs, a conditionally certified class of beer retailers doing business within the Fresno area, appeal from a ruling that defendants' alleged credit fixing agreement was not Per se illegal, but rather must be proven illegal under the rule of reason standard. Catalano, Inc. and C & C Food Marts, Inc. (hereinafter Catalano), two named plaintiffs, also appeal from a summary judgment of the district court adjudging that neither plaintiff had suffered **[**2]** injury in fact. Both appeals were consolidated. We affirm the district court's ruling that credit fixing, standing alone, was not an agreement to fix prices subject to a Per se rule of illegality. We reverse the district court's entry of summary judgment against Catalano and remand Catalano's claim for further proceedings.

I. FACTUAL BACKGROUND

Plaintiffs-appellants claim that defendants-appellees, various beer wholesalers, have engaged in a conspiracy to restrain trade violative of *section 1* of the Sherman Act. [1] The class of plaintiff retailers sought to establish, Inter alia, that the defendant wholesalers conspired to eliminate deferred payment terms, specifically short term trade credit formerly granted to them on beer purchases. [2]

Plaintiffs sought an order from the district court **[**3]** declaring the alleged credit fixing agreement, if proven, violative Per se of the antitrust laws. The district court refused to so rule. Plaintiffs then sought an interlocutory appeal from the district court's ruling on the Per se issue pursuant to *28 U.S.C. § 1292(b)*. The district court **[*1099]** properly certified the issue and we granted permission to appeal.

Contemporaneous with the request for the order declaring credit fixing a Per se violation, defendants sought a motion for summary judgment against plaintiffs Catalano asserting that they failed to establish injury in fact. The district court agreed, granted the motion for summary judgment, and Catalano appealed therefrom.

We granted a motion to consolidate the two appeals.

II. QUESTIONS PRESENTED

Two issues are presented by these appeals. First, did the district court err by ruling that a horizontal agreement among wholesalers to eliminate credit on retail sales would not constitute a Per se violation of the antitrust laws? Second, did the district court err by granting summary judgment against plaintiffs Catalano on the ground that they failed to demonstrate the existence of any injury in fact? We shall turn first **[**4]** to the Per se issue.

III. THE PER SE ISSUE

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[*] Honorable M. Joseph Blumenfeld, Senior District Judge for the District of Connecticut, sitting by designation.

[1] *15 U.S.C. § 1*.

[2] The district court conditionally certified plaintiffs' class to include those retailers to whom the wholesalers extended credit prior to the alleged agreement to terminate the credit provisions.

To support their contention that an alleged horizontal agreement among beer distributors to eliminate formerly free short term trade credit should be considered as illegal Per se, plaintiffs argue that: (1) Price fixing is subject to a Per se evaluation under the Sherman Act. [3] (2) Under the pertinent standard price fixing may be accomplished directly or indirectly. [4] (3) An agreement to fix credit terms fixes prices indirectly. (4) As a result, credit fixing is a Per se violation of the antitrust laws.

We cannot agree that on this record an agreement to fix credit terms amounts to indirect price fixing within the meaning of the antitrust laws. *Northern Pacific Ry. v. United States, 356 U.S. 1, 5, 78* ***[**5]*** *S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*, established ***HN1***[] the rationale for Per se illegality in antitrust suits: "(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Particular acts, of which price fixing is one, have been held so plainly anti-competitive as to be conclusively presumed illegal. The fixing of credit terms, on the other hand, is not "manifestly anticompetitive." An agreement to fix credit, a "non-price" condition of sale, may actually enhance competition. Proper analysis reveals "that an agreement fixing non-price trade items may either help or hurt competition, depending upon industry structure." L. Sullivan, Handbook of the Law of Antitrust, § 99, at 277 (1977). [5] Thus, an agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry. Moreover, competition could be fostered by the increased visibility of price made possible by the agreement **[**6]** to eliminate credit. For example, an agreement to eliminate credit might foster competition by increasing the visibility of the price term, and hence, promote open price competition in an industry in which imperfect information shielded various sellers from vigorous competition.

[*1100] **[**7]** We readily acknowledge that an agreement to fix credit may be in violation of the antitrust laws when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition. See *Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962, 966 n.2 (D.Ariz.1975)*, aff'd, *541 F.2d 226 (9th Cir. 1976)*; *Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D.Cal.1971)*. Thus, were competition with respect to price primarily centered on credit terms, as where, for example, explicit prices are fixed by government, an agreement to fix credit terms would amount to price fixing. And, of course, an agreement to fix credit terms as part of an effort to fix prices would contravene the ***antitrust law***.

At this juncture of the proceeding it has not been established that the agreement was entered into with the purpose, or had the effect, of restraining price competition in the industry. Simply labeling concerted conduct as price fixing without proof of purpose to affect price will not justify application of a Per se rule. "The antitrust laws concern substance, not form, in the preservation of competition." L. Sullivan, Supra, § 74, at 198. As a result, we refuse **[**8]** to characterize the credit fixing agreement here before us as price fixing.

Our conclusion is reinforced when we consider the function of Per se rules in ***antitrust law*** enforcement. A particular practice which is established as Inherently anti-competitive eliminates the need for elaborate analysis and may be deemed illegal Per se. ***HN2***[] Determination of the applicability of Per se illegality turns on whether the practice "appears to be one that would always or almost always tend to restrict competition and decrease output . . .

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[3] *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

[4] *Plymouth Dealers Assoc. v. United States, 279 F.2d 128 (9th Cir. 1960)*; *National Macaroni Mfrs. Assoc. v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965)*.

[5] The effects of an agreement standardizing non-price terms will vary much as will an agreement standardizing product. By such standardization the variety of offerings open to buyers and competitive differentiation open to sellers will inevitably be reduced, as they are when the product is standardized. . . . But the standardization of non-price terms, like standardization of product, will have other effects. It will in a sense serve to channel all transactions into a single, better integrated market; buyers will more easily be able to compare their alternative opportunities as to the unstandardized terms, most notably price, and sellers will more likely be aware of competitive offerings.

L. Sullivan, Supra, § 99, at 277-78.

or instead one designed to "increase economic efficiency and render markets more rather than less competitive.' " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 (1979)*; *United States v. United Gypsum Co., 438 U.S. 422, 441 n.16, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*; See *Continental T. V., Inc. v. GTE Sylvania, 433 U.S. 36, 50 n.16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *Northern Pacific Ry. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. We cannot say that credit term fixing "would always or almost always tend to restrict competition and decrease output." It is better, **[**9]** we believe, to rest an antitrust violation on demonstrable economic effects rather than "formalistic line drawing." *Continental T. V., Inc. v. GTE Sylvania, supra, 433 U.S. at 59, 97 S. Ct. 2549*. Thus, to determine the legality of credit fixing an evaluation of the competitive detriment or enhancement must be made in each situation.

Application of the rule of reason, however, does not necessitate invariably the conclusion that a horizontal agreement to eliminate trade credit is lawful. ***HN3***[] Under the rule of reason any concerted action violates the Sherman Act if its purpose or effect would significantly impair competition. The rule of reason, moreover, "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." *National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. It requires examination of the impact of credit fixing on competitive conditions, and such an agreement can benefit competition only if it improves the operation of the market. L. Sullivan, Supra § 100 at 280.

Any argument that the special characteristics of the beer industry render **[**10]** monopolistic arrangements better for trade and commerce than competition is foreclosed. *National Society of Professional Engineers v. United States, supra, 435 U.S. at 689, 98 S. Ct. 1355*.

> The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. F.T.C., 340 U.S. 231, 248, 71 S. Ct. 240, 95 L. Ed. 239*. The assumption that competition is the best method of allocating resources in a **[*1101]** free market recognizes that all elements of a bargain quality, service, safety, and durability and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Id. at 695, 98 S. Ct. at 1367. The underlying premise is that "unless the market is rigged, either by concerted agreement . . . or by excessive concentration and interdependent action, the market when left **[**11]** alone ought to adjust to consumer interests with responses at least as fine as those which the industry could concertedly agree upon." L. Sullivan, Supra, § 100, at 281.

Application of the rule of reason to the facts presented here may be unlikely to require an elaborate inquiry into the effects on the beer industry. A horizontal agreement among distributors eliminating deferred payment terms, while leaving all other terms subject to competitive forces, may well be unreasonable. Such an agreement tends to impair competition. The ease with which the rule of reason may be applied in this case does not, however, justify the invocation of a Per se rule. We must remain open to the possibility that situations will occur where such an agreement might work to increase competition. See id., § 100, at 281.

IV. SUMMARY JUDGMENT

Turning to the summary judgment against Catalano, we note that ***HN4***[] under *Fed.R.Civ.P. 56(c)* "(t)he burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, . . . (the court) must draw all inferences of fact against the movant and in favor of the party opposing the **[**12]** motion." *Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 683 (9th Cir. 1976)*, Cert. denied, *429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976)*. Once it appears from the movant's papers that the motion should be granted, the opposing party must controvert the showing. All evidence and inferences are to be viewed in a light most favorable to the party opposing the motion. *Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977)*. In the antitrust context the general standards for the granting of summary judgment are applied even more stringently. See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).

The district court concluded that the cessation of credit on wholesale distribution caused no injury in fact to plaintiffs. Summary judgment against plaintiffs Catalano was based upon a determination that there was no genuine issue of material fact regarding the injury issue. This, in turn, rested upon the deposition of Joseph Catalano, principal owner of the two Catalano businesses. He stated that, except for the possibility of selling more beer, paying cash for beer had no effect on profit and loss. **[**13]** Also, he could not estimate how much more profit might have been made had beer been sold on credit.

Opposing the motion, plaintiffs also relied on Catalano's deposition. They contended that the fact that Catalano could have sold more beer but for the cutoff of credit presented a material issue. Additionally, they relied on a subsequent affidavit in which Catalano testified:

> Both of my companies have always kept more money in checking accounts than absolutely necessary . . . . When defendants cut off credit, some of this money had to be put into beer inventory. As a result, my companies were less liquid than they were before . . . . (T)hey deprived my companies of the opportunity to put that money in time deposits, where it would have drawn interest . . . .

Plaintiffs further controverted the motion with testimony of an expert witness in the field of finance. He stated that a termination **[*1102]** of trade credit has an averse effect on Any business. "(I)f the company finances the inventories . . . by drawing down its cash reserves, the firm's liquidity and its financial strength are reduced resulting in a decrease in the value of the enterprise." In sum, he was of the opinion **[**14]** that plaintiffs suffered financial injury as a result of the agreement to end credit.

The district court reasoned that because Catalano could not specify how much more beer might have been sold, or how much profit might have been made, he suffered no injury. The court also rejected the claim that an injury can be suffered when surplus cash is utilized to finance inventories even though such use is accompanied by no borrowing or investment of additional cash. The district court erred. It failed to distinguish between the existence of an injury in fact and the means by which the amount of damage can be measured.

Plaintiffs' inability to fix the amount of lost profits bears directly on the issue of amount of damages rather than the existence of an injury. Catalano's inability to estimate his damages does not mean that they were not suffered; nor does it bar an antitrust suit. Bogosian v. Gulf Oil Corp., 393 F. Supp. 1046, 1050 n.7 (E.D.Pa.1975).

The plaintiffs made a sufficient showing of a genuine issue of material fact. The existence of an injury is a material fact sufficiently made a genuine issue by Catalano's claim of lesser sales and the expert witness' testimony that injury **[**15]** did exist. [6] Plaintiffs made an adequate showing of some damage flowing from the agreement, "inquiry beyond this minimum point goes only to the amount and not the fact of damage." 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), Accord Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976).

[16]** Affirmed in Part, Reversed and Remanded in Part.

Dissent by: BLUMENFELD

Dissent

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[6] Plaintiffs allege that the defendants have not reduced the price of beer to reflect the termination of free credit. As a result, the measure of damages for plaintiffs' injury, it is argued, should be equal to the cost of financing the beer inventories. Three different methods for determining the amount of damages were suggested by plaintiffs: (1) measure the opportunity cost of any new capital that plaintiffs invested in the business; (2) measure the opportunity cost of borrowing outside funds to finance the inventories; or, (3) measure the reduction in the value of plaintiffs' business occasioned by the financing of inventories out of cash on hand, thereby reducing the liquidity of the business. While not specifically sanctioning any of these methods, difficulty in measuring the amount of damages should not preclude plaintiffs from establishing that injury was suffered.

BLUMENFELD, District Judge (concurring and dissenting):

I am in agreement with the decision of the majority reversing the lower court's grant of summary judgment against the plaintiffs on the issue of damages; however, contrary to the majority, I would hold that the alleged horizontal agreement among wholesalers to eliminate credit on sales of beer to retailers constitutes a per se violation of the antitrust laws.

It is clear enough by the citation to *Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*, [1] **[*1103]** that the majority does not intend to change the established rule of law in antitrust cases that price fixing is a per se violation. See also *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. Although recognizing that price fixing may be accomplished directly or indirectly, the majority finds that the alleged agreement to fix credit terms does not amount to either direct or indirect price fixing. I disagree.

[17]** The purchase of goods creates an obligation to pay for them. Credit is one component of the overall price paid for a product. The cost to a retailer of purchasing goods consists of (1) the amount he has to pay to obtain the goods, and (2) the date on which he has to make that payment. If there is a differential between a purchase for cash and one on time, that difference is not interest but part of the price. See *Hogg v. Ruffner, 66 U.S. (1 Black) 115, 118-19, 17 L. Ed. 38 (1861)*. Allowing a retailer interest-free short-term credit on beer purchases effectively reduces the price of beer, when compared to a requirement that the retailer pay the same amount immediately in cash; and, conversely, the elimination of free credit is the equivalent of a price increase. [2]

To declare in the instant case that credit is "a "non-price' condition of sale," **[**18]** as the majority asserts Supra, is too generalized to be entirely true, and disintegrates when exposed to the economic realities of the beer industry in California. Price competition in the beer industry in California is partially restricted by state law through a system of mandatory territorial restrictions and price posting. See *Cal.Bus. & Prof. Code §§ 25000 Et seq.* While containers vary in material, and contents vary in taste, calories, and sometimes color, beer of one brand is substantially the same as that of another. It is common for retailers to buy and carry in stock for resale different brands from several distributors concurrently. Given the limits to competition on price and on product desirability, competition between wholesalers in extending credit takes on greater importance as a method by which wholesalers can effectively lower the price of beer in order to compete for the business of retailers. The majority acknowledges that where "competition with respect to price primarily center(s) on credit terms, . . . an agreement to fix credit terms would amount to price fixing." This was a naked agreement among competitors to fix credit a restraint which serves no economic purpose **[**19]** other than to affect prices. It affects no other functional element in a sale of beer by a distributor to a retailer. I would therefore hold that the alleged agreement is illegal per se. Nearly 40 years ago the Supreme Court stated:

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[1] "(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of Per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves (is) price fixing, *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210, 60 S. Ct. 811, 838, 84 L. Ed. 1129* . . . ."

356 U.S. at 5, 78 S. Ct. at 518.

[2] The defendants here do not argue that the purchase price of their beer decreased in proportion to the savings they realized from eliminating free short-term credit.

> "Any combination which tampers with price structures is engaged in an 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 Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.
> ". . .
>
> "Under the Sherman Act 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., supra, 310 U.S. at 221, 223, 60 S. Ct. at 843, 844.

The suggestion in the majority opinion **[**20]** that the per se rule cannot be applied without proof that the purpose of the agreement was to affect prices finds no support **[*1104]** in the cases. What the purpose of the defendants was, and what they thought about the wisdom of cutting off credit, is irrelevant. The Supreme Court has recently emphasized:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive,' *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)*; *Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 2558, 53 L. Ed. 2d 568 (1977)*, and so often "lack . . . any redeeming virtue,' *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*, that they are Conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."

Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 7, 8, 99 S. Ct. 1551, 1556, 60 L. Ed. 2d 1 (1979) (emphasis added). Even in the context of criminal **[**21]** liability under the Sherman Act, the Supreme Court has rejected the claim that a criminal conviction requires a finding of a purpose to produce anticompetitive effects. See *United States v. United States Gypsum Co., 438 U.S. 422, 444* & n.21, *98 S. Ct. 2864, 57 L. Ed. 2d 854*; *United States v. Continental Group, Inc., 603 F.2d 444* (3d Cir., 1979); Antitrust & Trade Reg.Rep. (BNA), No. 926, E-1, E-9. The agreement among the defendant competitors in the instant case fits comfortably within the classic mode of price fixing, and it is so plainly anticompetitive in its nature and necessary effect that no elaborate study is needed to establish its illegality. See *National Society of Professional Engineers v. United States, supra, 435 U.S. at 692, 98 S. Ct. 1355*. [3]

[22]** Paradoxically, our ruling that the plaintiffs' alleged damages would constitute antitrust injury flowing from the withdrawal of credit under the liberal rule for proving damages gives added weight to the foregoing analysis. We hold that plaintiffs have made "an adequate showing of some damage flowing from the agreement" to terminate credit. How to measure the damage is left unresolved; however, it is clear that the damage claim is derived from the increase in the cost of purchasing beer due to the elimination of free short-term credit. To say that the overall cost of purchasing beer increased as a result of the elimination of credit is functionally the same as saying that the effective price of beer rose for these plaintiffs. Since the alleged agreement to fix credit terms raised the effective

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[3] Lest we be led to a false conclusion by the use of ambiguous concepts, it is necessary to point out that the statement of the majority that "an agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry," is curiously inappropriate in this case. I am quite unpersuaded by this strange assertion, nor do I subscribe to the suggestion that it would justify an agreement to fix prices. No person seeking entry to the beer distributors' market is a party to this case. Furthermore, how another distributor who would abide by the agreement could add to price competition is difficult to understand since the agreement would "cripple (his) freedom . . . and thereby restrain (his) ability to sell in accordance with (his) own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 71 S. Ct. 259, 260, 95 L. Ed. 219 (1951)*.

price of beer, the alleged agreement amounts to price fixing. As such, the per se rule of illegality should govern this case, and the district court's ruling to the contrary should be reversed.

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People v. Mobile Magic Sales, Inc.

Court of Appeal of California, Fourth Appellate District, Division One

August 20, 1979

Civ. No. 18350

Reporter

96 Cal. App. 3d 1 *; 157 Cal. Rptr. 749 **; 1979 Cal. App. LEXIS 2034 ***; 1979-2 Trade Cas. (CCH) P62,940

THE PEOPLE, Plaintiff and Respondent, v. MOBILE MAGIC SALES, INC., et al., Defendants and Appellants

Prior History: **[***1]** Superior Court of San Diego County, No. 414439, Ross G. Tharp, Judge.

Disposition: We conclude: No abuse of discretion in issuing the preliminary injunction is shown. The order granting the preliminary injunction is affirmed.

Core Terms

mobilehome, preliminary injunction, Mobile, injunction, homesites, trial court, lease, retail dealer, tying arrangement, mobile home park, tying agreement, Cartwright Act, Sherman Act, space, conditioning, displayed, mandatory, dealer, rights, restraint of trade, tied product, competitors, issuance, restrain

LexisNexis® Headnotes

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Standards of Review, Substantial Evidence**

The substantial evidence rule applies to appeal court review of preliminary injunctions. Also the familiar rule requires, when evaluating the trial court's exercise of discretion in granting a preliminary injunction, that the facts be viewed in the light most favorable to the order.

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

HN2[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A "tying" arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] Injunctions, Preliminary & Temporary Injunctions

Cal. Code Civ. Proc. § 527 provides: An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] Injunctions, Preliminary & Temporary Injunctions

The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] Injunctions, Preliminary & Temporary Injunctions

The general purpose of a preliminary injunction is the preservation of the status quo until a final determination of the merits of the action. Thus, the court examines all of the material before it in order to consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it. In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion, and it must then be exercised in favor of that party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6[] Standards of Review, Abuse of Discretion

The granting or denial of a preliminary injunction, even though the evidence with respect to an absolute right therefor may be conflicting, rests in the sound discretion of the trial court and may not be disturbed on appeal except for an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN7[] Standards of Review, Abuse of Discretion

Discretion is abused in the legal sense whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.

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

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN8[] **Standards of Review, Substantial Evidence**

Appellate review of the issuance of a preliminary injunction requires a determination whether substantial evidence supports the discretion exercised by the trial court.

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

Contracts Law > Defenses > Illegal Bargains

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

HN9[] **Summary Judgment, Entitlement as Matter of Law**

On a motion for summary judgment, the function of the trial court is not issue determination but rather issue finding.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN10[] **Antitrust & Trade Law, Sherman Act**

The California ***antitrust law*** -- the Cartwright Act, *Cal. Bus. & Prof. Code §16700 et seq.*, is patterned after the federal Sherman Act, *15 U.S.C.S. § 1 et seq.* Both have their roots in the common law; federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. In 1961 California incorporated section 3 of the federal Clayton Act, *15 U.S.C.S. § 12 et seq*, in *Cal. Bus. & Prof. Code § 16727*. The Clayton Act goes beyond common law and the Sherman Act to inhibit trade restraints at their inception; federal interpretations thereof are similarly applicable.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Antitrust & Trade Law, Sherman Act**

The provisions of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and therefore *§§ 16720* and *16726* of the Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, codify the common law prohibition against combinations in restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

Both federal and state decisional law hold trade or commerce in real estate, or property rights in real estate, to be within the protections of the Sherman Act. *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > Clayton Act > General Overview

HN13[] Antitrust & Trade Law, Clayton Act

Section 3 of the Clayton Act, *15 U.S.C.S. § 12 et seq.*, and its California counterpart, *§ 16727* of the Cartwright Act -- are restricted to transactions involving commodities. *Cal. Bus. & Prof. Code § 16727*. And realty or property rights in realty have been denied the status of commodity under the Clayton Act.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN14[] Tying Arrangements, Clayton Act

Tying arrangements involving rights in real property are not removed from the prohibitions of the antitrust laws, for such tying arrangements are made unlawful by *section 1* of the Sherman Act, *15 U.S.C.S. § 1 et seq*, and *Cal. Bus. & Prof. Code §§ 16720* and *16726* of the Cartwright Act.

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

HN15[] Tying Arrangements, Sherman Act Violations

A "tying arrangement" is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product or at least agrees that he will not purchase that product from any other supplier.

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

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

HN16[] Tying Arrangements, Clayton Act

Tying agreements serve hardly any purpose beyond the suppression of competition. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons tying agreements fare harshly under the laws forbidding restraints of trade.

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

Real Property Law > Mobilehomes & Mobilehome Parks > Purchase & Sale

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The reasonableness of a tying arrangement is a question of fact.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN18[] **Injunctions, Preliminary & Temporary Injunctions**

The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. Instead, the appellate court must examine the terms and effect of the injunction in order to discover its character.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN19[] **Injunctions, Preliminary & Temporary Injunctions**

The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative positions of the parties. By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act.

Real Property Law > Zoning > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation

Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues

HN20[] **Real Property Law, Zoning**

Under the provisions *Cal. Veh. Code § 11709(c)*, it is unlawful to display mobile home model homes within a mobile home park after that park has reached 70 percent occupancy.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action by the People for civil penalties and injunctive relief against mobilehome dealers and the operator of a mobilehome park, the trial court granted a preliminary injunction which prohibited the conditioning of the lease or purchase of sites in mobilehome parks on the purchase or lease of a mobilehome from defendant dealers, prohibited defendants from misrepresenting the availability of mobilehome homesites, and required retail dealers to remove mobilehome models displayed in violation of Veh. Code, § 1709, subd. (c), which makes it unlawful to display mobilehome model homes within a mobilehome park after that park has reached 70 percent occupancy. (Superior Court of San Diego County, No. 414439, Ross G. Tharp, Judge.)

The Court of Appeal affirmed, holding no abuse of discretion in issuing a preliminary injunction was shown. With respect to the provisions prohibiting conditioning availability of homesites on purchase or lease of a mobilehome from defendants, the court held the evidence, viewed in the light most favorable to the order, warranted an inference that an illegal restraint of commerce was ongoing. Prohibiting defendants from misrepresenting availability of mobilehome sites was held merely to require defendants to conform their conduct to the standards of honest and fair dealing under the Unfair Practices Act (*Bus. & Prof. Code, § 17200*). In conclusion, the court rejected defendants' contention the injunction provision requiring retail dealers to remove illegally displayed mobilehome models was mandatory in character and therefore improperly granted. The requirement of the affirmative act of removal, the court held, was incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision. (Opinion by Staniforth, J., with Brown (Gerald), P. J., and Cologne, J., concurring.)

Headnotes

CA(1)[] **(1)**

Injunctions § 21—Preliminary Injunctions—Appeal—Factual Matters.

--In evaluating a trial court's exercise of discretion in granting a preliminary injunction, the facts must be viewed in the light most favorable to the order.

CA(2)[] **(2)**

Injunctions § 15—Preliminary Injunctions—Effect and Purpose.

--The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him. The general purpose of such an injunction is the preservation of the status quo until a final determination of the merits of the action.

CA(3)[] **(3)**

Injunctions § 18—Preliminary Injunctions—Hearing and Order.

--In determining whether to grant or deny a preliminary injunction, the court examines all of the material before it in order to consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it. In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case. In the last analysis, the trial court must determine which party is more likely to be injured by the exercise of its discretion and it must then be exercised in favor of that party.

CA(4)[] **(4)**

Injunctions § 15—Preliminary Injunctions—Discretion of Trial Court.

--The granting or denial of a preliminary injunction, even though the evidence with respect to an absolute right therefor may be conflicting, rests in the sound discretion of the trial court and may not be disturbed on appeal except for an abuse of discretion. Discretion is abused in the legal sense whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.

CA(5)[] **(5)**

Injunctions § 21—Preliminary Injunctions—Appeal—Scope of Review.

--Appellate review of the issuance of a preliminary injunction requires a determination whether substantial evidence supports the discretion exercised by the trial court.

CA(6)[] **(6)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act —Applicability of Federal Decisions.

--The California ***antitrust law***--the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*)--is patterned after the federal Sherman Act, and federal cases involving the Sherman Act are applicable with respect to the Cartwright Act.

CA(7)[] **(7)**

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—"Tying" Arrangements.

--A "tying arrangement" (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) involving rights in real property is made unlawful by provisions of the Cartwright Act (*Bus. & Prof. Code, §§ 16720*, *16726*).

CA(8)[] **(8)**

Mobile Homes, Trailers and Parks § 3—Regulation—Injunctive Relief—Illegal Trade Practices—"Tying" Arrangements.

--A provision of a preliminary injunction prohibiting the conditioning of the lease or purchase of sites in mobilehome parks on the purchase or lease of a mobilehome from defendant dealers was a reasonable exercise of the trial court's discretion. Though the legality or illegality of the arrangement was a matter for trial determination, the uncontradicted facts before the court showed agreements or business practices fitting the judicial definition of an illegal tying agreement. The evidence was ample to show economic hardship on consumers and competitors resulted from the device, and warranted an inference that an illegal restraint of commerce was ongoing. Moreover, the injunction did not prevent defendants from selling their mobilehomes or leasing or selling their property interests in the homesites and therefore posed only an insignificant inconvenience to their business.

CA(9)[] **(9)**

Mobile Homes, Trailers and Parks § 3—Regulations—Injunctive Relief—Misrepresentation of Homesite Availability.

--In an action by the People for civil penalties and injunctive relief against mobilehome dealers and the operator of a mobilehome park, the trial court properly exercised its statutory injunctive powers by a provision of a preliminary injunction prohibiting defendants from misrepresenting the availability of mobilehome homesites. The provision merely required that defendants conform their conduct to the standards of honest and fair dealing under the Unfair Practice Act (*Bus. & Prof. Code, § 17200*).

CA(10a)[] **(10a)** ***CA(10b)***[] **(10b)**

Mobile Homes, Trailers and Parks § 3—Regulation—Injunctive Relief—Unlawful Display of Models.

--In an action by the People for civil penalties and injunctive relief against mobilehome dealers and the operator of a mobilehome park, the trial court did not abuse its discretion by a provision of a preliminary injunction requiring retail dealers to remove mobilehome models displayed in violation of *Veh. Code, § 11709, subd. (c)*, which makes it unlawful to display mobilehome model homes within a mobilehome park after that park has reached 70 percent occupancy. Though removal as required by the order was an affirmative act, it was incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision.

CA(11)[] **(11)**

Injunctions § 2—Mandatory and Prohibitory Injunctions Distinguished—Determination of Nature of Order.

--The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. An appellate court must examine the terms and effect of the injunction in order to discover its character.

CA(12)[] **(12)**

Injunctions § 2—Mandatory and Prohibitory Injunctions Distinguished—Effect of Incidental Requirement of Affirmative Act.

--The purpose of mandatory injunctive relief is to compel the performance of a substantive act or a change in the relative positions of the parties while a prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act.

Counsel: de Krassel, Tierney & Cohen and Timothy T. Tierney for Defendants and Appellants.

Edwin L. Miller, Jr., District Attorney, Peter C. Lehman, Charles R. Hayes, Robert C. Fellmeth and John R. Heisner, Deputy District Attorneys, for Plaintiff and Respondent.

Judges: Opinion by Staniforth, J., with Brown (Gerald), P. J., and Cologne, J., concurring.

Opinion by: STANIFORTH

Opinion

[*5] [750]** The People sought civil penalties and injunctive relief against defendants Mobile Magic Sales, Inc. (Mobile), Ralph Forgeon dba La Moree Mobilehome Estates (La Moree), and other mobilehome dealers in North San Diego County (North County), based upon charges of unfair competition and restraint of trade in violation of the

Cartwright Act (*Bus. & Prof. Code, §§ 16720*, *16727* and *16754.5*). At the order to show cause hearing, the trial court granted a preliminary injunction which prohibited: "a. Conditioning the rental or lease of sites within Mobilhome Parks in San Diego **[**751]** **[***2]** County on the purchase or lease of mobile homes from Mobile Magic Sales, Inc., or any consenting dealer and/or their agents, employees, and servants; b. Intentionally misrepresenting the availability of mobile home park space within Mobilhome Parks in San Diego County; c. Displaying, or allowing to be displayed, any mobile home by Mobile Magic Sales, Inc., or any consenting dealer and/or their agents, employees, and servants, as a model home within Mobilhome Parks in San Diego County except as permitted by the California Vehicle Code or the Department of Motor Vehicles. Removal of any so situated mobile homes by any such dealers shall be accomplished within 45 days of the issuance of this order."

Defendants appeal, contending the trial court "improperly" granted the preliminary injunction and citing inter alia *Sherman v. Mertz Enterprises, 42 Cal.App.3d 769 [117 Cal.Rptr. 188]*. For reasons set forth below, we conclude the order granting the preliminary injunction must be affirmed.

I

CA(1)[] **(1) (see fn. 1.)** The relevant facts, as established by the pleading, declarations made under penalty of perjury, as well as oral testimony adduced at the hearing on the motion for preliminary **[***3]** injunction, are as follows: [1]

[*6] Mobile is one of the largest retail dealers in new mobilehomes within San Diego County and the State of California. Within the North County area, Mobile is the largest of such dealers by volume [2] and competes with approximately 15 other retail dealerships.

[*4]** Beginning in 1976, certain other retail dealers entered into business "arrangements" with the owners of mobilehome parks (including defendant La Moree) located in the North County area. In this arrangement, retail dealers contracted to lease or rent available homesites from cooperating park owners. By this process, trailer homesites were preempted by the retail dealer -- now lessee -- and as a direct result, these homesites were not available to the individual consumer unless they purchased or leased a mobilehome from the retail dealer-lessee. The dealer-lessee also displayed their mobilehomes for sale on these homesites and used these models to conduct retail sales activity.

In 1976, North County mobilehome spaces declined from approximately 200 to 50 homesites. This reduction was attributable to two factors: (1) limited development of new homesites, and (2) restriction of remaining homesites through leaseholds by certain retail dealers.

From 1976 to April of 1978 (when the People filed this complaint) available homesites in the North County area continued to decline. By 1978, "an insignificant number" of homesites existed, and only seven or eight homesites were available **[***5]** for individual consumer lease or rental which were not subject to the requirement that the mobilehome be purchased from Mobile. During the period 1976-1978, Mobile had obtained leaseholds on between 50 to 100 of the 600 homesites then available.

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[1] ***HN1***[] The substantial evidence rule applies to appeal court review of preliminary injunctions. Also the familiar rule requires, when evaluating the trial court's exercise of discretion in granting a preliminary injunction, that the facts be viewed in the light most favorable to the order. (*San Diego Gas & Elec. Co. v. San Diego Congress of Racial Equality, 241 Cal.App.2d 405, 407 [50 Cal.Rptr. 638]*.)

[2] The North County area has in recent years experienced the immigration of many new residents. This influx has resulted in an increased demand for housing. The current need, coupled with inflationary pressures, has forced many new residents to seek alternatives to conventional housing. Thus an expanding market for mobilehomes has been an outgrowth of these forces. Mobilehome housing, as consumer goods, is comprised of two components: mobilehomes, a moveable commodity, and mobilehome park space, a right of use of real property. Within a particular geographical area, these two components are necessary compliments.

By 1978, Mobile had made such lease arrangements with 14 mobilehome parks in **[**752]** North County. Pursuant to this "arrangement" the trailer **[*7]** park owner referred prospective mobilehome tenants to Mobile to secure an available space. Mobile in turn advised such prospective tenants that such park space was available only upon the purchase of a new mobilehome from Mobile.

Prospective tenants, due to their individual preference to locate in one particular mobilehome park, as opposed to any other such park, were forced to forego selective shopping for mobilehomes and were compelled either to purchase such a home, not of their own choosing, and pay the price demanded, or live elsewhere.

As of mid to late 1978, Mobile had such arrangements with respect to the majority of available space in La Moree Mobilehome Estates, and La Moree actively participated in referring prospective tenants to Mobile. A majority of the retail dealers **[***6]** in mobilehomes in the North County area sell brand name mobilehomes that meet the specifications for entry into La Moree. By virtue of its extensive involvement in the foregoing "arrangements," Mobile has been able to price its new homes at levels exceeding those of its North County competitors. Retail dealers in North County without such business arrangements are in imminent danger of going out of business.

II

Defendants contend the preliminary injunction issued was "mandatory" in nature and was improperly issued because it encompassed matters that must await determination on trial. Secondly, defendants argue that the trial court abused its discretion in granting the injunction in that "no California case" holds the species of "tying" agreement [3] here imposed to be illegal.

[*7]** The resolution of these contentions requires, first, an examination of the factual and legal prerequisites to issuance of a preliminary injunction under *Code of Civil Procedure sections 526* and *527*. *Code of Civil Procedure section 527*, so far as here pertinent, provides: ***HN3***[] "An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor."

[*8] ***CA(2)***[] **(2)** In *Continental Baking Co. v. Katz, 68 Cal.2d 512, 528 [67 Cal.Rptr. 761, 439 P.2d 889]*, the Supreme Court summarized the basic principles governing issuance of a preliminary injunction: "***HN4***[] 'The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him.' [Citations.] ***HN5***[] The general purpose of such an injunction is the preservation of the status quo until a final determination of **[***8]** the merits of the action. [Citations.] ***CA(3)***[] **(3)** Thus, the court examines all of the material before it in order to consider 'whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; . . .' [Citations.] In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. [Citations.] As was said in *Family Record Plan, Inc.* v. *Mitchell* . . . . 'In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion [citation] and it must then be exercised in favor of that party [citation].'" (See also *Weingand v. Atlantic Sav. & Loan Assn., 1 Cal.3d 806, 820 [83 Cal.Rptr. 650, 464 P.2d 106]*.)

[753]** ***CA(4)***[] **(4)** Further ***HN6***[] the granting or denial of a preliminary injunction, even though the evidence with respect to an absolute right therefor may be conflicting, rests in the sound discretion of the trial court and may not be disturbed on **[***9]** appeal except for an abuse of discretion. (*People v. Black's Food Store, 16 Cal.2d 59, 61 [105 P.2d 361]*; *Allied Artist Pictures Corp. v. Friedman, 68 Cal.App.3d 127 [137 Cal.Rptr. 94]*.)

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[3] ***HN2***[] A "tying" arrangement is defined as: ". . . an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." (*Northern Pac. R. Co. v. United States, 356 U.S. 1, 5-6 [2 L.Ed.2d 545, 550, 78 S.Ct. 514]*.)

HN7[] Discretion is abused in the legal sense "whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence." (*Estate of Parker, 186 Cal. 668, 670 [200 P. 619]*; *State Farm etc. Ins. Co. v. Superior Court, 47 Cal.2d 428, 432 [304 P.2d 13]*.)

CA(5)[] **(5)** Finally, HN8[] appellate review of the issuance of a preliminary injunction requires a determination whether substantial evidence supports the discretion exercised by the trial court. (*Fresno Canal etc. Co. v. People's Ditch Co., 174 Cal. 441, 447 [163 P. 497]*; *Weingand v. Atlantic Sav. and Loan Assn., supra, 1 Cal.3d 806, 820*; *City & County of San Francisco v. Evankovich, 69 Cal.App.3d 41, 54 [137 Cal.Rptr. 883]*.)

[*9] III

We begin our task by examining defendants' contention that the decision in *Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769*, precluded the granting of the preliminary injunction **[***10]** here. *Mertz* involves an appeal from the granting of a *summary judgment*. HN9[] On such motion, the function of the trial court is not "issue determination" but rather "issue finding." (*Walsh v. Walsh, 18 Cal.2d 439, 441 [116 P.2d 62]*.) The appeal court reversed the judgment, holding Sherman was entitled to a trial upon the claim that the tying agreement (similar to that used here) was illegal. Concerning tying agreements, the *Mertz* court stated at pages 779-780: ""For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' [Citation.] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power of leverage in another **[***11]** market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' [Citation.]" (Fns. omitted.) [Citation.] Tying arrangements are illegal per se "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" [citations] and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie. . . ." [Citation.]' [Citation.]"

The question here presented is whether defendants should be restrained pendente lite -- a totally different factual and legal issue. Defendants' reliance upon *Sherman v. Mertz Enterprises, supra*, is misplaced.

IV

In the instant case, an examination of the three provisions of the temporary injunction in light of applicable rules of law evidences an appropriate and a sound exercise of discretion.

[*10] CA(6)[] **(6)** HN10[] The California ***antitrust law*** -- the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) is patterned after the federal Sherman **[***12]** Act. Both have their roots in the common law; federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. (*Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 440 [313* ***[**754]*** *P.2d 936]*; *Rolley, Inc. v. Merle Norman Cosmetics, 129 Cal.App.2d 844 [278 P.2d 63, 282 P.2d 991]*.) In 1961 California incorporated section 3 of the federal Clayton Act in *Business and Professions Code, section 16727*. The Clayton Act goes beyond common law and the Sherman Act to inhibit trade restraints at their inception; federal interpretations thereof are similarly applicable. (*Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]*; *Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 852, 853 [94 Cal.Rptr. 785, 484 P.2d 953]*.)

HN11[] The provisions of the Sherman Act, and therefore *sections 16720* and *16726* of the Cartwright Act, codify the common law prohibition against combinations in restraint of trade. (*Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769, 775*; 2 Areeda & Turner, ***Antitrust Law*** (1978) § 302, pp. 2-4.)

The objective of these acts is **[***13]** to proscribe unlawful, "unreasonable" restraints upon trade or commerce and thus, the statutes embrace "virtually any economic act in our infinitely interconnected national economy." (1 Areeda

& Turner, ***Antitrust Law*** (1978) § 232a, p. 229.) ***HN12***[] Both federal and state decisional law hold trade or commerce in real estate, or property rights in real estate, to be within the protections of the Sherman Act. (*Northern Pacific Railway Company v. United States, supra, 356 U.S. 1, 7-8 [2 L.Ed.2d 545, 550-551]*; *Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769, 776-778*; *Jomicra, Inc. v. California Mobile Home Dealers Assn., 12 Cal.App.3d 396, 401 [90 Cal.Rptr. 696]*.)

By contrast ***HN13***[] section 3 of the Clayton Act and its California counterpart -- *section 16727* of the Cartwright Act -- are restricted to transactions involving "commodities." (Cf. *15 U.S.C. (1973) § 14* with Cal. Bus. & Prof. Code (West 1964) *§ 16727*.) And realty or property rights in realty have been denied the status of commodity under the Clayton Act. (*Plum Tree, Inc. v. N. K. Winston Corporation (S.D.N.Y. 1972) 351 F.Supp. 80, 86-87*; *Gaylord Shops, Inc.* v. *Pittsburg Miracle Mile T.* **[***14]** *& C. Shop. C*. (W.D.Pa. 1963) *219 F.Supp. 400, 403*.)

CA(7)[] **(7)** Nevertheless, ***HN14***[] tying arrangements involving rights in real property are not removed from the prohibitions of the antitrust laws, for such tying **[*11]** arrangements are made unlawful by *section 1* of the Sherman Act and *Business and Professions Code sections 16720* and *16726* of the Cartwright Act.

In point is *Northern Pacific Railway Company v. United States, supra, 356 U.S. 1*, where the railroad had deeded and leased land by instruments containing "preferential routing clauses" which compelled the grantees or lessees of such land to ship products of that land by the Northern Pacific railroad unless rates or services of competing lines were more favorable. The United States Supreme Court defined ***HN15***[] a "tying arrangement" as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product or at least agrees that he will not purchase that product from any other supplier (*id. at p. 5 [2 L.Ed.2d at p. 550]*) and applied this definition to the sale or lease of land "tied" or conditioned upon use of the railroad's transportation facilities. This "tying arrangement" **[***15]** was held per se unlawful restraint of trade in violation of *sections 1* and *4* of the Sherman Act (*15 U.S.C. §§ 1*, *4*). The Supreme Court reasoned: "Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed ***HN16***[] 'tying agreements serve hardly any purpose beyond the suppression of competition.' [Citation.] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of **[**755]** trade.' [Citation.]" (*Northern Pacific Railway Company v. United States, supra, at p. 6 [2 L.Ed.2d at p. 550]*.)

Similarly, *Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769*, and *Jomicra, Inc. v. California Mobile Home Dealers Assn., supra, 12 Cal.App.3d 396*, factually involved tying arrangements between the rental of trailer space and a required purchase of the mobilehome **[***16]** from a particular dealer. The fact that land or rights in land was one of the "tied" products in no way prevented the scheme from being violative of the Cartwright Act. We find nothing in the statutes or judicial interpretations that supports defendants' contention that the species of agreement, business practice here involved is lawful or prohibits a preliminary injunction on the factual showing made to the trial court.

CA(8)[] **(8)** ***HN17***[] While the reasonableness of the tying arrangement involved in this case is a question of fact yet to be determined on trial, nevertheless, **[*12]** the conditioning of mobilehome park space on the purchase of a mobilehome from a particular retail dealer "raises a serious issue of illegal conduct to restrain trade and competition." (*Jomicra, Inc. v. California Mobile Home Dealers Assn., supra, 12 Cal.App.3d 396, 401*.) The undisputed facts here support the trial court's exercise of discretion in granting the temporary injunction.

Nor does the fact that the legality or illegality of the particular business arrangement must await trial determination -- prevent the issuance of a preliminary injunction where circumstances dictate. Here the uncontradicted facts **[***17]** show agreements, business practices that fit the judicial definition of an illegal tying agreement. The evidence before the court was ample to show economic hardship on consumers and competitors results from this device. The evidence, viewed in the light most favorable to the order, warrants an inference that an illegal restraint of commerce was ongoing. [4] Moreover, the injunction does not prevent defendants from selling their mobilehomes or leasing or selling their property interests in the homesites and therefore poses only an insignificant inconvenience to their business. We conclude the injunctive provision prohibiting the conditioning of homesite availability on mobilehome lease or purchase was a reasonable exercise of the trial court's discretion.

[*18]** V

CA(9)[] **(9)** The second provision of the preliminary injunction prohibits defendants from misrepresenting the availability of mobilehome homesites. This provision merely requires that defendants conform their conduct to the standards of honest and fair dealing under the Unfair Practices Act. (*Bus. & Prof. Code, § 17200*.) The trial court validly exercised its statutorily granted injunctive powers in this regard. (*Bus. & Prof. Code, § 17203*.)

VI

CA(10a)[] **(10a)** Finally, defendants assert that the injunction provision (c) requiring the retail dealers to remove the mobilehome models where **[*13]** displayed in violation of *Vehicle Code section 11709, subdivision (c)*, is mandatory in character and therefore improperly granted.

This contention confuses the distinction between mandatory and prohibitive relief. ***CA(11)***[] **(11)** ***HN18***[] The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. Instead, the appellate court must examine the terms and effect of the injunction in order to discover its character. (*Feinberg v. One Doe Co., 14 Cal.2d 24, 28 [92 P.2d 640]*.)

[756]** ***CA(12)***[] **(12)** ***HN19***[] The purpose of mandatory relief is to compel the performance of a substantive **[***19]** act or a change in the relative positions of the parties. (*Mark v. Superior Court, 129 Cal.1, 6-7* [*61 P. 436]*; *Ambrose v. Alioto, 62 Cal.App.2d 680, 685 [145 P.2d 32]*.) By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. (See 38 Cal.Jur.3d, Injunctions, § 8 (1977) pp. 470-472.) The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act. (*United Railroads v. Superior Court, 172 Cal. 80, 88-89 [155 P. 463]*.)

CA(10b)[] **(10b)** ***HN20***[] Under the provisions of *section 11709, subdivision (c) of the Vehicle Code*, it is unlawful to display mobilehome model homes within a mobilehome park after that park has reached 70 percent occupancy. (*Veh. Code, § 11709, subd. (c)*.) Provision (c) of the trial court's preliminary injunction commands defendants to remove those model mobilehomes displayed at mobilehome parks in contravention to the Vehicle Code. While the act of removal is an affirmative act, it is incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision. **[***20]** Thus, the third provision of the preliminary injunction is prohibitive in character and properly issued to halt continuing violation of the Vehicle Code.

We conclude: No abuse of discretion in issuing the preliminary injunction is shown. The order granting the preliminary injunction is affirmed.

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[4] While no findings of fact were made by the trial court until after it had lost jurisdiction, findings were not required before entry of the preliminary injunction. (*Code Civ. Proc., § 632*; *Taliaferro v. Hoogs, 236 Cal.App.2d 521, 530 [46 Cal.Rptr. 147]*.) Our search is not for findings but rather for substantial evidence to support the exercise of discretion here made. (*City & County of San Francisco v. Evankovich, supra, 69 Cal.App.3d 41, 54*.)

Card v. National Life Ins. Co.

United States Court of Appeals for the Tenth Circuit

July 19, 1979, Argued ; August 21, 1979, Decided

No. 78-1180

Reporter

603 F.2d 828 *; 1979 U.S. App. LEXIS 12354 **; 1979-2 Trade Cas. (CCH) P62,804; 52 A.L.R. Fed. 245

ROBERT W. CARD and R.W. CARD & ASSOCIATES, INC., a Colorado corporation, Plaintiffs-Appellants, v. NATIONAL LIFE INSURANCE COMPANY, a Vermont corporation, Defendant-Appellee, EQUITY SERVICES, INC., a Vermont corporation, LAWRENCE LELAND and WILLIAM RYAN, Defendants.

Prior History: **[**1]** Appeal from the United States District Court for the District of Colorado (D.C. No. 74-A-446)

Core Terms

boycott, insurance company, general agent, Sherman Act, intimidation, termination, concerted, agent's contract, conspirators, regulated, district court, policyholders, antitrust, coercion, insurance business, insurers, trial court, state law, exemption, coerce, target

LexisNexis® Headnotes

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

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

Conduct by individual actors falling short of concerted activity is simply not a "boycott" within § 3(b) of the McCarran-Ferguson Act, *15 U.S.C.S. §§ 1012-1013*.

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN2[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The 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, patronage or services from the target.

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

HN3[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Boycotters and the ultimate target need not be in a competitive relationship with each other. Concerted refusals to deal where the target is a customer of some or all of the conspirators who is being denied access to a desired good or service because of a refusal to accede to particular terms set by some or all of the sellers is unlawful.

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN4[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

For a defendant's activity to fall within the scope of the boycott exception to the McCarran-Ferguson Act, *15 U.S.C.S. §§1012-1013*, there must first be concerted activity by individual actors. There must also be present a boycott, the essence of which is the pressuring of a party with whom one has a dispute by withholding or enlisting others to withhold patronage or services from the target. The target can be a customer.

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

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

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

The presence of legally viable conspirators is essential to fulfill the requirement of *15 U.S.C.S. § 1013*.

Counsel: Mary Lou Godbe, Salt Lake City, Utah (Alan E. Walcher, Ford G. Scalley, of Morgan, Scalley, Lunt & Kimble, Salt Lake City, Utah, Francis P. King and Robert A. Wherry, Jr., of Lentz, Evans & King, Denver, Colo., on the brief), for plaintiffs-appellants.

James E. Hautzinger, of Dawson, Nagel, Sherman & Howard, Denver, Colo. (Cassandra G. Sasso, of Dawson, Nagel, Sherman & Howard, Denver, Colo., on the brief), for defendant-appellee.

Judges: Before McWILLIAMS, DOYLE and McKAY, Circuit Judges.

Opinion by: DOYLE

Opinion

[*829] The issue presented in this antitrust action by an insurance agent and his firm against the defendant-appellee life insurance company and others is whether the trial court erred in its construction and application of the

McCarran-Ferguson [1.] exception, the result of which was a holding that it was inapplicable to the facts of the case. The allegation in the complaint is that the insurance company, which acted in concert with Equity Services, Inc. and the National Life General Agents Association, refused to deal with the plaintiffs.

[2]** Robert W. Card had been associated with National Life Insurance Company since 1966, and had been authorized to solicit applications for life insurance and annuity contracts issued by National Life and had been authorized, in addition, to sell shares of mutual funds, etc., through an associated company, a broker-dealer called Equity Services, Inc.

PROCEEDINGS AND FACTS

The dispute came to a head when Card and his corporation, R. W. Card & Associates, sought to become a general agent for an insurance company other than National Life, which action was contrary to the contract between Card and National Life. The other insurance company was Provident Life & Accident Insurance Company. It was the signing of this general agent's contract with Provident Life that brought about the termination by National Life of Card's general agency with it. This occurred in February 1974.

The coconspirators in this alleged Sherman Act boycott are: National Life Insurance Company; an unnamed party, the General Agents Association of National Life, which consists of all of the general agents of that company; Lawrence Leland, an executive vice-president of National Life Insurance Company; and William **[**3]** Ryan, a general agent for National Life Insurance Company, who resides in San Francisco, California. It is said that other persons, firms and corporations participated in the unlawful combinations, conspiracies and agreements to boycott, coerce and intimidate.

The allegations in respect to § 1 of the Sherman Act are somewhat extensive, but they boil down to the conspiracy to terminate and the termination of Card's contract with National Life as a general agent.

[*830] The thread which runs through National Life's answer is that the company is exempt from the Sherman Act because it is an insurance company which is regulated by the laws of the several states, and is therefore covered by the exemption provisions of the McCarran-Ferguson Act and not subject to the exception set forth in that Act.

There seems to be little question but that Card, under his contract with National Life as a general agent, was precluded from entering into a general agency agreement with any other company. Card recognizes this, but makes the claim that his agreement with Provident was a personal producing general agent's contract which was limited in its terms and did not run contrary to his general **[**4]** agent contract with National Life.

The main contention of plaintiffs-appellants is that the McCarran Act, *15 U.S.C. §§ 1012-1013*, does not exempt National Life's activity from the Sherman Act because the action taken by National Life in terminating the contract and refusing to deal with Card was in fact and in law an act which constituted boycott, coercion and intimidation.

The trial court gave careful consideration to this contention and concluded that in essence the action, if any, was in the nature of breach of contract, a suit which is subject to state court jurisdiction, but which falls short of being an act of boycott, coercion or intimidation. The district court decided this by applying the law on the subject, and particularly the exemption statutes referenced, [2.] to the undisputed facts.

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1. *15 U.S.C. §§ 1012-1013*.

2. The McCarran Act, *15 U.S.C. §§ 1012* and *1013*, provides as follows:

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

[5]** The thrust of the governing statute, as shown, is to remove the business of insurance from federal antitrust regulation. It provides that the Sherman Act, the Clayton Act and the Federal Trade Commission Act are not applicable to the business of insurance to the extent that such business is regulated by state law. *Section 1013* carves out a single exception to nonapplicability of the antitrust laws, which is the agreement to boycott, coerce, intimidate, or acts of boycott, coercion or intimidation.

Additional facts regarded as important by the plaintiffs must be mentioned. Plaintiffs say that they are engaged in the business of providing insurance consulting services specializing in the use of insurance in corporate and estate planning. Card had been affiliated with the National Life Insurance Company of Vermont since 1964, and had held an Agent's Appointment Agreement with the said company since 1966. The most recent contract had been executed in 1971. Card states that he was regarded as an independent contractor and not an employee. Card, as an individual, **[*831]** assigned his rights to commissions to Robert W. Card and Associates, Inc. As a consultant he had acquired **[**6]** considerable recognition not only from National Life but also from other insurance companies, had received awards, was a member of the President's Club, etc.

National Life Insurance Company is said to be one of the largest life insurance companies in the United States. It has a general agency system for marketing its insurance. The insurer appoints general agents who are responsible for actually merchandising products in the territory and also for training agents. The compensation is commissions.

The general agents of National Life have a corporation known as the General Agents Association, an entity said to be owned, controlled and financed by general agents with National Life. The general agents meet with the officers of National Life and the officers of National Life consult with the general agents about all major policy decisions. The agents are permitted to hold agent appointment agreements with competing insurance companies on a brokerage basis. The general agents are not allowed by National Life to hold any type of General agent's contract with a competing insurance company.

In January 1974, Card met with National Life's Vice-President, Lawrence W. Leland, and reached **[**7]** an informal agreement, whereby he would be allowed to place business with other companies so long as he gave fifty-one percent of the business to National Life.

In February 1974, Card met with Vice-President Johnston of Provident Life & Accident Insurance Company and negotiated a personal producing general agent's contract. He was told at that time that National Life would terminate him if he signed a general agent's contract with Provident. Such a contract was executed with Provident to be effective March 1, 1974.

Following some disagreements which Card had with one William Ryan, a San Francisco general agent who communicated to the home office that Card was contracting with companies other than National, and after having

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(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

been told by one of Ryan's agents that "Ryan was out to get Card's contract with National Life terminated," Card contacted Leland at National Life, who said that his contract was not in jeopardy.

Following a meeting in Puerto Rico in April 1974, Leland was told by Ryan that Card had a general agent's contract with Provident. Leland verified this, and it was then that he terminated the Card contract.

Plaintiffs-Appellants make the following contentions:

First, **[**8]** that summary judgment should be sparingly used in antitrust litigation, and in essence had it been sparingly used, it would not have been granted here.

Second, that the trial court erred in concluding that plaintiffs had failed to allege or establish a Sherman Act boycott. Although some circuits have given the exception a very narrow interpretation which holds that the boycott exception should be limited to situations where agents or insurance companies have been blacklisted by combinations of insurance companies or agents, other circuits have taken a less restricted view. They have held that an antitrust action can be brought in cases amounting to boycott in accordance with the Sherman Act generally. Appellants say that under this latter approach they can recover. We must disagree.

In their brief appellants cite some factual material which they regard as particularly cogent in establishing the existence of a conspiracy having the object of boycotting Card and his associates, as follows: the policy of National Life prohibiting its agents from holding general agent's contracts with competing companies; participation of the general agents in the formulation of that policy; complaints **[**9]** by general agent William Ryan concerning Card's interest in representing insurers other than National Life; discussions among officers and general agents of National Life with Ryan at a General Agents' Association meeting immediately prior to the termination **[*832]** of Card's contract; the revelation by Provident Life to National Life that Card had signed a general agent's contract; the refusal of National Life to deliver agreed upon contracts to Card at the behest of the general agents; motivation for National Life agents to prevent Card from holding personal producing general agents' contracts with competing insurers.

THE BOYCOTT QUESTION

It is our conclusion that neither the facts cited nor the law relied upon gave rise to an agreement to boycott, coerce or intimidate or of an act of boycott, coercion or intimidation.

The trial court, Judge Arraj, gave careful consideration to the issue before us and ruled against the plaintiff. The court granted the summary judgment on behalf of the defendants. The court said that undoubtedly the plaintiffs had shown the first two elements of §§ 1012-1013 in that they had established (1) that the activity constituted "the business of insurance," **[**10]** and (2) that it is regulated by state law, but had failed, the court continued, to establish that it was an act of boycott, coercion or intimidation. The court believed that the business of insurance, as used in the Act, was concerned with the relationship between the company and its policyholders and that the laws regulating this relationship, directly or indirectly, were the laws regulating the business of insurance. This was set forth in *Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)*. National Life's regulation of its general agents, the court said, was part of the "business of insurance." Also, the court said that National Life meets the second requirement for a McCarran Act exemption the regulation by state law.

Accordingly, the issue boiled down to whether or not the agreement constituted a boycott or was to coerce or intimidate.

In granting the summary judgment the district court held that the evidence failed to establish that this was true and that it was not necessary to determine the case under the narrow view. See *Meicler v. Aetna Casualty and Surety Co., 506 F.2d 732 (5th Cir. 1975)*; *Addrisi v.* ***[**11]*** *Equitable Life Assurance Society, 503 F.2d 725 (9th Cir. 1974)*, Cert. denied, *420 U.S. 929, 95 S. Ct. 1129, 43 L. Ed. 2d 400 (1975)*; *Black v. Nationwide Mutual Insurance Co., 429 F. Supp. 458 (W.D.Pa.1977)*, *Aff'd, 571 F.2d 571 (3d Cir. 1978)*; Blackley v. Farmers Insurance Group, Inc., 1976-2 Trade Cas. P 61,061 (D.Utah 1976); *Transnational Insurance Co. v. Rosenlund, 261 F. Supp. 12 (D.Or.1966)*.

The more liberal construction of the boycott exception is shown in *Barry v. St. Paul Fire & Marine Insurance Co., 555 F.2d 3 (1st Cir. 1977)*, *Aff'd, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)*; *Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co., 326 F.2d 841 (2d Cir. 1963)*, Cert. denied, *376 U.S. 952, 84 S. Ct. 968, 11 L. Ed. 2d 971 (1964)*; *Ballard v. Blue Shield of Southern West Virginia, Inc., 561 F.2d 262 (4th Cir. 1976)*; *Proctor v. State Farm Mutual Automobile Insurance Co., 182 U.S.App.D.C. 264, 561 F.2d 262 (1977)*.

The only decisions in the Tenth Circuit are from district courts. One of these was by Judge Matsch in Western Health Care Corp. v. Colorado Hospital Service, No. 76-M-760 (D.Colo. Feb. 16, 1977). The narrow approach to the exception was adopted **[**12]** in that case.

The so-called narrow construction cases insist that Congress was engaged in preventing the blacklisting by the combinations of insurance companies, so this would have to be shown under that view.

The broader approach includes a concerted refusal to deal. See *Barry v. St. Paul Fire & Marine Insurance Co., supra*, and *Monarch Life Insurance Co. v. Loyal Protective Insurance Co., supra.*

The trial court said that the result was the same regardless of whether the narrow or the broad view was taken, because even adopting the broad view, the acts did not constitute a boycott under the Sherman Act. Even under the broader view, it is necessary that there be a combined, concerted **[*833]** refusal to deal which so threatens free competition as to constitute a per se violation of the Sherman Act. The primary issue for this court is whether the defendants violated the exception under the broad construction or the narrow one. In our view there was no violation under either construction.

The United States District Court for the District of Utah, Judge Anderson, rendered a decision which dealt with the issues before us, Blackley v. Farmers Insurance Group, Inc., 1976-2 Trade **[**13]** Cas. P 61,061 (D.Utah 1976). As in our case, plaintiff was a terminated insurance agent who alleged that his termination by the insurance company pursuant to an exclusive general agent provision in his contract constituted a boycott. The court disagreed, saying that the essential activity protected was that of dealing with clients and the restriction of their right to choose companies freely. The court said that a restriction dealing with the plaintiff was not enough.

To the same effect is *Black v. Nationwide Mutual Insurance Co., 429 F. Supp. 458 (W.D.Pa.1977)*. The court there said that the practices in issue were governed by the state law and under state law the termination was not a boycott.

The Supreme Court in its 1978 term rendered its decision in *St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)*. The Supreme Court's decision in St. Paul is helpful in considering the nature of a boycott in the present context. This was a class action by a number of licensed physicians and their patients against four insurance companies engaged in writing malpractice insurance in the State of Rhode Island. The allegation was that a conspiracy **[**14]** existed between three of the four companies in that they refused to deal on any terms with the policyholders of the fourth. This was a means of compelling them to submit to new ground rules set by the fourth, whereby coverage on an "occurrence" basis would not be renewed and coverage would only issue on a "claims made" basis. [3.] The insurance companies moved to dismiss the antitrust claim contending that it was barred by the McCarran-Ferguson Act. This motion was granted by the district court. The court of appeals reversed, holding that the complaint stated a claim within the boycott exception in § 3(b) of that Act, the provision with which we are dealing.

The Supreme Court adopted the less restrictive **[**15]** view of the exception to the McCarran-Ferguson Act and affirmed the decision of the court of appeals. It resolved the issue whether the boycott exception applied to policyholders and insurers by concluding that it did. It did not, however, hold that the § 3(b) exception necessarily applied to "all concerted activity violative of the Sherman Act * * *."

[3.] Footnote 3 explains the difference between an "occurrence" policy and a "claims made" policy. The latter is much narrower in its coverage. It applies only to claims made during the life of the policy, whereas the "occurrence" basis protects the policyholder from any act done while the policy is in effect.

The important ruling of the case was that the exception contained in § 3(b) of the McCarran-Ferguson Act applied not alone to concerted activity against competitive insurers and agents, but also to policyholders and insurers.

The opinion of the Court made a statement as part of its conclusion which is significant here. It said:

> Moreover, ***HN1***[] conduct by individual actors falling short of concerted activity is simply not a "boycott" within § 3(b). Cf. Times Picayune v. United States, 345 U.S. (594) at 625 (*73 S. Ct. 872, 889, 97 L. Ed. 1277*).

438 U.S. at 555, 98 S. Ct. at 2937.

The Supreme Court expressed its own definition of boycott. It said:

> ***HN2***[] The 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, patronage or services **[**16]** from the target. The word gained currency in this country largely as a term of opprobrium to describe certain tactics employed by parties to labor disputes. **[*834]** * * * Thus it is not surprising that the term first entered the lexicon of ***antitrust law*** in decisions involving attempts by labor unions to encourage third parties to cease or suspend doing business with employers unwilling to permit unionization.

438 U.S. at 541, 98 S. Ct. at 2930.

The Court said that ***HN3***[] the boycotters and the ultimate target need not be in a competitive relationship with each other. The Court went on to say:

> This Court also has held unlawful concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a desired good or service because of a refusal to accede to particular terms set by some or all of the sellers.

Id.

The Court concluded that the conduct shown in St. Paul was within the common understanding of a boycott. The four insurance companies which controlled the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders **[**17]** of the fourth. As a means of ensuring policyholder submission to new restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance of its policyholders.

The St. Paul case differs substantially from our case. Nevertheless, it is helpful because it teaches ***HN4***[] that there must first be concerted activity by individual actors. There must also be present a boycott, the essence of which is the pressuring of a party with whom one has a dispute by withholding or enlisting others to withhold patronage or services from the target. The target can be a customer.

The decision in St. Paul thus furnishes guidance for considering whether a boycott exists in the present case. We hold that regardless of how it is considered there was not present the element of coercion.

PRESENCE OF SEVERAL CONSPIRATORS

We have not overlooked the related issue on which Judge Arraj based his decision in the district court, namely, that all of the "conspirators" were part of National Life Insurance, whereby National was in effect conspiring with itself. On this we agree with Judge Arraj that the General Agents Association, **[**18]** consisting as it did of general agents of National Life Insurance Company, was really a part of the National Life Insurance Company structure and they could not be regarded as conspirators. The same is true of the defendant Ryan and the defendant Leland. Ryan is a general agent for National Life Insurance Company and Leland is executive vice-president, so they cannot be effective conspirators either. So, although we believe that it is of importance to go to the merits of the case, in so doing the problem of whether there is a boycott is the ultimate issue to be resolved. We nevertheless recognize that ***HN5***[] the presence of legally viable conspirators is also essential and is not unrelated to the boycott issue.

In sum, this case is lacking in all of the essentials necessary to fulfill the *§ 1013* requirement. Not only is there a deficiency in the area of conspirators, but also the evidence fails to establish an agreement to boycott, coerce or intimidate or an act of boycott, coercion or intimidation.

The judgment of the district court is affirmed.

Concur by: McKAY

Concur

McKAY, Circuit Judge, concurring:

I concur with the majority opinion insofar as it affirms Judge Arraj's conclusion **[**19]** that the parties alleged to have acted in concert could not, as a matter of law on the undisputed facts of this case, have committed among themselves a boycott of plaintiff in violation of the Sherman Act. I express no view on the other issues treated in the opinion.

LexisNexis

Jennings Oil Co. v. Mobil Oil Corp.

United States District Court for the Southern District of New York

August 23, 1979

No. 77 Civ. 1398 (HFW)

Reporter

1979 U.S. Dist. LEXIS 10226 *; 1979-2 Trade Cas. (CCH) P62,826

JENNINGS OIL COMPANY, INC., MIDSTATE OILS, INC., and ALADDIN OIL COMPANY, INC., on behalf of themselves and all others similarly situated, Plaintiffs, against MOBIL OIL CORPORATION, Defendant.

Core Terms

gasoline, distributors, products, overcharges, three year, amended complaint, service station, interchangeability, statute of limitations, oil

LexisNexis® Headnotes

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

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

HN1[] **Monopolies & Monopolization, Actual Monopolization**

To prevail on a monopolization claim, a plaintiff must establish the possession of monopoly power and the wilful acquisition or maintenance of that power. Defining the relevant product and geographic markets is the first step in determining whether monopoly power exists. The issue of whether monopoly power exists is a quintessential question of fact.

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

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

HN2[] **Regulated Practices, Market Definition**

To prevail on an attempted monopolization claim, a plaintiff must prove specific intent to monopolize and the dangerous probability of success.

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

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

HN3[] Regulated Practices, Monopolies & Monopolization

Products are in the same market if they are "reasonably interchangeable." When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal.

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

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

HN4[] Regulated Practices, Monopolies & Monopolization

The "reasonable interchangeability" test is but the first step in defining the scope of the relevant product market. The reasonable interchangeability of the uses, or the cross-elasticity of demand, of a product and its possible substitutes merely determines the "outer boundaries" of a product market. Within this broad market, well-defined submarkets may which, in themselves, constitute product markets for antitrust purposes.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN5[] Pretrial Judgments, Judgment on Pleadings

In deciding a motion for judgment on the pleadings, a court must take as being true the material facts alleged in plaintiffs' complaint. For purposes of a *Fed. R. Civ. P. 12(c)* motion, 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. Where the proof is largely in the hands of alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN6[] Statute of Limitations, Time Limitations

N.Y. C.P.L.R. § 214(2) provides that an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in *§§ 213* and *215*, must be commenced within three years of the accrual of the cause of action.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN7[] Statute of Limitations, Time Limitations

N.Y. C.P.L.R. § 213(1) provides for a six year statute of limitations for actions for which no limitation is specifically prescribed by law, and is intended to govern equitable actions.

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

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

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

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Price Terms

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Section 210 of the Economic Stabilization Act of 1970 (ESA) provides that any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court for appropriate relief, including damages. 12 U.S.C.S. § 1904. The ESA provides for refund of overcharges and, in certain instances, for treble damages. An "overcharge" is defined as the amount by which the consideration for the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN9[] **Statute of Limitations, Time Limitations**

The issue of when the statute of limitations begins to run may turn not on the time when the defendant sets in motion the chain of events that led to ultimate injury, but rather when the plaintiff first had a claim for relief. The test is when the particular plaintiff became entitled to vindicate his individual rights. Nor is the failure to utilize the modern procedure of declaratory judgment enough to start the statute running. The declaratory judgment remedy is an optional device.

Counsel: [*1] BERGER & MONTAGUE, P.C., 1622 Locust Street, Philadelphia, Pa. 19103

By: David Berger, Warren D. Mmulloy, Alan C. Kessler, Howard Langer, Of Counsel and RICHARD LEVY, Suite 502, 320 King Street, Alexandria, Va. 22314 and OLNICK, SELTZER & BOXER, 909 Third Avenue, New York, New York 10022 For Plaintiffs

DONOVAN LEISURE NEWTON & IRVINE, 30 Rockefeller Plaza, New York, New York 10020

By: Sanford M. Litvack, John H. Wilkinson For Defendant

Opinion by: WERKER

Opinion

MEMORANDUM DECISION

HENRY F. WERKER, D.J.

Defendant Mobil Oil Corporation ("Mobil") moves pursuant to *Fed. R. Civ. P. 12(c)* for judgment on the pleadings with respect to count II of the amended complaint and pursuant to *Fed. R. Civ. P. 12(b)(6)* for dismiss of count III of the amended complaint for failure to state a claim upon which relief can be granted.

The facts of this case are set forth in the Court's opinion conditionally certifying the action as a class action, see *Jennings Oil Co. v. Mobil Oil Corp., 80 F.R.D. 124 (S.D.N.Y. 1978)*, and thus will not be repeated here.

COUNT II

Count II of the amended complaint charges Mobil with violating section two of the Sherman Act, *15 U.S.C. § 2*, by monopolizing [1] **[*2]** and attempting to monopolize [2] the sale and distribution of Mobil products to Mobil branded retail service stations. Mobil contends that the relevant product market cannot as a matter of law be defined to consist solely of Mobil products and that count II should therefore be dismissed.

[*3] The Supreme Court in *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)*, set forth the fundamental rule that ***HN3***[] products are in the same market if they are "reasonably interchangeable." [3] The Court there held that "[when] a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *Id. at 394*.

HN4[] The "reasonable interchangeability" test is but the first step in defining the scope of the relevant product market. The reasonable interchangeability of the uses (or the cross-elasticity of demand [4]) of a product and its possible substitutes merely determines the "outer boundaries" of a product market. *Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962)*. "[Within] this broad market, well-defined submarkets may which, in themselves, constitute product markets for **[*4]** antitrust purposes." *Id. at 325*.

Notwithstanding Mobil's contentions otherwise, the possibility exists in the instant suit that plaintiffs will prove at trial that Mobil products in themselves constitute such a submarket for antitrust purposes. [5] Mobil's assertion that a product market cannot as a matter of law be defined to consist solely of its own products must be rejected. [6]

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[1] ***HN1***[] To prevail on a monopolization claim, a plaintiff must establish the possession of monopoly power and the wilful acquisition or maintenance of that power. *United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)*. See generally Berkey Photo, Inc. v. Eastman Kodak Co., Nos. 78-7445, 78-7448, slip op. at 3146-54 (2d Cir. June 25, 1979). Defining the relevant product and geographic markets is the first step in determining whether monopoly power exists. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-95 (1956)*; *United States v. Grinnell, 384 U.S. at 570-76*. The issue of whether monopoly power exists is "a quintessential question of fact." *Brager & Co. v. Leumi Securities Corp., 429 F. Supp. 1341, 1347 (S.D.N.Y. 1977)*. Accord, *International Boxing Club v. United States, 358 U.S. 242, 244-45 (1959)* (applying "clearly erroneous" standard in reviewing district court's findings as to market definition).

[2] ***HN2***[] To prevail on an attempted monopolization claim, a plaintiff must prove specific intent to monopolize and the dangerous probability of success. *American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946)*; *United States v. Aluminum Co. of America, 148 F. 2d 416, 431-32 (2d Cir. 1945)*. See generally ABA, ***Antitrust Law*** Developments 60-63 (1975). Although there is some authority to the effect that market definition is not necessary to an analysis of an attempted monopolization claim, the majority view is otherwise. See generally *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 & n.69 (5th Cir. 1978)*, cert. denied, ***99 S. Ct. 1289 (1979)***, and cases and authorities therein cited.

[3] "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." *351 U.S. at 395*. See also *id. at 404*.

[4] See *United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 394, 400-04*.

[5] ***HN5***[] In deciding a motion for judgment on the pleadings, the Court must take as being true the material facts alleged in plaintiffs' complaint. *Hospital Bldg. Co. v. Trustee of Rex Hosp., 425 U.S. 738, 740 (1976)*. For purposes of a *Rule 12(c)* motion, a "complaint should not be dismissed 'unless it appears beyond doub that the plaintiff can prove no set of facts in support of his

[*5] The structure of the gasoline industry is such that some oil producers compete with their own customers. In the instant case, Mobil-branded retail service stations purchase gasoline directly from Mobil itself as well as through Mobil-branded independent distributors. Hence, despite its "natural monopoly" over its own products, Mobil competers with its independent distributors in terms of selling gasoline and other Mobil products to Mobil service stations for sale to the public. On the other hand, Mobil and Mobil-branded distributors do not compete with other oil companies and other branded distributors for the wholesale distribution of gasoline to Mobil-branded service stations. Since "a market for antitrust purposes is the area of effective competition," M. Handler, 2 Twenty-Five Years of Antitrust 1050 (1973) (emphasis added), the product market may be defined in this case to consist solely of Mobil products.

With respect to the reasonable interchangeability test, it is clear that Mobil gasoline may be interchangeable with other brands of gasoline from the point of view of consumers. However, Mobil gasoline may not have been interchangeable with other brands from the point **[*6]** of view of the distributors. Because of restrictive covenants in the contracts between Mobil and its distributors, the distributors could not sell other types of gasoline to Mobil-branded or non-branded service stations. Plaintiffs' Mem. in Opp. to Defendant's Motion to Dismiss, at 27-28 & n., quoting wholesale distributor agreement. In addition, the oil egulations required the oil companies to allocate their products among their established wholesale customers, thus rendering it difficult for distributors to shift to different supliers. Id. at 29-30 & nn, citing 10 C.F.R. § 211.9(a).

Plaintiffs thus allege a situation where a product market (Mobil gasoline and accessories) is controlled by one of their competitors (Mobil) without substitutes being reasonably available in the wholesale market. Assuming these facts to be true, which I must do at this juncture, the conclusions that Mobil possessed monopoly power or that the dangerous probability existed that Mobil could have successfully monopolized the market can be drawn. See *United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 394*.If plaintiffs can also prove that Mobil wilfully acquired or maintained that power **[*7]** or that Mobil had the specific intent to monopolize the market, they may prevail on count two of the amended complaint. Accordingly, the motion for judgment on the pleadings with respect to count two must be denied.

COUNT III

Count III of the amended complaint charges Mobil with violating the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 n. (the "ESA"), as amended and incorporated in the Emergency Petroleum Allcoation Act, *15 U.S.C. § 751 et seq.* (the "EPAA"), by violating various regulations promulgated thereunder, more specifically, Special Rule No. 1, Cost of Living Council, *38 Fed. Reg. 6284*, and 10 C.F.R. §§ 210-12. Plaintiffs' charges arise from Mobil's

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claim which would entitle him to relief.'" *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977)*, quoting *Conley v. Gibson, 355 U.S. 41, 45-46 (1957)*. In antitrust cases in particular, "where 'the proof is largely in the hands of the alleged conspirators,'… dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. at 746*, quoting *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)*.

[6] See, e.g., *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d at 282* ("Several cases indicate that it is possible under certain prescribed circumstances to limit the relevant market to a single firm's products."); *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 979-81 (5th Cir. 1977)*, cert. denied, ***434 U.S. 1087 (1978)*** (affirming jury's finding that product market consisted of the sale of air-conditioners for Volkswagen, Porsche and Audi automobiles); *Coleman Motor Co. v. Beckman Instruments, Inc., 525 F.2d 1338, 1349 (3d Cir. 1975)*, vacating *376 F. Supp. 546, 562 (W.D. Pa. 1974)* (third circuit did not foreclose possibility on remand of jury finding that product market could consist of wholesale market for Dodge automobiles); *United States v. CBS Inc., 459 F. Supp. 832, 836-39 (C.D. Cal. 1978)* (held, each television network's prime time television programs could constitute relevant submarket for antitrust purposes); *Castoe v. Amerada Hess Corp., 1976-2 Trade Cases (CCH) P61,054 (S.D.N.Y. 1976)* (motion to dismiss attempted monopolization claim on ground that a defendant could not as a matter of law attempt to monopolize its own product denied); *Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824, 840-41 (N.D. Ga. 1976)* (in section one case, held that under certain circumstances, "a single brand of automobiles could be construed as the relevant market"). See also *Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974)*; Comment, The Propriety of the Single Firm's Product as the Relevant Market in Attempt to Monopolize Cases, 29 Baylor L. Rev. 77 (1977). The Court is not, of course, defining at this time the product market to consist solely of Mobile products, since this is a matter to be resolved at trial.

March 1973 reduction in the discount in the price of gasoline sold by Mobil to distributors while the price of gasoline sold directly to service stations was kept constant. Mobil contends that because the price increase occurred in March 1973 and suit was not filed until March 1977, count III is barred by the applicable statute of limitations.

Since neither the ESA nor the EPAA contains a time limitations provision, the Court must turn to the most analogous statute of limitations of the forum state. *Ashland **[*8]** Oil Co. v. Union Oil Co., 567 F.2d 984, 989-90 (T.E.C.A. 1977)*, cert. denied, *435 U.S. 994 (1978)*. The most analogous New York statute of limitations in this case is ***HN6***[] *N.Y.C.P.L.R. § 214(2)* (McKinney Supp. 1978-1979), which provides that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in *sections 213* and *215*…" must be commenced within three years of the accrual of the cause of action. See *Hornblower & Weeks-Hemphill, Noyes v. Burchfield, 366 F. Supp. 1364 (S.D.N.Y. 1973)*.

Plaintiffs contend that the exception in *section 214(2)* is applicable to this suit and that *N.Y.C.P.L.R. § 213(1)* (McKinney 1972) should be applied instead of *section 214(2)*. I disagree. ***HN7***[] *Section 213(1)* provides for a six year statute of limitations for actions "for which no limitation is specifically prescribed by law…" and is intended to govern equitable actions. See J. McLaughlin, Practice Commentaries C213:1, *N.Y.C.P.L.R. § 213* (McKinney 1972). Hence, with respect to any claims for money damages, *section 213(1)* would certainly not be applicable. Furthermore, the reference in *section 214(2)* to *section 213* is intended to make reference **[*9]** to *subdivision (7) of section 213* which covers stockholders' derivative actions. J. Weinstein, H. Korn & A. Miller, 1 New York Civil Practice P214.03 (1978). Count III, of course, does not involve stockholders' derivative claims, but falls squarely within *section 214(2)*. The period of limitations to be applied is thus three years.

Mobil maintains that the three year period is to be measured from the date of the allegedly illegal price increase, i.e., March 1973, when the regulations were purportedly breached. Mobil relies in part on express language in Special Rule No. 1 of the Cost of Living Council to the effect that "a firm… may not increase the price for a covered product above its base price…." Special Rule No. 1, P4, *38 Fed. Reg. 6284* (emphasis added).

Mobil's reading of Special Rule No. 1 is overly narrow. By its very terms, the rule "establishes mandatory rules governing price adjustments for the sale of crude petroleum and petroleum products." Id. P1. More importantly, the ESA is clearly concerned with overcharges as well as unlawful price increases. ***HN8***[] Section 210 provides that "[any] person suffering legal wrong because of any act or practice arising out **[*10]** of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court… for appropriate relief, including… damages." ESA § 210(a), 12 U.S.C. § 1904 n. The ESA provides for refund of overcharges and, in certain instances, for treble damages. An "overcharge" is defined as "the amount by which the consideration for… the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title." Id. § 210(c) (emphasis added). Certainly, plaintiffs had no claim for overcharges until they actually purchased gasoline from Mobil and were in fact overcharged.

In *Barninger v. National Maritime Union, 372 F. Supp. 908 (S.D.N.Y. 1974)*, then District Judge Gurfein held:

But ***HN9***[] the issue of when the statute [of limitations] began to run may turn not on the time when the defendant set in motion the chain of events that led to ultimate injury, but rather when the plaintiff first had a claim for relief. The test is when the particular plaintiff became entitled to vindicate his individual rights….

Nor is the failure to utilize the modern procedure of declaratory judgment enough to start the statute running…. **[*11]** The declaratory judgment remedy is an optional device.

372 F. Supp. at 913, citing inter alia *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)*.

In the instant action, plaintiffs could very well have sought a declaratory judgment under section 210(a) of the ESA. However, they could not have had any claim for the refunding of overcharges until they purchased gasoline and were overcharged. With each purchase of gasoline at an unlawful price, a new claim for an overcharge accrued. Accord, *Thomas v. Petro-Wash, Inc., 429 F. Supp. 808, 812 (M.D.N.C. 1977)* (Sherman Act and Clayton Act case).

Accordingly, as the plaintiffs themselves contend, "the statute of limitations began to run from the date of each individual sale." Plaintiffs' Mem. in Opp. to Defendant's Motion to Dismiss, at 48. Sinced this action was not filed until March 22, 1977, any of plaintiffs' claims arising from sales occurring prior to three years before that date are time-barred. Since the amount of the alleged unlawful increase was known, damages were ascertainable. The claims arising from the time of the price increase until three years before March 22, 1977 were not "speculative, uncertain **[*12]** or incapable of proof" and thus could have been sued upon within three years from the time they accrued. Compare *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. at 338-39*. Those claims are therefore barred.

CONCLUSION

The motion for judgment on the pleadings as to count II of the amended complaint is denied. The motion to dismiss count III is granted to the extent that all claims accruing prior to three years before the filing of the action are dismissed.

SO ORDERED.

Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc.

United States District Court for the District of Massachusetts

August 29, 1979

Civ. A. No. 76-417-G

Reporter

475 F. Supp. 973 *; 1979 U.S. Dist. LEXIS 10127 **; 1979-2 Trade Cas. (CCH) P62,833

ANDERSON FOREIGN MOTORS, INC., on behalf of itself and all others similarly situated, Plaintiffs, v. NEW ENGLAND TOYOTA DISTRIBUTOR, INC., ET AL., Defendants.

Core Terms

dealers, delivery, tied product, attachment, seller, transportation, tie, plaintiffs', products, tying product, antitrust, stock, tying arrangement, delivery service, common carrier, distributor, coercion, tie-in, preliminary injunction, courts, instant case, franchise, damages, Defendants', equitable, appears, buyers, merits, million dollars, manufacturers

LexisNexis® Headnotes

Civil Procedure > Remedies > Provisional Remedies > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Remedies, Provisional Remedies**

Although real estate can be the subject of an ordinary motion for attachment under Massachusetts law, Mass. R. Civ. P. 4.1; Mass. Gen. Laws ch. 223, § 42, stock cannot be attached in an action seeking only money damages, Mass. Gen. Laws ch. 223, § 71.

Civil Procedure > Remedies > Provisional Remedies > General Overview

HN2[] **Remedies, Provisional Remedies**

Fed. R. Civ. P. 64 requires that a federal court look to the law of the forum state for any provisional remedies to secure a final judgment: At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought.

Civil Procedure > Remedies > Provisional Remedies > General Overview

Civil Procedure > Remedies > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Provisional Remedies > Attachment

Civil Procedure > Remedies > Provisional Remedies > Civil Arrests

Civil Procedure > Remedies > Provisional Remedies > Replevin

Civil Procedure > Remedies > Provisional Remedies > Sequestration

HN3[] **Remedies, Provisional Remedies**

Fed. R. Civ. P. 64 makes state law control the availability of provisional remedies to secure satisfaction of a judgment, and specifically provides that the remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies. The precise scope of *Rule 64* is somewhat unclear. According to a narrow interpretation of the Rule, the phrase "and other corresponding or equivalent remedies," was never intended to exclude temporary equitable relief otherwise proper under *Fed. R. Civ. P. 65*, even though that relief operates only to secure satisfaction of a final judgment and state law offers no equivalent remedy.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > Remedies > Provisional Remedies > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Shareholder Actions, Actions Against Corporations**

Mass. Gen. Laws ch. 214, § 3(7) confers jurisdiction on the supreme and superior courts in actions to reach and apply shares or interests in corporations. Massachusetts state courts rely on *§ 3(7)*, together with their power to issue injunctions pendente lite, to grant a plaintiff an equitable attachment of defendants' shares of stock by restraining their transfer prior to final adjudication of plaintiff's substantive claim.

Civil Procedure > Remedies > Provisional Remedies > Attachment

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Remedies > Provisional Remedies > General Overview

HN5[] **Provisional Remedies, Attachment**

The conditions for issuance of a writ of attachment are set forth in Mass. R. Civ. P. 4.1(c), which requires that the plaintiff show a reasonable likelihood that he will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment.Massachusetts law empowers the attaching officer under certain circumstances to require security from the plaintiff before or after attachment in order to indemnify the officer from liability for an improper attachment. Mass. Gen. Laws ch. 223, § 45A. Otherwise, there is no requirement for an attachment bond.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6[] **Grounds for Injunctions, Likelihood of Success**

The *Due Process Clause of the Fourteenth Amendment* compels the notice and hearing procedures implemented by Mass. R. Civ. P. 4.1(c). The preliminary injunction that will limit disposition of stock and assets owned or controlled by defendants amounts to a deprivation of property within the meaning of the *Fourteenth Amendment*, requiring prior notice and hearing. In particular, plaintiffs must demonstrate more than just a probability of success on the merits in order to prevail on their motion for a preliminary injunction; they must also show a reasonable likelihood that they will recover a judgment in excess of the total value of the property that is the subject of plaintiffs' motions.

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

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

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

HN7[] **Conspiracy to Monopolize, Sherman Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Not all tie-ins fall within the Sherman Act's prohibition against a contract, combination, or conspiracy in restraint 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 > Tying Arrangements > Per Se Rule

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Courts treat tying arrangements as per se illegal. In order to establish an illegal tie, under the per se theory, the plaintiff must prove (1) that tying and tied products are separate, and (2) that the defendant has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product. It is also relevant to consider whether the seller's behavior follows the general pattern found unacceptable in earlier tying cases.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Courts are developing two inroads on the per se doctrine in tying cases. Some courts expand the concept of two separate products by permitting business justifications for aggregation of the products to enter into the single product analysis. By holding that a challenged arrangement constitutes only a single product, courts avoid the strictures of the per se approach entirely, even though at times producing rather unusual results. A second line of attack, which is often not clearly distinguished from the first, takes the form of increasing the availability of affirmative defenses to a liability finding. Although these two approaches are often confused, there is an important difference. The plaintiff has the burden of proof on all issues implicated in the single product determination, whereas the defendant has the burden of proof with respect to each affirmative defense.

Antitrust & Trade Law > Sherman Act > Defenses

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

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

HN10[] Sherman Act, Defenses

In addition to the elements of the per se doctrine, the plaintiff in a private antitrust action must also show as part of his case in chief that he was injured by the challenged practice. Once the prima facie case is established the defendant may respond with several affirmative defenses based on limited business justifications. Finally, the plaintiff's failure to prove all elements of the per se theory does not foreclose his antitrust claim; the challenged practice must then be examined according to the rule of reason in order to determine if a violation of *§ 1* of the Sherman Act has nevertheless occurred.

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

HN11[] Tying Arrangements, Sherman Act Violations

A *§ 1* of the Sherman Act violation does not require a conspiracy, to which the multitude of *§ 1* tying cases involving a single seller of tied and tying products amply attests. Tying arrangements are condemned under *§ 1* as contracts in restraint of trade.

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

HN12[] Price Fixing & Restraints of Trade, Tying Arrangements

The cases support a four-pronged analysis: (1) examination of the product structure itself, (2) investigation of the defendant's product marketing practices, (3) consideration of the behavior of other industrial sellers and (4) analysis of the efficiencies gained by and the business justifications for the product combination.

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

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The single product determination frequently hinges as much on the way the two products are coupled and on the character of each product as on the fact that their sales are connected at all.

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

HN14[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The franchisor is free to demonstrate that the tie constitutes a necessary device for controlling the quality of the end product sold to the consuming public. As part of this defense, however, the franchisor must establish that the tie constitutes the method of maintaining quality that imposes the least burden on commerce. If there are less burdensome alternatives, a franchisor is obligated to employ them rather than the tie.

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

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

Plaintiffs in a tying case need not prove a tying product monopoly but only that defendants enjoyed sufficient economic power in the tying product market appreciably to restrain free competition in the tied product market. An appreciable restraint is shown if the seller exercises some control over some of the buyers in the market and enjoys an advantage over competing tying product suppliers.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN16[] **Private Actions, Remedies**

In a private antitrust action, the plaintiff, in addition to proving a violation and an injury, must also show that the violation was the direct and material cause of the injury he suffered. Plaintiff's burden on the causation issue is not a heavy one; he need only establish the causal connection "with reasonable probability" and to "a fair degree of certainty."

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

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Coercion has no relevance to a determination of antitrust liability; it is relevant, if at all, only to determining whether a tie-in exists, that is, whether the seller has conditioned the sale of one product on the purchase of another. Once a tie is established, liability follows if the other two elements of the per se rule power in the tying product market and foreclosure of a not insubstantial amount of interstate commerce in the tied product are satisfied. Neither of these two elements incorporates a coercion requirement. The requisite economic power may be found on the basis of either uniqueness or consumer appeal. Such an inference does not permit an inquiry into individual coercion.

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

HN18[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Coercion may have some relevance for proving the tie in some situations, but in a case in which the tie is manifest in the express terms of a standard form contract, independent proof of individual coercion is entirely unnecessary.

Counsel: **[**1]** Donald B. Gould, Goodwin, Proctor & Hoar, Boston, Mass., for plaintiffs.

James D. St. Clair, Robert W. Mahoney, Hale & Dorr, Boston, Mass., for defendants.

James F. McHugh, John J. Curtin, Jr., Bingham, Dana & Gould, Boston, Mass., for Toyota Motor Sales, U.S.A., Inc.

Opinion by: GARRITY

Opinion

[*976] MEMORANDUM OF DECISION

The precise characterization of the motions now before the court is disputed by the parties. Anderson Foreign Motors, Inc., a Toyota automobile dealer, brought this class action against New England Toyota Distributor, Inc. (hereinafter NET) and George A. Butler, formerly President and Treasurer and now Chairman of the Board and Chief Executive Officer of NET, [1.] **[**2]** for violation of *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. [2.] Plaintiffs complain of an allegedly illegal tying arrangement **[*977]** in which defendants require dealers to purchase NET's new car delivery services along with the purchase of Toyota automobiles for resale. On April 12, 1978, following a hearing, this court granted plaintiffs' motion for class certification, defining the class as all persons and entities who were Toyota dealers after January 25, 1972.

Plaintiffs now bring two motions: (1) a motion pursuant to *Fed.R.Civ.P. Rule 64* for approval of the attachment of certain real property and assets and (2) a motion pursuant to *Fed.R.Civ.P. Rule 65* for a preliminary injunction to limit the disposition of certain stock and assets of NET controlled by the defendants.

Plaintiffs seek through the pending motions to secure payment of an eventual judgment entered **[**3]** in plaintiffs' favor by restraining the disposal of certain assets in any manner injurious to plaintiffs' interests. The characterization problem stems from the nature of the property that plaintiffs wish to encumber: (1) specific parcels of real estate owned by NET and Butler and assets owned by NET and (2) the stock, rights, and assets of NET. **HN1**[] Although real estate can be the subject of an ordinary motion for attachment under Massachusetts law, [3.] Mass.R.Civ.Pro., Rule 4.1; *M.G.L. c. 223, § 42*, stock cannot be attached in an action seeking only money

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[1.] The original complaint included as a defendant Toyota Motor Sales, U.S.A., the national Toyota distributing concern which imported and distributed automobiles to regional wholesale distributor-franchisees like NET. Toyota Motor Sales, however, was subsequently removed as a party-defendant on request of counsel.

[2.] Although tying arrangements can violate both *Section 1* of the Sherman Act and *Section 3* of the Clayton Act, only the former statutory provision applies to this case, since the jurisdictional prerequisites for a Clayton Act violation are not present. In particular, the tied product in this case, delivery services, is not within the Clayton Act's prohibition against ties involving "goods, wares, merchandise, machinery, supplies or other commodities." *15 U.S.C. § 14*; See, *Moore v. Jas. H. Matthews & Co., 9 Cir. 1977, 550 F.2d 1207, 1214*; *United States v. Jerrold Electronic Corporation, E.D.Pa.1960, 187 F. Supp. 545, 554*, Aff'd per curiam, 1961, *365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806*.

[3.] **HN2**[] *Fed.R.Civ.P. Rule 64* requires that a federal court look to the law of the forum state for any provisional remedies to secure a final judgment:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought . . . .

damages, *M.G.L. c. 223, § 71*. But see, *Krohn Hite v. Berube, D.Mass.1974, 372 F. Supp. 1262, 1263* (state court appears to have effected equitable attachment by injunction). Plaintiffs, therefore, have treated what is in reality a motion for an equitable attachment of defendants' stock and assets as a motion for a preliminary injunction prohibiting NET and Butler from transferring or diminishing the value of the stock and assets other than in the ordinary course of business.

[4]** We must first decide a threshold question as to the availability of a provisional remedy in the form of the preliminary injunction that plaintiffs seek. This issue was not discussed by the parties, but since it relates to the power of this court, we must address it. ***HN3***[] *Fed.R.Civ.P. Rule 64* makes state law control the availability of provisional remedies to secure satisfaction of a judgment, and specifically provides that "(t)he remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, . . ." The precise scope of *Rule 64* is somewhat unclear. See, 7 Moore's Federal Practice P 64.04(3). According to a narrow interpretation of the Rule, 7 Moore's, Supra, at 64-20-21, the phrase "and other corresponding or equivalent remedies, . . ." was never intended to exclude temporary equitable relief otherwise proper under *Fed.R.Civ.P. Rule 65*, even though that relief operates only to secure satisfaction of a final judgment and state law offers no equivalent remedy. Under this interpretation, we plainly have power to grant plaintiffs' motion, whether or not Massachusetts law permits equitable attachment of shares of stock.

[5]** However, the Rule is susceptible of a broader interpretation. It may make state law the Exclusive source of available remedies to secure a final judgment. Even under this broad interpretation, we still have power to grant plaintiffs' motion for a preliminary injunction. The motion in effect seeks an equitable attachment. *Daley v. Ort, D.Mass.1951, 98 F. Supp. 151, 152*. Although in Daley a motion identical to plaintiffs' motion in this case was denied because the court could find no authority for an equitable attachment prior to verdict under Massachusetts or federal law, the court appears to have overlooked ***HN4***[] *M.G.L. c. 214, § 3(7)*, (formerly *M.G.L. c. 214, § 3(8)*), **[*978]** which confers jurisdiction on the Supreme and Superior courts in "actions to reach and apply shares or interests in corporations, . . ." Massachusetts state courts rely on *§ 3(7)*, together with their power to issue injunctions Pendente lite, to grant a plaintiff an equitable attachment of defendants' shares of stock by restraining their transfer prior to final adjudication of plaintiff's substantive claim. See, *McCarthy v. Rogers, 1936, 295 Mass. 245, 3 N.E.2d 787*; Cf., *Salvucci v. Sheehan, 1965, 349 Mass. **[**6]** 659, 662-63, 212 N.E.2d 243*. Hence Massachusetts law appears to provide a procedure comparable to that used by plaintiffs in this case, and we will treat plaintiffs' motion for a preliminary injunction as in the nature of an action to reach and apply coupled with a motion for temporary relief.

We now turn to the standards for exercising our power under *Rules 64* and *65*. ***HN5***[] The conditions for issuance of a writ of attachment are set forth in Mass.R.Civ.Pro., Rule 4.1(c), which requires that the plaintiff show "a reasonable likelihood that (he) will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment." Cf., *M.G.L. c. 223, § 42A*. Because there is no evidence of liability insurance, the central question on the motion for approval of attachment is whether plaintiffs are likely to prevail on the merits and obtain damages in the necessary amount. Massachusetts law empowers the attaching officer under certain circumstances to require security from the plaintiff before or after attachment in order to indemnify the officer from liability **[**7]** for an improper attachment. *M.G.L. c. 223, § 45A*. Otherwise, there is no requirement for an attachment bond.

The standards for granting the preliminary injunction that plaintiffs seek differ only slightly from those governing the attachment. ***HN6***[] The *due process clause of the Fourteenth Amendment* compels the notice and hearing procedures implemented by Mass. Rule 4.1(c). *Bay State Harness Horse R. & B. Ass'n v. PPG Industries, Inc., D.Mass.1973, 365 F. Supp. 1299*. The preliminary injunction that plaintiffs seek will limit disposition of stock and assets owned or controlled by defendants and thus also amounts to a deprivation of property within the meaning of the *Fourteenth Amendment*, requiring prior notice and hearing. *Fuentes v. Shevin, 1972, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556*. In particular, plaintiffs must demonstrate more than just a probability of success on the merits in order to prevail on their motion for a preliminary injunction; they must also show a reasonable likelihood that they will recover a judgment in excess of the total value of the property that is the subject of plaintiffs' two motions. Cf., *Fuentes, supra, at 97*, [4] *92 S. Ct. 1983*.

[8]** Because plaintiffs' motion under *Rule 65* is in the nature of a equitable attachment, we do not require a strong showing of irreparable injury or a favorable balance of harms. Plaintiffs fear that they will not be able to obtain satisfaction for a final judgment that likely may exceed twelve million dollars, see, Part II.A Infra, without executing on the stock and assets of NET. It is our opinion that this fear is reasonably justified. Moreover, if defendants were to sell the stock and other personal property and, with the proceeds, purchase real estate, plaintiffs would be able to attach the real estate under Mass. Rule 4.1(c) without showing irreparable harm. There **[*979]** is no reason for a different result in this case just because the property happens to be in the form of stock.

After reviewing the numerous briefs and affidavits, we find that plaintiffs have demonstrated a probability of success on the merits and a reasonable likelihood of recovering a judgment in excess of seven million dollars and have otherwise satisfied the requirements of Mass.R.Civ.P. Rule 4.1(c). Therefore, we grant plaintiffs' motion for approval of attachment in the requested amount of seven million **[**9]** dollars. However, we cannot decide the motion for a preliminary injunction without some evidence of the value of the property that is the subject of that motion. Furthermore, without such evidence we are also unable to set the amount of the bond required by *Fed.R.Civ.P. Rule 65(c)*. Therefore, we are issuing a contemporaneous procedural order calling for either a stipulation of the parties or evidence of the value of the property and briefs on the issue of the amount of the security that should be required.

The parties have submitted a number of relevant affidavits in connection with both the current motion and the prior motion for class certification. Before embarking on an analysis of the issues, we will first outline generally the significant factual background. NET was the sole distributor of Toyota automobiles in the five state New England area Vermont, Maine, New Hampshire, Massachusetts and Rhode Island until March 1978 when Toyota Motor Sales, U.S.A., Inc. (hereinafter TMS), the national distributor-franchisor, assumed NET's New England distributorship. Pursuant to standard franchise agreements between NET and its dealers, NET sold automobiles to New England Toyota dealers, **[**10]** transporting the cars from the Port of Boston to the dealers' various locations in the five state area. Prior to 1972 NET had subcontracted this transportation function to independent common carriers and had required dealers to reimburse NET for its transportation costs. In that year, however, NET unilaterally changed its transportation policy, relying on the right it reserved in its dealer franchise contracts, "to deliver all Toyota products purchased by DEALER by whatever mode of transportation and from whatever point DISTRIBUTOR may from time to time establish or select." Toyota Dealer Sales and Service Agreement, Article III, PP 1, 2 (Defendants' Exhibit 1 to 5/10/76 Deposition of Ross Anderson); Accord, Toyota Dealer Sales and Service Agreement, Article VI, P B.1 (Plaintiffs' Exhibit 1 to 5/10/76 Anderson Deposition) ("most recent" agreement). NET purchased a number of tractors and trailers and in 1972 began to transport the vehicles to dealers on its own trucks, charging the dealers for the cost of carrying the cars according to Article III, P 2, of the earlier Sales and Service Agreement. The contract between TMS and NET required NET to execute this standard Agreement with each **[**11]** of its dealers. See, 11/2/70 and 3/7/73 Distributor Agreements between Toyota Motor Sales, U.S.A., Inc. and New England Toyota Distributors, Inc., Article III. Each dealer was charged the same average amount for each automobile he purchased, the total charge for all automobiles averaged over all the cars sold.

The change in delivery policy met with some opposition, mainly from the Toyota Dealer Council, an independent dealer body organized to negotiate modifications in some of NET's policies. The Dealer Council and vocal dealers objected to what they felt were excessive delivery prices charged by NET. At a later date, the dealers, dissatisfied

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[4] Of course, the seven million dollar attachment includes property that is also covered by the motion for a preliminary injunction. The overlap should not be counted twice, since attachment alone constitutes a sufficient property deprivation to trigger due process requirements. In addition, because NET no longer distributes Toyota automobiles in New England, it may be that NET's stock has no value apart from the value of the company's assets. If so, the stock would add nothing to the total value of the property plaintiffs wish to encumber. On the other hand, NET's stock may be worth more than the attachment amount of $ 5,000,000 or even more than likely damages of $ 12,000,000. At this point, we lack sufficient information to make these determinations.

with the efforts of the Council, formed the Toyota Dealers Alliance to continue negotiations with NET. Following unsuccessful attempts to change NET's transportation policy, the Dealers Alliance filed a complaint with the Federal Trade Commission in July 1976 alleging an illegal tie of the sale of automobiles to the sale of delivery services. The present action was commenced on January 30, 1976.

Defendants make two principal arguments in opposition to plaintiffs' motions. First, they contend that plaintiffs are unlikely to succeed on the merits **[**12]** for three reasons: (1) that a *Section 1* violation requires **[*980]** a conspiracy and after dismissal of TMS there is no basis for a conspiracy finding; (2) that delivery services and automobiles are a single product, a delivered car, and thus there can be no unlawful tie; and (3) that even if automobiles and delivery services are separate products, there is no proof that plaintiffs suffered any injury as a direct result of the tie since plaintiffs have not shown that defendants "coerced" them into purchasing the two in tandem. Second, defendants argue that in any event plaintiffs have failed to show that they are likely to recover damages in excess of the property they seek to attach. In the following analysis we discuss each argument separately.

I. Probability of Success on the Merits

A. Background

HN7[] 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 Pac. R. Co. v. United States, 1958, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545*. Not all tie-ins fall within the Sherman Act's **[**13]** prohibition against a "contract, combination, . . . or conspiracy in restraint of trade . . . ." The theory of illegal tie-ins has evolved in response to the dual economic evils of tying: the tying arrangement harms competing sellers of the tied product by foreclosing them from access to the market for reasons having nothing to do with the merits of the tying seller's product, and harms buyers by restricting their range of choice in the tied product market. *Northern Pac. R. Co., supra, at 6, 78 S. Ct. 514*; *Times-Picayune v. United States, 1953, 345 U.S. 594, 605, 73 S. Ct. 872, 97 L. Ed. 1277*. The seller who enjoys a powerful position in the tying product market seeks to extend his economic power into the tied product market. Since demand for the tied product varies directly with demand for the tying product, the seller need only reduce the price of his tying product in order to increase sales of the tied product. In this manner he is able to reap his monopoly profit at the same time as gaining a foothold in the market for the tied product. It is this leverage made possible by the seller's strong economic position in the typing product market that offends antitrust values. *Times-Picayune, **[**14]** supra, at 614, 73 S. Ct. 872*; See, W. S. Bowman, Jr., Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957).

Historically, ***HN8***[] courts have treated tying arrangements as Per se illegal. In order to establish an illegal tie, under the Per se theory, the plaintiff must prove (1) that tying and tied products are separate, *Fortner Enterprises v. U.S. Steel (Fortner I), 1969, 394 U.S. 495, 507-508, 89 S. Ct. 1252, 22 L. Ed. 2d 495*, (2) that the defendant has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product, *Fortner Enterprises (Fortner I), supra, at 499-500, 89 S. Ct. 1252*; *Northern Pacific R. Co., supra, 356 U.S. at 6, 78 S. Ct. 514*. It is also relevant to consider whether the seller's behavior follows the general pattern found unacceptable in earlier tying cases. *Kentucky Fried Chicken v. Diversified Packaging, 5 Cir. 1977, 549 F.2d 368, 375*.

HN9[] Courts have developed two inroads on the Per se doctrine in tying cases. Some courts have expanded the concept of two separate products by permitting business justifications for aggregation of the products to enter into the single product analysis. See, **[**15]** *Dehydrating Process Co. v. A. O. Smith Corp., 1 Cir. 1961, 292 F.2d 653, 655-57*, Cert. denied 1961, *368 U.S. 931, 82 S. Ct. 368, 7 L. Ed. 2d 194*; Forrest v. Capital Buildings & Loan Assn., E.D.La.1974, 385 F. Supp. 831, 838-39, Aff'd per curiam, 5 Cir. 1974, *504 F.2d 891*, Cert. denied, 1975, *421 U.S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470*; *Automatic Radio Mfg. Co. v. Ford Motor Company, D.Mass.1965, 242 F. Supp. 852, 856-57*; *United States v. Jerrold Electronics Corporation, E.D.Pa.1960, 187 F. Supp. 545, 558-60*, Aff'd per curiam 1961, *365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806*; L. A. Sullivan, The Law of Antitrust, 443 (1977). **[*981]** By holding that a challenged arrangement constitutes only a single product, courts have avoided the strictures of the Per se approach entirely, even though at times producing rather unusual results. See, e.g., *Jerrold Electronics Corporation, supra* (components of antenna system are single product during start-up phase of business but separate products at a later stage). A second line of attack, which is often not clearly distinguished from the first, takes the form of increasing the availability of affirmative defenses to a liability finding. See, **[**16]** *Kentucky Fried Chicken, supra, at 376-78*; *Northern v. McGraw-Edison Co., 8 Cir. 1976, 542 F.2d 1336, 1347*, Cert. denied 1977, *429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544*; *Baker v. Simmons Company, 1 Cir. 1962, 307 F.2d 458*; *Jerrold Electronics Corporation, supra, at 556-58*; Annot., *14 A.L.R.Fed. 458, 492, 495 (1973)*. Although these two approaches are often confused, there is an important difference. The plaintiff has the burden of proof on all issues implicated in the single product determination, whereas the defendant has the burden of proof with respect to each affirmative defense. In our opinion, there is no need in the instant case to sort out who should bear the burden as to each issue in this case, See generally, M. E. Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L.J. 963, 989-992, 1011-14, since it appears likely that even if plaintiffs were assigned the burden of proof on all issues, they would still prevail.

HN10[] In addition to the elements of the Per se doctrine already discussed, the plaintiff in a private antitrust action must also show as part of his case in chief that he was injured by the challenged practice. See, *Ford Motor Co. **[**17]** v. Webster's Auto Sales, Inc., 1 Cir. 1966, 361 F.2d 874, 883*. Once the prima facie case is established the defendant may respond with several affirmative defenses based on limited business justifications. Finally, the plaintiff's failure to prove all elements of the Per se theory does not foreclose his antitrust claim; the challenged practice must then be examined according to the rule of reason in order to determine if a violation of *Section 1* of the Sherman Act has nevertheless occurred. *Fortner Enterprises (Fortner I), supra, 394 U.S. at 499-500, 89 S. Ct. 1252*.

It should also be noted that ***HN11***[] a *Section 1* violation does not require a conspiracy, to which the multitude of *Section 1* tying cases involving a single seller of tied and tying products amply attests. See generally, *Northern Pac. R. Co., supra*; *Times-Picayune, supra*; *International Salt Co. v. United States, 1962, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20*. "Tying arrangements are condemned under (*Section 1*) as "contracts in restraint of trade.' " *Baker, supra, at 467*. In the instant case, the required element of concerted action is supplied by the existence of the vertical tie-in contract containing the tie-in clause, Viz., **[**18]** Article III, PP 1, 2 of the Toyota Dealer Sales and Service Agreement, as interpreted and enforced by *NET. Bogosian v. Gulf Oil Corporation, E.D.Pa.1975, 393 F. Supp. 1046, 1048, 1048 n. 3*, Rev'd on oth. grds., *3 Cir. 1977, 561 F.2d 434*, Cert. denied, 1978, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791*; See, *Osborn v. Sinclair Refining Company, 4 Cir. 1963, 324 F.2d 566, 573*; Cf., *United States v. Parke, Davis & Co., 1959, 362 U.S. 29, 44-47, 80 S. Ct. 503, 4 L. Ed. 2d 505*; *United States v. Schrader's Son, Inc., 1920, 252 U.S. 85, 99-100, 40 S. Ct. 251, 64 L. Ed. 471*; *Ford Motor Co., supra, at 879*; *Sum of Squares, Inc. v. Market Research Corp. of Am., S.D.N.Y.1975, 401 F. Supp. 53, 55-56*. In *Solomon v. Houston Corrugated Box Co., Inc., 5 Cir. 1976, 526 F.2d 389*, upon which defendants rely, the court expressly found that the contract between the two defendants was "not restrictive in any sense," *Id., at 394*. This answers defendants' argument that plaintiffs cannot assert a *Section 1* violation following the dismissal of TMS as a party.

B. Is there a tie?

Having carefully examined the parties' arguments on this important issue, the court concludes that Toyota automobiles and delivery **[**19]** services are two separate products **[*982]** for purposes of determining a *Section 1* violation. Because the parties devoted so much attention to this issue, we will present our analysis in some detail.

One initial point deserves special mention. Labeling a product aggregation does not involve a process of discovery; there are no a priori, determinate categories of single products that might serve as templates against which to measure the particular product configuration at issue. Any such judgment is basically normative, requiring an answer to an essentially prescriptive question: should the seller be forced to market the products separately?

Standards for analyzing a product aggregation have been developed by only a few courts. See, e.g., *Siegel v. Chicken Delight, 2 Cir. 1971, 448 F.2d 43, 47-49*; *Kugler v. AAMCO Automatic Transmissions, Inc., D.Minn.1971, 337 F. Supp. 872, 874-76*, *Aff'd 8 Cir. 1972, 460 F.2d 1214*; *Jerrold Electronics Corporation, supra at 559*. See generally, 2 Callman, Unfair Competition, Trademarks and Monopolies, § 38.2(b)(1)(b) (3d ed. 1969. Supp.1977). In

Siegel, the challenged arrangement involved the tying of certain supplies to the sale of franchise licenses. **[**20]** An important issue was whether a license could ever be a separate tying product. The court summarized the necessary inquiry in the following terms:

> In determining whether an aggregation of separate items should be regarded as one or more items for tie-in purposes in the normal case of sales of products, the courts must look to the function of the aggregation. Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales expenses and the like normally attendant upon any tie-in, and whether the items are normally sold or used as a unit with fixed proportions. *448 F.2d at 48*.

Jerrold Electronics Corporation sets forth more specific guidelines: (1) whether other members of the industry sell the products separately, (2) whether versions of the alleged single product differ in significant respects, (3) whether the customer is charged separately for the products, and (4) whether any components of the alleged single product are sold separately. *Id. at 559*. Kugler used two approaches to determining whether advertising, the tied product, and an AAMCO franchise license, the tying item, were one product **[**21]** for antitrust purposes. The court first applied the four Jerrold Electronics standards, and then it looked to the industry as a whole to determine if the products had been or could be sold separately. *337 F. Supp. at 875*.

HN12[] These three cases support a four-pronged analysis: (1) examination of the product structure itself, (2) investigation of the defendant's product marketing practices, (3) consideration of the behavior of other industrial sellers and (4) analysis of the efficiencies gained by and the business justifications for the product combination. We will discuss each factor in turn.

An examination of the product structure in the instant case reveals several important points. The automobile product and the delivery service do not naturally merge into a third identifiable unit. Moreover, the finished Toyota automobile delivered at the Post of Boston is able to perform all the functions for which it was designed. Delivering it to the dealer's location adds nothing to the automobile Qua automobile. In short, there is no relationship between the car and its delivery inherent in the nature of the automobile itself and thus no conceptual barrier to treating the two as separate products. **[**22]** See, *Fortner Enterprises v. U. S. Steel (Fortner I), 1969, 394 U.S. 495, 508-09, 89 S. Ct. 1252, 22 L. Ed. 2d 495*.

NET, however, sold its transportation services in a fixed one-to-one proportion to the sale of its cars. The dealer was not required to purchase carrying services from NET above and beyond those needed to move the cars that he bought. Although in many cases this factor might offer some support for a single product conclusion, See, D. Turner, The Validity of Tying Arrangements Under the ***Antitrust Law***, 72 Harv.L.Rev. 56, 68-72 (1958), the facts of this case greatly weaken its persuasive force. The **[*983]** only need dealers might have had for NET carrying services in addition to car delivery from Boston was the occasional transportation of vehicles sold or exchanged between dealers from one dealer's location to the other's premises. The initial delivery of automobiles thus represents the overwhelming segment of dealer demand for car delivery services.

NET's product marketing approach is also relevant. Although the dealer pays one price for the car, the carrying charge is an item separable from the cost of the vehicle. The dealer can quote the ultimate consumer a base **[**23]** price for the car that does not include carrying and handling charges. The fact that these costs are kept distinct suggests that both the dealer and NET treated the car and its delivery as separate items. See, *Jerrold Electronics Corporation, supra.* On the other hand, there is no evidence that NET sold its transportation services to other than its franchised dealers and for purposes other than the transportation of its automobiles.

Much of the controversy surrounding this issue focussed on the third factor, the significance of intra-industry comparisons. Defendants submitted evidence suggesting that throughout the domestic automobile industry distributors control the transportation of vehicles to their dealers. The general acceptance of this aggregated product configuration, defendants insist, is strong support for the existence of a single product. We disagree. A favorable intra-industry comparison, although relevant, is by no means conclusive on the single product issue. See, *Jerrold Electronics Corporation, supra, at 559*. All firms in an oligopolistic market, for example, might use the same economically inefficient, but financially lucrative, tie-in. If the uniformity of the practice **[**24]** were determinative, a clearly suspect tying arrangement would often be insulated from Per se scrutiny.

The comparison that defendants offer suffers from a serious weakness. Their evidence shows that although automobile manufacturers do control delivery of their vehicles, all except for Subaru employ independent common carriers to transport the cars. [5] NET uses its own trucks. This is a crucial distinction. Defendants are wrong in arguing that the only important question is who ought to have the right to control transportation services. Of equal importance is how that control is exercised. ***HN13***[] The single product determination frequently hinges as much on the way the two products are coupled and on the character of each product as on the fact that their sales are connected at all. See, e.g., *Kentucky Fried Chicken, supra* ; *Crawford Transport Company v. Chrysler Corporation, 6 Cir. 1964, 338 F.2d 934*, Cert. denied, 1965, *380 U.S. 954, 85 S. Ct. 1088, 13 L. Ed. 2d 971*; *Miller Motors, Inc. v. Ford Motor Company, 4 Cir. 1958, 252 F.2d 441, 446*; Forrest v. Capital Building & Loan Assn., E.D.La.1974, 385 F. Supp. 831, Aff'd per curiam, 5 Cir. 1974, *504 F.2d 891*, Cert. denied 1975, *421 U.S. 978,* ***[**25]*** *95 S. Ct. 1980, 44 L. Ed. 2d 470*. The ultimate concern of antitrust theory is with the anti-competitive effect generated by particular economic practices. Because different ways of tying two products can produce different market effects, they can also have different antitrust consequences.

In this case, NET's practice of using its own trucks has a potentially more serious economic impact than does an approach which employs independent common carriers and, therefore, NET gains no support from the marketing practices of other automobile distributors. First, the use of independent common carriers encourages the development of a market in the tied product. NET's practice, on the other hand, removes a substantial segment of the demand for delivery services from the competition of that market. Secondly, automobile manufacturers who use independent carriers can allow dealers to suggest potential carriers for the distributor's **[**26]** approval, perhaps according to a set of pre-established **[*984]** criteria. This kind of arrangement, although superficially similar to NET's practice, permits more dealer freedom than does NET's scheme, and dealer freedom of choice is an important value protected by tie-in law.

With respect to the fourth factor implicated in single product analysis the business justifications for one product treatment defendants suggest two reasons for distributor control over delivery. First, they insist that distributor selection of carriers is necessary to ensure timely delivery of a first class product for resale to the consumer. The reputation of Toyota and thus the livelihood of the manufacturer and distributor is made or broken at the dealer level, and therefore the distributor has a strong interest in supervising the dealer's management of his business in order to ensure product quality. Second, defendants suggest that NET's delivery system enhances efficient marketing of Toyota cars by promoting competition among dealers located at varying distances from Boston. Without a centralized delivery scheme, they argue, dealers closest to Boston would have a decided competitive advantage, since **[**27]** their transportation costs would be less than those of outlying dealers.

Business justifications for aggregated product treatment, however, have been interpreted very narrowly. Cf., *Standard Oil Co. v. United States, 1949, 337 U.S. 293, 306, 69 S. Ct. 1051, 93 L. Ed. 1371*. Consider, for example, defendants' first justification: the preservation of customer goodwill and product reputation. Although some courts use quite general terms when discussing this issue, the cases involve factual situations in which the tying arrangement at stake was the only way that the seller could ensure the maintenance of goodwill. See, e.g., *Baker, supra* (mattress company's leasing of signs to motels, advertising company's mattresses available in motel, necessitated requirement that motel stock only company's mattresses); *Dehydrating Process Co., supra, at 657* (tie of silo to sale of unloader justified by customer complaints of improperly functioning unloader when bought separately and absence of any other supplier manufacturing silos to defendant's specifications). And recently some courts have made these limitations explicit [6] *Kentucky Fried Chicken, supra, at 376*; *Northern, supra, 356 U.S. 1, 78 S.* ***[**28]*** *Ct. at 519*.

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[5] Prior to 1972, NET itself had subcontracted the delivery function to independent common carriers.

[6] This trend appears to be most marked in those opinions which analyze justifications as affirmative defenses; however, their teachings apply with equal force to the single product issue.

Kentucky Fried Chicken, a case upholding an approved source system by which the franchisor exercised some control over supply sources used by its franchisees, adopted a least restrictive alternative-type analysis to confine the goodwill defense:***HN14***[]

> (T)he franchisor is free to demonstrate that the tie constitutes a necessary device for controlling the quality of the end product sold to the consuming public. . . . As part of this defense, however, the franchisor must establish that the tie constitutes the method of maintaining quality that imposes the least burden on commerce. If there are less burdensome alternatives, a franchisor is obligated to employ them rather than the tie. *549 F.2d at 376*.

The facts of the instant case do not support such a compelling business justification. Defendants have suggested **[**29]** no reason why NET could not merely issue a list of common carrier requirements to dealers and permit dealers to select carriers that conform to those requirements. In *Northern v. McGraw-Edison Co., 8 Cir. 1976, 542 F.2d 1336*, Cert. denied 1977, *429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544*, the court struck down an arrangement whereby the purchase of dry cleaning equipment from the seller was tied to the sale of the dry cleaning franchise. The Northern court recognized a goodwill-product quality defense but limited it to those situations in which substitutes for the tied product had to comply with such precise and detailed specifications that other manufacturers might not be able to market a product functionally compatible with the tying product. *Id. at* ***[*985]*** *1347*. Defendants' product quality argument failed to meet this exacting standard. It is unlikely that NET will fare any better with its tying arrangement.

Even if central control over delivery proved to be necessary, there are less restrictive alternatives available to NET. Cf., *Kentucky Fried Chicken, supra at 376*. *Crawford Transport Company, supra*, illustrates one such alternative. Like Chrysler in the Crawford case, **[**30]** NET could assume control over the selection of independent common carriers according to a set of established standards. Furthermore, both dealers and independent carriers could suggest candidates, and NET might then select among them, perhaps limiting the total number. We do not suggest that such an arrangement would not violate *Section 1* under any circumstances, but it does seem likely that it would not be Per se illegal.

The second NET interest, promoting inter-dealer competition, will also not justify the restrictive tying arrangement in the instant case, even assuming substantial inter-dealer competition. All centrally controlled delivery systems further this interest to the same extent, and as discussed above, there are less burdensome alternatives to the system NET has selected.

Thus, each of the four prongs of single product analysis outlined above points in the direction of treating new cars and delivery services as two separate products. See, *BBD Transportation Co., Inc. v. U.S. Steel Corp., N.D.Calif.1976, 1976-2 Trade Cases (CCH) P 61079 at 69874*. See generally, M. E. Ross, 23 Emory L. J., Supra, at 1014; Note, Product Separability: A Workable Standard to Identify Tie-In **[**31]** Arrangements Under the Antitrust Laws, 46 S.Calif.L.Rev. 160 (1972). Cost savings seem unlikely to result from jointly selling an automobile and a service which is entirely independent of the manufacture of the car to which it is tied. See, D. Turner, 72 Harv.L.Rev., Supra, at 71-72. Indeed, dealer objections to the arrangement in the instant case suggest that it might not be an economically efficient approach.

Defendants place considerable reliance on *Crawford Transport Co. v. Chrysler Corporation, E.D.Ky.1962, 235 F. Supp. 751*, *Aff'd 6 Cir. 1964, 338 F.2d 934*, Cert. denied 1965, *380 U.S. 954, 85 S. Ct. 1088, 13 L. Ed. 2d 971*, quoting extensively from the opinion of the District Court. Holding that Chrysler's selection of independent common carriers to transport cars sold to its dealers did not offend *Section 1* of the Sherman Act, the District Court reasoned that Chrysler's strong interest in seeing to it that cars are delivered in a form attractive to consumers necessitate treating transportation as "part of the sale of an automobile", *235 F. Supp. at 753, 755*. The District Court did not devote an in-depth analysis to this issue and in particular did not consider less restrictive **[**32]** alternatives to the approach employed by Chrysler. Moreover, as the opinion of the Court of Appeals made clear, the Crawford arrangement differed significantly from the arrangement in the instant case. In Crawford, independent common carriers were used to haul the cars; Chrysler did not profit in any way from the provision of transportation services and, therefore, did not use its economic position in the automobile market as leverage to invade the car delivery market. NET, on the other hand, used its own trucks and, as plaintiffs claim, profited from providing delivery services. Although the Court of Appeals stressed the economic necessity for central control of automobile delivery, *338 F.2d at 939*, it did not draw the same conclusion from this observation as the District Court had done, Viz., that it supported a single product inference. Instead, the Court of Appeals based its conclusion on the absence of any economic gain to Chrysler. Cf., *Ohio-Sealy Mattress Mfg. Co. v. Seely, Inc., 7 Cir. 1978, 585 F.2d 821, 835*, Cert. denied, *440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486*.

In response to our question at the hearing, both sides submitted briefs on the issue of who had title to **[**33]** the automobiles before acceptance by the dealers. Defendants argue that NET retained title, while plaintiffs contend that title passed to the dealers at some point prior to completion of delivery. We doubt whether title has any relevance **[*986]** to the existence of an illegal tie. We have been unable to locate any case which turns on this factor, and neither party offers any argument on the merits based on title. In our opinion, enforcement of the antitrust laws should not depend on the technical requirements and ambiguities of "title".

If NET were responsible for damage to the automobiles in transit (whether or not it had formal "title"), it might be reasonable to allow NET considerable latitude in arranging for safe delivery. However, in this case plaintiffs have shown to our satisfaction a reasonable likelihood that dealers were responsible for transit damage to cars during a good portion of the time period spanned by plaintiffs' claims. Defendants' argument to the contrary based on the September 8, 1978 affidavit of Mr. Benson DeWitt, in which he claims that NET reimbursed dealers $ 18,762.91 for repairs dealers made as a result of car damage at Boston or in transit during **[**34]** the period 1975 through 1977, overlooks the fact that NET was then both seller and common carrier and as common carrier, not as seller, was responsible for the loss.

Even if NET, as seller, were responsible for damage, it does not follow that NET was justified in tying delivery to cars. As we discussed Ante, there are several less restrictive alternatives that adequately protect product quality in this case.

From the foregoing analysis it appears that NET's arrangement conforms to the classic model of a tie-in. There is a tying product, Toyota automobiles, and a tied product, automobile delivery, and there are markets in both the tied product and the tying product. NET, seller of the tying product, also sold the tied product, Cf., *Kentucky Fried Chicken, supra, at 377*; *Crawford Transport Company, supra*; *Miller Motors, Inc., supra, at 446*, and dealers had to purchase the tied product from NET. Finally, NET's arrangement was authorized by neither state nor federal law. Cf., *Forrest v. Capital Buildings & Loan Assn., supra, at 837*.

This is not a case of a company unilaterally extending itself into a new market by horizontal or vertical integration, which without more does not generally **[**35]** offend *Section 1*. When a firm integrates horizontally or vertically, it enters the new market as a competitor, and the increase in competition is plainly desirable. In the instant case, however, NET did not enter the common carrier market as a competitor. To the contrary, it exploited its franchisees' dependence to secure its own economic position by creating a steady demand for its services. Although Toyota automobiles were an integral feature of the franchise arrangement, delivery services were not. Thus, NET's arrangement suffers from the evils common to all illegal ties.

C. Seller's Economic Power

After *Northern Pac. Ry. Co. v. United States, 1958, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545*, ***HN15***[] plaintiffs in a tying case need not prove a tying product monopoly but only that defendants enjoyed sufficient economic power in the tying product market appreciably to restrain free competition in the tied product market. *Id., at 11, 78 S. Ct. 514*; Accord, *Fortner Enterprises v. U.S. Steel (Fortner I), 1969, 394 U.S. 495, 502-03, 89 S. Ct. 1252, 22 L. Ed. 2d 495*. An appreciable restraint is shown if the seller exercises some control over some of the buyers in the market and enjoys an advantage **[**36]** over competing tying product suppliers. *U.S. Steel Corp. v. Fortner Enterprises (Fortner II), 1977, 429 U.S. 610, 621-22, 97 S. Ct. 861, 51 L. Ed. 2d 80*; *Fortner Enterprises (Fortner I), supra, 394 U.S. at 503, 89 S. Ct. 1252*.

The tying product market in this case is the market for new automobiles foreign and domestic and the relevant buyers are dealers in those automobiles. By virtue of its franchise agreements, NET controlled a group of those dealers, namely those who sold Toyota automobiles in the five state New England area. It thus appears likely that plaintiffs will be able to satisfy the Fortner Standards.

[*987] D. "Not Insubstantial" Amount of Interstate Commerce

In view of the very liberal interpretation given this element of the tying test by the Supreme Court, it is quite probable that plaintiffs will be able to demonstrate that "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely De minimus is foreclosed to competitors by the tie . . . ." *Fortner Enterprises (Fortner I), supra, at 501, 89 S. Ct. at 1258*. Other common carriers engaged in the new vehicle delivery business in New England were foreclosed from access to that **[**37]** portion of the tied product market represented by the sale of Toyota vehicles to regional Toyota dealers.

E. Causation

It appears likely from the affidavit evidence submitted by both parties that plaintiffs have suffered injury in the form of overcharges for new car delivery. Since NET changed its transportation policy in 1972, the freight and handling charge has been a hotly disputed issue between the dealers, acting first through the Toyota Dealer Council and then through the Toyota Dealer Alliance, and NET. Furthermore, following the termination of NET's distributorship franchise and TMS' assumption of New England distribution, TMS, making use of independent common carriers, reduced the delivery cost from the $ 139.95 per car charged by NET to $ 77.50 per car. The marked difference between these two figures, plaintiff maintains, can only be explained as an overcharge by NET.

Defendants argue that TMS is able to charge less for delivery because, by eliminating NET's distributorship, TMS earns more profit on each automobile. Even assuming TMS now makes more from the sale of an automobile, it is not apparent to this court, and defendants have not explained, why TMS should choose **[**38]** to absorb some of its legitimate delivery costs instead of charging the entire $ 139.95 to its dealers. It seems probable both from the long history of negotiations between NET and its dealers and the unexplained reduction in delivery charges following the entry of TMS as the New England distributor that NET had overcharged dealers for its delivery services. [7.]

Defendants argue further that **[**39]** even if plaintiffs could prove their claims of injury resulting from NET's delivery overcharges, they are still unable to demonstrate that the challenged tying arrangement was a material cause of that injury, since dealers voluntarily accepted NET's exclusive control over vehicle delivery. ***HN16***[] In a private antitrust action, the plaintiff, in addition to proving a violation and an injury, must also show that the violation was the direct and material cause of the injury he suffered. See, *Ford Motor Co. v. Webster's Auto Sales, Inc., 1966, 361 F.2d 874, 883*. Plaintiff's burden on the causation issue is not a heavy one; he need only establish the causal connection "with reasonable probability" and to "a fair degree of certainty." Id.

As we understand defendants, they argue that in order to establish causation, buyers in a private antitrust action must prove that they were coerced by the seller to purchase the tied product. It is unclear at precisely which point proof of coercion is relevant. Often it has been treated as a factor in determining the existence of a tie. In other cases it has entered into the liability analysis as an element relevant to a seller's possession of market power. **[**40]** And on occasion coercion has been viewed as a requirement of plaintiff's standing under Section 4 of the Clayton Act, that is, to establish that plaintiff was harmed by the **[*988]** tie-in. Our analysis bears on the relevance of coercion to all facets of this case.

[7.] In oral argument, defendants contended that the dealers suffered no injury at all because they passed on any overcharges to consumers. In general defendants who are direct purchasers cannot make use of a pass-on theory to defend against a private antitrust damages action. *Illinois Brick v. Illinois, 1977, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 1968, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. Nor is it likely that this case falls within any exception to the Hanover Shoe doctrine, if any exists. See, *Illinois Brick, supra, 431 U.S. at 743-45, 97 S. Ct. 2061*.

We are impressed with the array of considerations arguing against a coercion requirement in a case like the instant one involving an express tie. As the court in *Bogosian v. Gulf Oil Corp., 3 Cir. 1977, 561 F.2d 434*, Cert. denied, 1978, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791*, explained:

> It has never been an element of plaintiff's case to disprove, nor even a permitted defense, that the tied product is superior to others available on the market, or that even without the tie requirement plaintiff would have purchased the tied product. The short answer to defendants is, and always has been, that without a tie requirement, "i?f the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway." *Standard Oil v. United States, 337 U.S. 293, 306, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371 (1949)*.

561 F.2d at 449

Distinguishing an earlier **[**41]** case, *Ungar v. Dunkin' Donuts of America, Inc., 3 Cir. 1976, 531 F.2d 1211*, Cert. denied, 1976, *429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84*, on which numerous courts have relied to support the coercion requirement in varied fact situations, the Bogosian court held, at 450, that a plaintiff need only show that the seller expressly conditioned the sale of the tying product on the purchase of the tied product. Whereas in Ungar coercion was relevant to proving the existence of the tie because the conditional nature of the sale was not apparent from the express agreement or from the operation of its terms, the challenged gas station leases in Bogosian expressly required the lessee to purchase specified amounts of defendant's gasoline. The instant case is on all fours with Bogosian : the conditioning of the sale of cars on the purchase of delivery services from NET is manifest in the provisions of the dealer franchise agreement, a standard contract that TMS required NET to sign with all its dealers.

Bogosian emphasized that ***HN17***[] coercion has no relevance to a determination of antitrust liability; it is relevant, if at all, only to determining whether a tie-in exists, that is, whether the seller **[**42]** has conditioned the sale of one product on the purchase of another. Once a tie is established, liability follows if the other two elements of the Per se rule power in the tying product market and foreclosure of a not insubstantial amount of interstate commerce in the tied product are satisfied. Neither of these two elements incorporates a coercion requirement. See, *Fortner Enterprises v. U.S. Steel (Fortner I), 1969, 394 U.S. 495, 499-500, 89 S. Ct. 1252, 22 L. Ed. 2d 495*; *United States v. Loew's Inc., 1962, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11*; *Northern Pac. R. Co. v. United States, 1958, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545*. In *United States v. Loew's, supra*, for example, the Court noted that "the requisite economic power may be found on the basis of either uniqueness or consumer appeal, . . ." *371 U.S. at 45 n. 4, 83 S. Ct. at 102*. Such an inference does not permit an inquiry into individual coercion.

The Supreme Court's Per se test is designed to eliminate detailed evidentiary inquiries of the type that would be required to prove individual buyer coercion. The advisability of this mechanical rule-oriented approach rests on the Supreme Court's judgment right or wrong **[**43]** that tying arrangements offer the consumer little benefit and much potential harm. It is the nature of the test that it focuses not on the buyer's state of mind but rather on the seller's actions; tying doctrine seeks to deter a seller's conduct in unnecessarily conditioning the sale of one product on the purchase of another. *Bogosian, supra, at 450*. See generally, A. D. Austin, The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant, 65 Calif.L.Rev. 1143 (1977).

HN18[] Coercion may have some relevance for proving the tie in some situations, but in a case like the instant one in which the tie is manifest in the express terms of a standard form contract, independent proof of individual coercion is entirely unnecessary. This appears to be the approach of a majority **[*989]** of courts. See, e.g., *Bogosian, supra*; *Moore v. Jas. H. Matthews & Co., 9 Cir. 1977, 550 F.2d 1207, 1216-17*; *Hill v. A-T-O, Inc., 2 Cir. 1976, 535 F.2d 1349, 1355*; *Schuler v. Better Equip. Launder Center, Inc., D.Mass.1977, 74 F.R.D. 85, 87*; *AAMCO Automatic Transmissions, Inc. v. Tayloe, E.D.Pa.1976, 407 F. Supp. 430, 434-35*; *Thompson v. T. F. I. Companies,* *Inc., N.D.Ill.1974, 64 F.R.D. 140, 146*; **[**44]** *Abercrombie v. Lum's, Inc., S.D.Fla.1972, 345 F. Supp. 387, 390*. But see, *Hehir v. Shell Oil Co., D.Mass.1976, 72 F.R.D. 18, 21-22*. [8.]

[45]** II. Additional Requirements

Plaintiffs have succeeded in demonstrating a probability of success on the merits. In order to prevail on their motions, however, plaintiffs must also show that they will probably prove damages in excess of the amount of the property they seek to encumber. Moreover, in order to obtain a preliminary injunction, plaintiffs must offer a bond in an amount sufficient to protect the defendants from their losses should this court's ruling be reversed on appeal.

A. Damages in Excess of Attachment

Plaintiffs calculate their probable damages according to a formula that converts the difference between NET's delivery charge before the TMS take-over and TMS's delivery charge after the take-over into a percentage of the NET delivery charge. This percentage, plaintiffs contend, represents the rate of NET overcharge for each automobile. They then apply the percentage to each of the NET delivery prices over various periods of NET distributorship and arrive at a grand total by multiplying the resulting figures by total cars sold during the corresponding periods and summing over time. After trebling, this total, according to plaintiffs' calculations, is more than twelve **[**46]** million dollars, an amount greatly exceeding the amount of their attachment, two million dollars of real property and five million dollars of assets. [9.]

Plaintiffs' damage formula, in our opinion at this stage of the proceedings, is a reasonable one, especially in light of the liberal standards controlling proof of damages in private antitrust actions. See, *Haverhill Gazette Company v. Union Leader Corporation, 1 Cir. 1964, 333 F.2d 798, 804-807*. Defendants' principal argument in opposition to the use of this method is that it fails to take into account the larger profit TMS enjoys from the sale of each car. As we noted at an earlier point in this **[**47]** opinion, we are unable to comprehend why TMS would absorb part of its delivery cost when it could charge the dealers the full amount.

We are satisfied that plaintiffs have established a reasonable likelihood that they will recover damages in excess of the amount of their attachment. We therefore **[*990]** approve the attachment in the amount of seven million dollars. However, we are unable at this time to determine the value of the property encumbered by plaintiffs' motion for a preliminary injunction. In a contemporaneous procedural order we are calling for a stipulation of the parties or affidavits bearing on this remaining question.

B. Posting of Security

Plaintiffs must post a bond sufficient to hold the defendants harmless if it turns out that the preliminary injunction was erroneously granted; setting the precise amount of the bond lies within the discretion of the issuing court.

[8.] Even if proof of individual coercion were an element of a tying violation, it appears from an examination of the affidavit evidence that there is a reasonable likelihood that plaintiffs would prevail on this issue. Only in 1972 did NET switch from hiring independent common carriers to using its own transportation facilities. Dealers who voluntarily accepted centralized delivery with the use of independent contractors could not also be deemed to have agreed to delivery by NET itself. The switch-over appears to have been a unilateral NET decision pursuant to the general terms of the standard dealer franchise agreement reserving the seller's right to control delivery. Dealers were not allowed to negotiate this new arrangement; they could either accept it or risk termination of their franchise. See, Toyota Dealer Sales and Service Agreement, Article XIII, P B(3) (most recent agreement) (Pltff's Ex. 1 to 5/10/76 Anderson Dep). Considering the large investment of each dealer in his ongoing business and the fact that no dealer could purchase Toyotas from another distributor, the latter alternative was hardly a realistic one. NET, therefore, exercised its power in the tying product market, its economically powerful position vis a vis its dealers, to coerce compliance with the new delivery system. Cf., *F. T. C. v. Texaco, 1968, 393 U.S. 223, 226-29, 89 S. Ct. 429, 21 L. Ed. 2d 394*.

[9.] We have considered the results of the informal survey conducted by Ronald A. Joseph, President of NET, in December 1976, just prior to commencement of this litigation. 1/6/77 Affidavit of R. A. Joseph. The survey purports to indicate that 22 of 75 dealers did not object to the NET delivery scheme. We attach little weight to this highly informal, self-serving study.

Fed.R.Civ.P., Rule 65(c); *N. E. Airlines v. Nationwide Charters & Conventions, Inc., 1 Cir. 1969, 413 F.2d 335, 338*; *Continental Oil Company v. Frontier Refining Company, 10 Cir. 1964, 338 F.2d 780, 782-83*. Unlike Continental Oil Company, on which plaintiffs rely in support of their contention that **[**48]** a bond is not required, there is no evidence in the instant case that plaintiffs have sufficient assets to respond in damages if either of the defendants is injured by reason of the wrongful issuance of this injunction.

Due to the absence of any estimates relating to the value of the stock and assets involved in this motion and damages which might result from the contemplated restraint on their alienation during the pendency of these proceedings, we are unable to determine a proper amount for the bond. Therefore, in the contemporaneous procedural order mentioned above, we are also calling, conditionally, for briefs on the issue of the amount of security which should be required and evidence of the total value of the stock and assets referred to in plaintiffs' motion under *Fed.R.Civ.P., Rule 64*.

Penne v. Greater Minneapolis Area Board of Realtors

United States Court of Appeals for the Eighth Circuit

February 15, 1979, Submitted ; September 5, 1979, Decided

No. 78-1776

Reporter
604 F.2d 1143 *; 1979 U.S. App. LEXIS 12065 **; 1979-2 Trade Cas. (CCH) P62,820

John Penne and Penne Realty, Inc., a Minnesota Corporation, Appellants, v. The Greater Minneapolis Area Board of Realtors, Appellee.

Subsequent History: **[**1]** Rehearing and Rehearing En Banc Denied September 28, 1979.

Prior History: Appeal from the United States District Court for the District of Minnesota

Core Terms

listing, firms, cooperative, dissemination, charging, selling, broker, punitive, commission rate, price information, commissions, divide, sales, brokerage fees, split, alleged conspiracy, circulars, seller, genuine issue, competitors, customers, antitrust, rates, summary judgment, conspiracy, injunction, properties, buyer

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

Inter-seller price verification is where specific firms are identified as selling specific services to specific customers at specific prices, all in advance of the sale. Such information exchanges are not per se violations of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. The Supreme Court has recognized that they can serve to render the conduct of commercial affairs more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction and that it is not the purpose or the intent of the Sherman ***Antitrust Law***, *15 U.S.C.S. § 1, et seq.*, to inhibit the intelligent conduct of business operations. However, such information exchanges are not necessarily or per se legal either; their legality under the antitrust laws depends specifically on their effect upon competition. In particular, the exchange of price information among competitors carries with it the potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions.

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

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

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

In passing upon a motion for summary judgment, the court is required to view the facts in the light most favorable to the party opposing the motion and to give to that party the benefit of reasonable inferences to be drawn from underlying facts, and summary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy, and the other party is not entitled to recover under any discernible circumstances.

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 antitrust outcome does not turn merely on the presence of sound business reason or motive. The inquiry is whether, assuming non-predatory motives and business purposes, the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved.

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

HN4[] **Summary Judgment, Entitlement as Matter of Law**

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Counsel: David Essling, Johnson, Essling, Williams, Essling & Daly, St. Paul, Minn., for appellants.

James R. Safley (on brief), Robins, Davis & Lyons, Minneapolis, Minn., argued; and Barry G. Reed, Minneapolis, Minn., on brief, for appellee.

Judges: Before GIBSON, Chief Judge, HENLEY, Circuit Judge, and HANSON, * Senior District Judge.

Opinion by: HANSON

Opinion

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* The Honorable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

[*1145] Appellants brought this private antitrust action under *28 U.S.C. § 1337* and *Sections 4*, 12 and 16 of the Clayton Act against the Greater Minneapolis Area Board of Realtors (the Board) and 19 of its member firms, alleging that the defendants had contracted, combined or conspired to fix and maintain brokerage fees charged in connection with the sale of real property, in violation of *Section 1* of the Sherman Act and certain Minnesota statutes. [1] The district court [2] granted the Board's motion for summary judgment and directed entry of final **[**2]** judgment in its favor pursuant to *Rules 56* and *54(b), F.R.Civ.P.* The only question presented on this appeal is whether the record presents a genuine issue of material fact concerning involvement of the Board in an alleged combination or conspiracy to fix and maintain brokerage fees. Because we conclude that it does, we reverse.

I.

Penne Realty and all defendants except the Board are real estate brokerage firms. John Penne is president of Penne Realty. (Penne Realty and Penne will be referred to herein collectively as "Penne.") The brokerage firms are in the business of bringing sellers and buyers of real estate together. The firms compete both for sellers, or "listings," and for sales. People with real estate for sale sign listing agreements with individual firms that bind the seller, among **[**3]** other things, to pay a commission to the listing firm when the property is sold. This commission is normally some percentage of the selling price, agreed upon between the seller and the firm with which the property is listed. Penne offers its customers rates of 4% Or 5%; the defendant firms offer their customers rates of 6% Or 7%. There is thus competition on the basis of price for sellers (listings) between Penne and the defendant firms.

The Board is a trade association that promulgates and enforces rules and regulations governing its members and provides them with various professional, educational and social services. Penne Realty and all the defendant firms are members of the Board. The directors and many of the officers of the Board are drawn from persons engaged in the real estate business; during the last six years many of these have been persons employed by firms that are defendants in this case. Members of the Board are required to submit disputes between themselves to the Board's Ethics and Arbitration Committee. This committee is also composed of persons who are members of the Board.

The most important professional service the Board offers its members is its Multiple **[**4]** Listing Service (MLS), in which about 400 firms participate, including Penne Realty and all of the defendant firms. The MLS is a cooperative selling service that works as follows. When a participating firm secures the right to sell a property (a listing), it normally must file the listing agreement with the MLS, along with a "listing circular" containing information about the listed property. The MLS distributes these listing circulars to other participating firms, all of which may then try to find a buyer for the listed property. Under Minnesota law only the MLS member with which the seller has listed the property is entitled to be paid the commission for its sale. If the listing firm itself finds the buyer, it keeps the entire commission. If another broker finds the buyer, the sale is called "cooperative," and the listing broker divides the commission **[*1146]** with the broker that has found the buyer. The Board's MLS is the only such service in the Minneapolis area, and there is evidence that participation in it is necessary for a brokerage firm to compete effectively with other firms. The workings of the MLS are at the heart of this lawsuit.

One main problem comes in **[**5]** deciding how to divide the commission on a cooperative sale. This problem is not so severe when all firms charge at the same rate for their services. This evidently was the case in Minneapolis prior to 1969 or 1970, when virtually all firms charged 6%, and the Board required that the commission be divided 50/50 between listing and selling firms. In 1972 the Board withdrew that requirement, and it appears that at present the most usual division between firms charging at the same rate has shifted to 55/45 in favor of the listing firm.

However, when firms charge different percentages of the selling price as their commission that is, when they compete for listings on the basis of price the following problem arises. Suppose that firm A charges 4% And firm B charges 7%, and that A and B divide commissions on cooperative sales on a straight 55/45 basis. Then if A sells a B listing for $ 100,000, A earns 45% Of the $ 7,000 B collects as its fee, or $ 3,150. But if B sells an A listing for $

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[1] *Minn. Stats. Sections 325.81, subd. 1*, and its successor statutes, *Minn. Stats. Sections 325.8013* and *325.8015*.

[2] The Honorable Earl R. Larson, Senior United States District Judge, District of Minnesota.

100,000, B only earns 45% Of the $ 4,000 that A collects as its fee, or $ 1,800. Quite aside from the different incentives and disincentives this creates, B may think the arrangement unfair, since **[**6]** A, the cut-rate broker, appears to have the best of both worlds: because of its lower fee, A has an advantage in the competition for listings; and yet A benefits from B's higher fee whenever it sells one of B's listings. For these and perhaps other reasons, B might seek to alter its fee-splitting arrangement with A as follows: Instead of dividing its full 7% Commission with A when A sells one of its listings, B will divide only so much of the commission with A as A would have collected had A listed the property and charged its usual fee. Thus, if A now sells a B listing for $ 100,000, A only earns 45% Of $ 4,000, or $ 1,800 the same as B would earn if it sold A's listing for $ 100,000. This not only prevents A from benefiting from B's higher fee when A sells a B listing, but it actually benefits B. For whereas under the old arrangement B only kept $ 3,850, or 55% Of its $ 7,000 commission when A sold its listing, B Now keeps $ 4,200 or 74.3% Of the fee. What B loses in listings to A's price competition it may gain back from A's zeal to sell houses. And now, of course, it will be A who will feel it is being treated unfairly, since when A and B cooperate on a sale of one of B's **[**7]** listings, the division of the commission is almost 75/25 in favor of B, whereas when they cooperate on a sale of one of A's listings the division is only 55/45 in favor of A. Penne, who takes the part of the cut-rate broker A, refers to this latter method of dividing fees on cooperative sales as "punitive," thereby suggesting that the higher-priced firms that divide their fees with it on this basis are punishing it for its lower rates.

Until 1969 or 1970, the Board recommended that its members charge 6% On most listings. [3] When this recommended fee schedule was eliminated, some members began charging 7%. These firms did not wish to split their fees on a straight 50/50 or 55/45 basis with the firms charging less than they, as above. In January 1971 the Board adopted the following rule:

[8]**

> On a cooperative sale the listing firm shall divide half the gross brokerage fee received with the selling firm, after payment of the Multiple Listing fee. Listing firm shall, however, have the right to base the division of fees on the brokerage fee the selling firm regularly charges on sales of similar type properties.

[*1147] This rule gave the "punitive split" [4] of commissions the sanction of the Board.

At about the same time that commission rates began to vary and "punitive splits" received the sanction of the Board, the Board also began to print a roman numeral in a special place on the MLS listing circulars it distributed to each MLS participant on every listed property. This roman numeral indicated the commission rate at which the listing firm was charging the seller on that listing. Thus, the circulars on Penne's listings would ordinarily have a "IV" or "V" in one corner; **[**9]** other firms would have a "VI" or "VII". The reason given for the institution of this form of interseller price information exchange was that each firm was entitled to know what fee it would divide with the listing firm on a cooperative sale of the given listed property.

In 1972 the Board retracted all written rules concerning the division of commissions on cooperative sales. It is clearly established in the record that since that time the Board has frequently made public pronouncements dissociating itself from both the setting of commission rates and the division of commissions on cooperative sales, and informing its member firms that they are to individually determine their commissions and the division of commission they will offer on cooperative sales. Penne has offered no evidence that since 1972 the Board has made recommendations to any of its member firms regarding the division of commissions. However, the Board has continued to print roman numerals on the MLS listing circulars, indicating the commission rate at which the listing firm is charging the seller on the listed property. [5] Furthermore, the "punitive split" has continued even without the

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3 This recommendation was enforced by the Board through a rule providing that a member firm could submit a listing at less than 6% Only if it "agreed" to pay the selling firm 50% Of a 6% commission. This variant of the "punitive split" discussed above was apparently also dropped in 1969 or 1970.

4 By using this term we mean to imply no opinion as to the legality or illegality of the practice referred to.

5 We note that listing firms are not required to have the commission rate information printed on the listing circulars. However, if the information is not supplied on a given circular, it can be obtained simply by calling the MLS and asking what the commission rate is on the listing in question. Apparently most firms, including Penne, have the information printed most of the time.

official sanction of the **[**10]** Board. In December 1973, soon after Penne applied for admission to the Board, one of Minneapolis' largest real estate brokerage firms, Edina Realty, caused a letter to be distributed to all member firms of the MLS, announcing that it would impose "punitive" divisions of commissions on cooperative sales on firms charging less than 7%. Edina stated that it would divide commissions on cooperative sales of its listings on the basis of the lowest fee offered to the general public by the selling firm. During the next few months many other firms publicly followed suit, and all of the defendant firms in this case have allegedly divided commissions with Penne on such a "punitive" basis.

[11]** II.

The crux of Penne's charges against all the defendants is that they have combined or conspired to fix and maintain brokerage fees by the use of essentially three devices: imposing "punitive" divisions of commissions on cooperative sales upon brokers who charge lower rates; "blacklisting" brokers who charge lower rates by refusing to cooperate in the sale of their listings; and making deprecatory statements about brokers who charge lower rates to their customers and potential customers. Penne alleges that all of these devices have been used against it in particular. The Board is said to be the "vehicle" of the alleged conspiracy. Its involvement is predicated mainly on its dissemination of its member firms' price information, usually by publication of the information on the MLS listing circulars, but sometimes through other means (See n.5 Supra).

That the Board's dissemination of this information is a form of ***HN1***[] interseller price verification there can be no doubt: specific firms are identified as selling specific **[*1148]** services to specific customers at specific prices, all in advance of the sale. Such information exchanges are not Per se violations of *Section 1* of the **[**12]** *Sherman Act, United States v. Citizens and Southern National Bank, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*; *United States v. Container Corp., 393 U.S. 333, 339, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969)* (concurring opinion); the Supreme Court has recognized that they can serve to render the conduct of commercial affairs "more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction(,)" and that "(it) was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations(.)" *Maple Flooring Mfg. Assn. v. United States, 268 U.S. 563, 583, 45 S. Ct. 578, 585, 69 L. Ed. 1093 (1925)*.

However, such information exchanges are not necessarily or Per se legal either; their legality under the antitrust laws depends specifically on their effect upon competition. See *United States v. Container Corp., Supra, 393 U.S. at 337, 89 S. Ct. 510*; *Maple Flooring Mfg. Assn. v. United States, Supra, 268 U.S. at 585, 45 S. Ct. 578*. In particular, as the Supreme Court recently reiterated, the exchange of price information among competitors carries with it the potential "for the **[**13]** development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions." *United States v. United States Gypsum Co., 438 U.S. 422, 457, 98 S. Ct. 2864, 2884, 57 L. Ed. 2d 854 (1978)*. It is the development of precisely such a price-fixing arrangement that Penne alleges in this case.

We think that on the question of the role in this alleged conspiracy of the price information exchange fostered by the Board, "it is (not) quite clear what the truth is, . . . (or that) no genuine issue remains for trial," *Sartor v. Arkansas Natural Gas. Corp., 321 U.S. 620, 627, 64 S. Ct. 724, 728, 88 L. Ed. 967 (1944)*, Quoted in *Poller v. Columbia Broadcasting System, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*, and hence that summary judgment was improper in this case. We are guided by the rule that

> (***HN2***[] i)n passing upon a motion for summary judgment the court is required to view the facts in the light most favorable to the party opposing the motion and to give to that party the benefit of reasonable inferences to be drawn from underlying facts(,)

and that

> summary judgment is an extreme remedy, and one which is not to be granted unless the **[**14]** movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances.

See *Unlaub Co., Inc. v. Sexton, 568 F.2d 72, 76 (8th Cir. 1977)*; *Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 209-10 (8th Cir. 1976)*. The Board simply has not demonstrated that Penne is not entitled to recover against it under any discernible circumstances. On the contrary, upon the record as it now stands, it remains an open question whether the price information exchange "has had an anti-competitive effect in the industry, chilling the vigor of (Penne's) price competition." *United States v. Container Corp., Supra 393 U.S. at 337, 89 S. Ct. at 512*. The record presents at least the following factual issues relating to this question:

1. "Punitive Splits." There is evidence that some of Penne's competitors have adopted the practice of dividing commissions with Penne and other cut-rate firms on a "punitive" basis. Penne alleges not only that this practice is employed pursuant to a conspiracy to fix brokerage fees, but also that the Board's dissemination of commission **[**15]** rate information on its MLS listing circulars and otherwise facilitates the practice. Admittedly the summary judgment record contains little evidence that shows How the price information exchange facilitates the practice of the "punitive split;" [6] **[*1149]** however, we believe there is sufficient evidence to raise genuine issues about the connection between the two. Among other things there is the historical fact that the dissemination of the price information began at about the same time that the "punitive split" was officially sanctioned by the Board; and Penne's analysis of the alleged legitimate business purpose of the dissemination of the information, which suggests that at best only the "high-priced" firms benefit by it. Penne should be allowed to make its argument to a fact finder after a full exploration of the connections between the Board and the alleged conspiracy to fix brokerage fees. We believe that if Penne can prove a conspiracy to fix prices through the use of the "punitive split," a fact finder might find that the price information exchange fostered by the Board is implicated in the conspiracy. At the very least, nothing in the record forecloses such a finding. **[**16]**

2. "Blacklisting." There is evidence that some of Penne's competitors have refused to cooperate with Penne on the sale of its listings, or at least on the sale of those of its listings on which it was charging only a 4% Or 5% Commission. Such refusals to deal, if proven and proven to have been undertaken pursuant to a conspiracy to stifle Penne's price competition, could well constitute violations of *Section 1* of the Sherman Act. See *Worthen Bank and Trust Co. v. National Bank Americard Inc., 485 F.2d 119 (8th Cir. 1973)*. The record presents a genuine issue of fact relating to the role played by the Board's dissemination of Penne's commission rates on specific listed properties in the alleged conspiracy to "blacklist" Penne's low-commission listings.

3. "Deprecatory statements" to Penne customers. There is evidence that some of Penne's competitors have approached persons **[**17]** who have listed their properties with Penne at 4% Or 5%, and have told them that Penne listings would not sell; that other brokers would not show the properties because of the low commission rate; and that the persons should cancel their agreements with Penne and list with a different firm. Such activity might be found to have both the purpose and effect of "chilling the vigor of Penne's price competition" in violation of Section I of the Sherman Act. The record presents genuine issues of fact relating to the role played by the Board's dissemination of Penne's commission rates on specific listed properties, both in enabling Penne's competitors to identify customers whom Penne is charging only 4% Or 5%, and in aiding Penne's competitors in making their alleged deprecatory statements. [7]

[18]** III.

The Board makes three arguments for its claim that its dissemination of commission rate information on its MLS listing circulars and otherwise raises no genuine issues of material fact about its involvement in the alleged conspiracy of the other defendants. One is that there is a legitimate business reason for the practice, since "(knowlege) of the brokerage fee which the owner has agreed to pay the listing broker is . . . a matter of legitimate

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[6] This would involve a fuller exploration of how the defendant firms implement the practice than is presented in the record before us.

[7] There is evidence that some of Penne's competitors have shown Penne customers the listing circulars on their properties, pointed to the roman numeral indicating the commission rate, explained what it meant, and then gone from there to explain why other brokers would allegedly not show or sell Penne listings.

concern to such (potentially cooperative) selling broker." However, even aside from Penne's analysis suggesting that only the "high-priced" firms benefit from the dissemination of the price information by the Board, the law is settled that

> *HN3*[] (t)he antitrust outcome does not turn merely on the presence of sound business reason or motive. . . . Our inquiry is whether, assuming nonpredatory motives and business purposes . . ., the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory **[**19]** concern with **[*1150]** the preservation and promotion of competition that protection is achieved. *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*.

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375, 87 S. Ct. 1856, 1863, 1864, 18 L. Ed. 2d 1249 (1967). [8]

The Board also argues that "dissemination of Penne commission charges on MLS listings cannot possibly result in damage or injury to (Penne) as their commission charges are heavily advertised and intended by (them) to **[**20]** be of common knowledge in the real estate industry." It is clear from the record that Penne does advertise its fees widely, even in Board publications specifically intended for consumption by those involved in the real estate business. However, as we have indicated, we believe that there are genuine issues specifically about the illegitimate use by Penne's competitors of the commission rate information disseminated by the Board. There are therefore genuine issues of fact relating to damage or injury to Penne as a result of the Board's dissemination of the information, even taking Penne's own advertisement of its rate structure into consideration.

Finally, the Board points out that under the terms of an injunction entered as part of the settlement of a previous antitrust suit in which it was involved, it was expressly permitted to disseminate commission rate information. See Edward C. Forbes, et al. v. Greater Minneapolis Area Board of Realtors, et al., No. 4-72 Civil 569 (D.Minn. August 29, 1975) (unpublished). The pertinent language of the injunction is as follows:

> VIII. Nothing in this Injunction shall be deemed to prohibit circulation by the Board's multiple listing services **[**21]** of information, in connection with bona fide efforts to sell real property, concerning the commission which a broker has agreed upon with his clients, or the percentage division thereof which a listing broker has agreed to pay a selling broker, arrived at in accordance with this Injunction.

The Board also notes that the circulation of commission rate information has been permitted by other courts in cases involving real estate boards and multiple listing services. [9]

The short answer to this argument is that nothing in the Forbes injunction or the other cases cited by the Board can be construed to countenance **[**22]** the sort of dissemination of price information as is here involved if such dissemination is shown to have anti-competitive effects forbidden under the Sherman Act. We hold only that the record in this case presents fact questions on this latter issue that cannot be resolved on a motion for summary judgment.

IV.

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[8] Insofar as Schwinn held that certain vertical territorial restraints were illegal Per se, it was of course overruled by *Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. However, the principles quoted above from Schwinn were not affected by G.T.E. Sylvania. See *Hecht v. Pro-Football, Inc., 187 U.S.App.D.C. 73, 87 n. 67, 570 F.2d 982, 996 n. 67 (D.C.Cir. 1977)*, Cert. denied, ***436 U.S. 956, 98 S. Ct. 3069, 57 L. Ed. 2d 1121***.

[9] See Murphy v. Alpha Realty, Inc., 1978-2 Trade Cases P 62,388 (N.D.Ill.1978); Hill v. Art Rice Realty Co., 1974-2 Trade Cases P 75,364 (D.Ala.1974); U. S. v. Greater Pittsburgh Board of Realtors, 1973-1 Trade Cases P 74,454 (W.D.Pa.1973); U. S. v. Los Angeles Realty Board, 1973-1 Trade Cases P 74,366 (C.D.Cal.1973); U. S. v. Long Island Board of Realtors, Inc., 1972 Trade Cases P 74,068 (E.D.N.Y.1972).

In view of the foregoing, we need not consider in detail Penne's other allegations against the Board. If proven, they would tend to implicate the Board more closely in the "punitive split" policies of the defendant firms than the mere price information exchange discussed above might do, [10] and would raise questions about the intent behind and reasonableness of a certain advertising **[*1151]** restriction that the Board imposed on its members for some years. [11] Since the Board is to remain in the litigation in any case, we think Penne should be allowed to explore these other alleged connections between the Board and the alleged conspiracy among the defendant firms in as much detail as the facts will warrant. Suffice it to say that on these other matters as well we are not convinced by the material now in the record that it is quite clear what the truth is and that no **[**23]** genuine issues remain for trial.

[24]** We express no opinion on the strength or weakness of Penne's case against the Board, but hold only that the Board's involvement in the alleged conspiracy to fix and maintain brokerage fees has not been conclusively disproved by pretrial discovery and that there remain material issues of fact that can only be resolved at later stages of the litigation. As the Supreme Court has cautioned, "***HN4***[] summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Supra, 368 U.S. at 473, 82 S. Ct. at 491*. [12]

The judgment of the district court is reversed, and the case is **[**25]** remanded for further proceedings.

End of Document

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[10] Penne alleges that the Board distributed the letters of some of its member firms in which they announced their "punitive split" policies soon after Penne applied for membership in the Board; and that the Board has enforced these "punitive split" policies through its Ethics and Arbitration Committee.

[11] The rule read as follows:

Section 5 Solicitations. On a cooperative sale, only the listing participant is authorized to make any contact with the neighbors with sold cards, brochures, letters and the like, except with the consent of the listing broker.

The Rule was withdrawn in 1978. The district court concluded that the fact of this advertising restriction "does not help plaintiffs because rules relating to advertising are independent of rules relating to commission splits." Memorandum and Order of February 14, 1977. However, Penne's claim against the Board does not rest solely on the issue of "punitive" commission splits; the claim is rather that the Board has been involved in a conspiracy to fix and maintain brokerage fees. The Board's advertising restriction would conceivably have something to do with such a conspiracy.

[12] Compare *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704, 89 S. Ct. 1391, 22 L. Ed. 2d 658 (1969)*.

Las Vegas Drive-In Theatre, Inc. v. National General Theatres, Inc.

United States District Court for the District of Nevada.

September 7, 1979, Filed

No. Civ. LV-1724 RDF.

Reporter

1979 U.S. Dist. LEXIS 9958 *; 1979-2 Trade Cas. (CCH) P62,895

Las Vegas Drive-In Theatre, Inc., Smoke Ranch Drive-In Theatre, Inc., Las Vegas Theatrical Corp., Confection Corp. of Las Vegas, Inc., Plaintiffs and Counterclaim Defendants v. National General Theatres, Inc., et al., Defendants and Counterclaimants, Raymond J. Syufy and Syufy Enterprises, Inc., Additional Counterclaim Defendants.

Core Terms

counterclaim, distributors, conspiracy, conspiring, films, Sherman Act, damages, antitrust, exhibitors, summary judgment, affiliated, entities, single entity, counterdefendants', subsidiary, theatres, lawsuit, bid

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

It is fundamental to the law of conspiracy that there must be at least two entities in order for there to be a conspiracy; a single entity cannot conspire with itself. In determining whether the component parts of a single, commonly owned business enterprise are to be treated as separate entities which are capable of conspiring with each other in violation of the Sherman Act, or are to be treated merely as parts of a single entity which is incapable of conspiring with itself, the courts have generally held that affiliated corporations within a single, commonly owned enterprise are separate entities which are capable of conspiring with each other in violation of the Sherman Act. When individual officers are acting on behalf of the corporation, they are merely parts of a single entity and are thus incapable of conspiring either with each other or with the corporation.

Antitrust & Trade Law > Sherman Act > Penalties

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] **Sherman Act, Penalties**

A restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among 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 as substance rather than form.

Antitrust & Trade Law > Sherman Act > General Overview

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

Where one person not only is the sole or principal owner of affiliated corporations, but also was the only person involved in the corporations' decision-making processes, the one person and the affiliated corporations were to be treated as a single entity and there could be no conspiracy among the affiliated corporations.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Antitrust law is concerned with the concerted action of distinct economic entities. In any case, whether such action has occurred turns on the particular facts. Separate incorporation is just one among many factors; it may be significant in an antitrust sense or it may be only a technicality, a byproduct of decisions with no antitrust impact. The corporate structure itself determines whether there are separate units or one entity.

Opinion by: **[*1]** FOLEY

Opinion

Memorandum Opinion Granting Summary Judgment

FOLEY, D.J.: The Syufy counterdefendants filed a motion for summary judgment on the counterclaim November 6, 1978. On June 11, 1979, the Court heard oral argument on the motion and took the matter under submission.

Disposition of the Original Complaint

In their complaint, plaintiffs charged defendant exhibitors with a violation of *§ 1* of the Sherman Act. Plaintiffs alleged that certain Las Vegas theatre owners conspired with non-named film distributors to confine the exhibition of first run films to defendants' theatres. In addition, defendants were charged with secretly agreeing to divide first run films among themselves to the exclusion of Syufy. The trial before a jury began in 1975 and, at the conclusion of the plaintiff's case, the Court granted defendants' motion for a directed verdict. Syufy filed a notice of appeal which was dismissed without prejudice in light of the pending counterclaim. The counterclaim went to trial in 1976, and Syufy's motion for a mistrial was granted. The counterclaim was then severed from the original complaint, and the directed verdict on the claim was affirmed by the Court of **[*2]** *Appeals (575 F. 2d 233)*.

One of the reasons for the directed verdict as to plaintiffs' claim and the affirmance on appeal was that there was no evidence that the film distributors offered films for bid on a day and date basis. Without such evidence, there could be no conspiracy among the exhibitors not to bid on a day and date basis, for a film exhibitor could only bid for films consistent with the distributors' bid invitations. No agreement was shown among the distributors to offer films a certain way. (See Revised Findings of Fact and Conclusions of Law, entered August 19, 1975.)

The Counterclaim

The defendants' counterclaim charges a violation of *§ 1* of the Sherman Act (*15 U.S.C. § 1*). Counterclaimants allege that the various Syufy corporations conspired among themselves and with the non-party distributors to restrain competition by forcing distributors and exhibitors to offer and exhibit motion pictures in the manner Syufy desired, that is, on a day and date basis only. Counterclaimants charge that the various Syufy entities engaged in a program and plan, through the use of litigation, threats, coercion and fabrication of evidence, to eliminate and prevent competition **[*3]** between Syufy theatres and other theatres in the Western United States.

In counterclaimants' trial brief, filed April 2, 1976, they limit their request for damages to their attorneys' fees trebled:

If the complaint in this action is found to have been brought as part of or in furtherance of a conspiracy to restrain competition by forcing distributors and competing exhibitors to exhibit motion pictures on a day and date basis, then the counterclaimants are entitled to recover as damages their attorneys' fees trebled. (Counterclaimants' trial brief, page 18.)

Counterclaimants are therefore not attempting to prove or recover actual damages to their businesses in addition to attorneys' fees.

Issues on the Summary Judgment Motion

1. Was there a conspiracy or combination within the meaning of *§ 1* of the Sherman Act?

2. Can the bringing of a lawsuit be a violation of the antitrust laws?

3. Do Syufy's acts constitute a restraint of trade or competition as would injure the counterclaimants?

Contract, Combination, or Conspiracy

In order to prevail on their counterclaim, counterclaimants must prove, as a threshold element, that there was a combination, conspiracy, or **[*4]** agreement within the meaning of *§ 1* of the Sherman Act. If there was, the case should go to trial; if not, summary judgment should be granted to the counter-defendants. Without proof of a conspiracy or combination, the entire counterclaim fails, despite the fact that other factual issues may remain undecided.

Counterclaimants attempt to satisfy the conspiracy element in three ways:

1. Intracorporate conspiracy among the various Syufy corporations:

HN1[] It is fundamental to the law of conspiracy that there must be at least two entities in order for there to be a conspiracy; a single entity cannot conspire with itself. In determining whether the component parts of a single, commonly owned business enterprise are to be treated as separate entities which are capable of conspiring with each other in violation of the Sherman Act, or are to be treated merely as parts of a single entity which is incapable of conspiring with itself, the courts have generally held that affiliated corporations within a single, commonly owned enterprise are separate entities which are capable of conspiring with each other in violation of the Shereman Act. When individual officers are acting on behalf of **[*5]** the corporation, they are merely parts of a single entity and are thus incapable of conspiring either with each other or with the corporation.

In *United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)*, a case involving a conspiracy among affiliated and subsidiary corporations, the Court held that:

HN2[] [A] restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affilation 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 as substance rather than form.

Accord, *Perma Life Muffers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)*, (a familyowned business consisting of a parent and three subsidiaries could conspire); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons. Inc., 340 U.S. 211 (1951)*, (rule especially applicable where conspiring subsidiaries held themselves out as competitors); *Joseph E. Seagram **[*6]** & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F. 2d 71 (9th Cir. 1969)*, cert. denied, *396 U.S. 1062 (1970)*, (common owner-ship and control do not liberate corporations from the impact of the antitrust laws).

In some cased decided by the lower federal courts, it has been held that *HN3*[] where one person not only was the sole or principal owner of affiliated corporations, but also was the only person involved in the corporations' decision-making processes, the one person and the affiliated corporations were to be treated as a single entity and there could be no conspiracy among the affiliated corporations. See *Rayco Manufacturing Co. v. Dunn, 234 F. Supp. 593 (N.D. Ill. 1964)*, (subsidiary corporations, parent corporation, and individual owner held to be one and the same person for purposes of *§ 1* conspiracy); *Windsor Theatre Co. v. Walbrook Amusement Co., 94 F. Supp. 388 (D. Md. 1950)*, aff'd, *189 F.2d 797 (4th Cir. 1951)*, (no evidence that the activities of the two defendant corporations were directed or caused by anyone other than a single person who was the president and chief executive of both corporations.

In *Knutson v. Daily Review, Inc., 548 F. 2d 795 (9th Cir. 1976)*, cert. **[*7]** denied, *433 U.S. 910 (1977)*, the Court held that a corporation and its wholly owned subsidiary formed a single unified structure and could not therefore conspire to restrain trade in violation of *§ 1* of the Sherman Act, where the same individual was the controlling shareholder of the parent corporation, president of both corporations, and publisher of all five newspapers involved, and the corporations did not compete or hold themselves out as competitors. In Knutson, the Court stated:

HN4[] ***Antitrust law*** is concerned with the concerted action of distinct economic entities. In any case, whether such action has occurred turns on the particular facts. Separate incorporation is just one among many factors; it may be significant in an antitrust sense or it may be only a technicality, a byproduct of decisions with no antitrust impact. The corporate structure itself determines whether there are separate units or one entity. (*548 F. 2d at 802*; footnote omitted.)

In the instant case, there are no genuine issues of material fact as to whether Syufy's various corporations constituted a single entity for the purposes of *§ 1*. In the affidavit of Raymond J. Syufy, filed October 23, 1978, he **[*8]** states that the four corporations were wholly owned by himself or members of his immediate family; Syufy was was owner, operator and managing agent for each corporation. He was ultimately responsible for all decisions and for buying and booking of films. The two drive-in theatres owned by him did not hold themselves out as competitors or in fact compete. This Court holds that the Knutson case controls here. The Syufy corporations cannot be held to have conspired among themselves.

2. Conspiracy element satisfied by Katz settlement:

Lloyd Katz was a named defendant in the original claim. Subsequently, he settled with Syufy and agreed to play day and date with Syufy's drive-ins in Las Vegas. Counterclaimants assert that the settlement agreement between Syufy and Katz, albeit coerced, establishes the conspiracy requirement. Their argument is not persuasive. The Katz agreement was entered into afer the counterclaim was filed, was subject to the approval of the Court, and no antitrust objections were raised at the time of the settlement (May 28, 1974).

3. Conspiracy or agreements with nonparty distributors:

Counterclaimants allege in their comlaint, and asserted at oral **[*9]** argument on June 11, 1979, and in their letter to the Court of June 19, 1979, that the *§ 1* conspiracy element is satisfied by the Syufy agreements with the third party film distributors, named in the counterclaim as coconspirators but not as counteredefendants. This alleged combination between Syufy and the distributors was not covered in the original pretrial order, in the trial brief on the counterclaim, nor in counterclaimants' requested jury instructions. It was not briefed by either side on the summary judgment motion. It is not stated to be an issue of fact for trial by counterclaimants in their points and authorities in opposition to summary judgment. The issue was totally ignored from the time the counterclaim was filed until oral argument on June 11, 1979. There is no evidence adduced at the trial on the original claim to support this theory of a conspiracy between Syufy and the distributors. No distributors were called to testify, nor were any of their depositions taken. Counterclaimants' position is that the coerced agreements obtained by Syufy through other litigation and threats of litigation satisfy the requirements of *§ 1*. However, the only agreements introduced **[*10]** at the trial (defense exhibits in evidence AV-5, AV-6, and AW) were agreements between Syufy and some distributors concerning the exhibition of motion pictures in Northern California only.

The allegation that there was an illegal combination between Syufy and the distributors is inconsistent with this Court's findings on the motion for a directed verdict on the claim (entered August 19, 1975) and the position taken by the counterclaimants during the trial. Counterclaimants, in the position of having to refute Syufy's allegations that there was a conspiracy between themselves and the distributors, argued throughout the trial of plaintiffs' claim that the distributors were at all times acting lawfully and independently in the manner in which they offered films in Las Vegas (Tr. 2988, 3046, 3047). Defendants requested a jury instruction that the distributors were acting lawfully as a matter of law (defendants' requested jury instruction No. 20). This Court found that "Distributors decide to whom they will license their motion pictures on the basis of earning the most money in each market area." (Finding of Fact No. 25) This Court also found that the bid invitation controls the manner **[*11]** of licensing (Finding No. 27).

Counterclaimants also have a standing problem. Assuming arguendo that the agreements with the distributors constitute an illegal restraint of trade, it is difficult to see how they would have any impact on the Las Vegas market, and how these counterclaimants could claim any injury. Actual damages would be limited to businesses in the geographical area affected by the agreements, that is, Northern California. The damages claimed here are simply the costs of defendaing the original lawsuit. Therefore, there appears to be no causal connection between the alleged agreements and damages to these counterclaimants.

Counterclaimants' position simply does not make sense. If, through coercion and litigation, Syufy obtained agreements with distributors which forced them to offer films day and date in Northern California, how does this cause any damage to these counterclaimants? Certainly the agreements did not concern the bringing of a lawfuit in Las Vegas; that was Syufy's own doing. Counterclaimants' argument is circular: Syufy brought lawsuits to force exhibitors to play day and date; as a result of the lawsuits, the distributors were coerced into **[*12]** signing agreements; therefore, the agreements constitute a combination in restraint of trade; and these counterclaimants are damaged in the amount of their attorneys' fees. This is absurd. Even if the counterclaimants prove the agreements between the distributors and Syufy, they have to prove the resultant restraint of trade and causally connected damages. Injury by way of litigation costs is not enough. Counterclaimants cannot bring in peripheral agreements simply to satisfy the jurisdictional requirements and then claim any damage, however unrelated.

This Court holds as a matter of law that as to the agreements before the Court (AV-5, AV-6, AW) there is no illegality as would support damages or injunctive relief in this case. Furthermore, there cannot be any other pertinent evidence to be offered.All of the counterdefendants' evidence in support of its counterclaim has already been offered on the trial of the counterclaim in 1976, which resulted in a mistrial.

Additionally, it should be noted that throughout their papers counterclaimants have mistakenly relied on *Beacon Theatres, Inc. v. Westover [1958 TRADE CASES P98,923], 252 F. 2d 864* (9th Cir.), rev'd on other grounds **[*13]** [*1959 TRADE CASES P69,360], 359 U.S. 500 (1958)*, for the proposition that the bringin of a lawsuit to coerce distributors or exhibitors to enter into an agreement or contract is, without more, a violation of the Sherman Act. Beacon did not so hold. In Beacon, plaintiffs sought a declaratory judgment that their behavior was lawful under the Sherman Act, and sought to restrain or enjoin the defendant from bringing suit or threatening antitrust litigation. Procedurally, our case is very different. Counterclaimants seek treble damages under the antitrust laws, not simply an injunction against vexatious litigation. Having elected to proceed under the Sherman Act, they must satisfy all the elements of *§ 1*.

The counterdefendants' motion for summary judgment must be granted because there is not a genuine issue of material fact as to whether there was a combination, conspiracy or agreement under any of counterclaimants' three theories discussed supra. Counterdefendants are entitled to judgment as a matter of law.

This memorandum opinion constitutes the Court's findings of fact and conclusions of law. Let summary judgment be entered accordingly.

[Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.](#)

Supreme Court of Missouri

September 11, 1979

No. 60720

Reporter

586 S.W.2d 310 *; 1979 Mo. LEXIS 303 **; 1979-2 Trade Cas. (CCH) P62,924

Fischer, Spuhl, Herzwurm & Associates, Inc., et al., Appellants, v. Forrest T. Jones & Company, et al., Respondents

Subsequent History: [1]** Motion for Rehearing Overruled October 11, 1979.

Prior History: From the Circuit Court of Miller County

Civil Appeal

Judge John E. Parrish

Disposition: Affirmed in Part; Reversed in Part; Cause Remanded for Further Proceedings.

Core Terms

exemption, anti trust law, business relationship, antitrust statute, regulated, appellants', state action, tortious interference, life insurance, anticompetitive, trial court, respondents', expectancy, cause of action, school district, insurance industry, implied exemption, Sherman Act, allegations, anticompetitive conduct, expressly approve, competitors, contracts, relations

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. § 416.031.1* makes unlawful every contract, combination or conspiracy in restraint of trade or commerce, conduct which is prohibited by *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

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

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 > 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

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Conspiracy to Monopolize, Sherman Act**

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. § 416.031.2* makes unlawful monopolization, attempted monopolization, and conspiracy to monopolize trade or commerce, conduct which is prohibited by *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. § 416.031.3* makes unlawful specified acts that substantially lessen competition or tend to create a monopoly, conduct which is prohibited by § 3 of the Clayton Act, *15 U.S.C.S. § 14*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > Unincorporated Associations

HN4[] **Public Enforcement, State Civil Actions**

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. §§ 416.011-416.161* applies to any individual, corporation, firm, partnership, incorporated or unincorporated association of any other legal or commercial entity, *Mo. Rev. Stat. § 416.021(2)* (1978), and any economic activity involving or relating to any commodity or service, *Mo. Rev. Stat. § 416.021(4)* (1978).

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Collectives & Cooperatives, Clayton Act**

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. §§ 416.011-416.161* expressly exempts, with some qualifications, labor, agricultural and horticultural organizations in *Mo. Rev. Stat. § 416.041.1* (1978), the same organizations expressly exempted from federal antitrust laws by § 6 of the Clayton Act, *15 U.S.C. S. § 17*.

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

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. § 416.041.2* exempts activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of the state or of the United States.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Public Enforcement, State Civil Actions**

The Missouri ***antitrust law*** of 1974 (Act), *Mo. Rev. Stat. § 416.141* (1978) directs that the Act's provisions shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

Governments > Legislation > Interpretation

HN8[] **Legislation, Interpretation**

Antitrust laws are to be construed liberally and exceptions from their application are to be construed strictly.

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN9[] **Exemptions & Immunities, Parker State Action Doctrine**

Implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

HN10[] **Procedural Matters, Jurisdiction**

The Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. § 416.041.2*, does not exempt the insurance industry solely because its activities are regulated.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN11[] **Scope, Exemptions**

The exemption in the Missouri ***antitrust law*** of 1974, *Mo. Rev. Stat. § 416.041.2*, represents a codification of the "state action" doctrine of federal ***antitrust law***, which provides that while a state may not give immunity to those who would violate the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, legitimate statutory measures to solve economic problems through regulatory schemes will not violate federal antitrust laws despite their anticompetitive features.

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

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

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

The threshold inquiry in determining if an anticompetitive activity is state action of the type that the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, was not meant to proscribe is whether the activity is required by the state acting as sovereign.

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

HN13[] **Exemptions & Immunities, Parker State Action Doctrine**

Courts consistently refuse to find that regulation gives rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, and even then only to the minimum extent necessary.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN14[] **Exemptions & Immunities, Parker State Action Doctrine**

Under the "state action" exemption, anticompetitive activities are exempt if they are compelled by state regulations. The "state action" doctrine does not relieve antitrust liability for anticompetitive conduct which also violates state regulations for particular industries.

Torts > ... > Commercial Interference > Contracts > General Overview

HN15[] **Commercial Interference, Contracts**

The right of recovery for inducing a breach of contract is but one instance of the protection which the law affords against unjustified interference in business relations. An existing contract may be the basis for greater protection, but some protection is appropriate against unjustified interference with reasonable expectancies of commercial relations even where an existing contract is lacking.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN16[] **Intentional Interference, Elements**

The elements of a cause of action for tortious interference with business relations under Missouri law are: (1) A contract or a valid business relationship or expectancy (not necessarily a contract); (2) Defendant's knowledge of the contract or relationship; (3) Intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) The absence of justification; and, (5) Damages resulting from defendant's conduct.

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

HN17[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A petition is sufficient against a motion to dismiss if it invokes the substantive principles of law which entitle plaintiff to relief and alleges facts which inform the defendant of what plaintiff will attempt to establish at trial.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN18[] **Pleadings, Rule Application & Interpretation**

A pleader is required to state only the ultimate facts and it is not necessary to plead the facts or circumstances by which the ultimate facts will be established.

Counsel: Harvey M. Tettlebaum, Jefferson City, Missouri, Theodore S. Schechter, Clayton, Missouri, Attorneys for Appellants.

Cullen Coil, Alex Bartlett, Jefferson City, Missouri, John T. Martin, William G. Zimmerman, Robert E. Northrip, Kansas City, Missouri, David A. Yarger, Versailles, Missouri, Veryl L. Riddle, John J. Hennelly, Jr., Lee H. Wagman, St. Louis, Missouri, Robert J. Quigley, Eldon, Missouri, Attorneys for Respondents.

John Ashcroft, Roger Bern, Nanette Laughrey, Jefferson City, Missouri, Attorneys for Amicus Curiae.

Judges: En Banc. Seiler, J. Rendlen, Morgan, JJ., Welborn, Sp. J., and Finch, Sr. J., concur. Bardgett, C.J., concurs in part and dissents in part in separate opinion filed. Donnelly, J., not sitting. Welliver and Higgins, JJ., not participating because not members of the court when cause was submitted.

Opinion by: SEILER

Opinion

[*311] This is an appeal in a suit wherein plaintiffs sought damages for lost commissions in the sale of insurance **[**2]** allegedly caused by defendants' acts in restraint of trade, claimed to be unlawful under both the former and new Missouri antitrust statutes, and for tortious interference with plaintiffs' business relations. The trial court held that the former ***antitrust law*** did not apply to the types of insurance involved in this case, that all activities of the insurance industry are exempt from the Missouri ***antitrust law*** of 1974 under *§ 416.041.2, RSMo 1978*, and that plaintiffs failed to assert a cause of action for tortious interference with business relations. The trial court granted defendants' motion to dismiss the actions. Plaintiffs appealed and filed a motion to transfer the case prior to opinion from the court of appeals, western district, to this court under rule 83.06. We granted the motion to transfer because of the general interest and importance of the questions presented and we will treat the case as though here on original appeal. *Mo. Const. art. V, § 10*.

Appellants are insurance brokers who filed a petition in the circuit court of Miller County alleging that over the years respondents had violated § 416.010, RSMo 1969, of the former antitrust statute and *§ 416.031, RSMo 1978*, **[**3]** of the new antitrust statute, by engaging in unlawful contracts, combinations, undertakings or conspiracies that constitute an unreasonable restraint of trade or commerce. Appellants also allege that respondents' activities constituted tortious interference with appellants' business relations. Respondents are as follows: Forrest T. Jones & Co., an insurance brokerage company; Missouri State Teachers Association (MSTA), a corporation organized to represent the interests of teaching and nonteaching personnel of elementary and secondary schools in Missouri; American Health and Life Insurance Co., Fidelity Security Life Insurance Co., and New York Life Insurance Co., past or present underwriters of group insurance coverage for teachers employed by Missouri school districts; Forrest T. Jones, Dorothy M. Jones, Richard F. Jones, and M.M. Morrison, officers and directors of Forrest T. Jones & Co.; J.A. Kinder, officer, and Everett Keith, former officer of MSTA; James E. Woodruff, licensed insurance agent and director of the MSTA Group Insurance Plan; and, Warren P. Gardner, officer and director of Fidelity Security Life Insurance Co.

Specifically, appellants allege in their petition, among **[**4]** other things, that respondent Forrest T. Jones & Co., had made gifts to and provided entertainment for persons in positions of authority with MSTA or its affiliated groups, that respondent Forrest **[*312]** T. Jones & Co. had entered into agreements with MSTA and its agents and school districts to withhold necessary statistical data, or to provide incomplete or false data, concerning MSTA members employed by particular school districts from potential competitors of Forrest T. Jones & Co., and that Forrest T. Jones & Co. entered into agreements with school districts pursuant to which districts could obtain group accident and health insurance only if they also purchased group life insurance. Appellants allege that Forrest T. Jones & Co. acted as agents of American Health and Life Insurance Co., Fidelity Security Life Insurance Co., and New York Life Insurance Co. in the above anticompetitive activities.

On appeal, appellants contend that the trial court improperly dismissed the action. Appellants submit that the former antitrust statute did apply to life, health and accident insurance, and that § 416.041.2 of the new statute does not exempt entire industries. Rather, appellants contend, **[**5]** § 416.041.2 of the new statute merely codifies the "state action" doctrine of federal ***antitrust law*** and exempts only specific anticompetitive activities and arrangements in fact expressly approved or regulated by the state. Appellants contend further that the alleged anticompetitive activities of the respondents were not expressly approved or regulated by the division of insurance and are therefore outside of the scope of the exemption granted in § 416.041.2. Moreover, appellants argue that they have stated a cause of action for respondents' tortious interference with appellants' business relations. Respondents answer that the former antitrust statute was limited in its application to activities related to products, commodities, articles or things and did not apply to insurance, except for the express inclusion of insurance of property against loss or damage by fire, lightning or storm in the statute. As to the new antitrust statute, respondents answer that the statutes relating to the regulation and supervision of the insurance industry are an exclusive and complete code. Accordingly, respondents submit, the insurance industry's activities are regulated by the state and therefore **[**6]** are exempt under § 416.041.2. Respondents also submit that the appellants' failure to allege the existence of a contract or a pre-existing business relationship is fatal to the claim of tortious interference with appellants' business relations. We will discuss these issues in the order that they are set out above.

The "old" antitrust statute, originally enacted in 1907, did not apply to restraints in trade occurring in connection with service activities. Almstead and Tyler, State Antitrust Laws: New Directions in Missouri, 39 Mo. L. Rev. 489, 489-90 (1974). The statute applied only to activities relating to products, commodities, articles and things. *See* §§ 416.010 through 416.040, RSMo 1969, and Bond, The Antitrust Laws of Missouri, 27 J. Mo. B. 61, 62 (1971). Section 416.040 of the old antitrust statute, however, expressly included insurance of property against loss or damage by fire, lightning or storm within the purview of the statute. The statute did not otherwise apply to services or other types of insurance, such as the life, health and accident insurance contracts involved in this case. The trial court correctly held that the old antitrust statute did not apply to the **[**7]** insurance contracts and activities which are the subject of this litigation.

Arguably in part because the old antitrust statute did not apply to service contracts, but whatever the reason, the General Assembly enacted the Missouri ***antitrust law*** of 1974 (the Act), *§§ 416.011 to 416.161, RSMo 1978*, with a much broader scope of application. *See* Almstead and Tyler, 39 Mo. L. Rev. at 490-91. The Act closely parallels provisions of the Sherman and Clayton Acts of federal ***antitrust law***. ***HN1***[] Section 416.031.1 of the Act makes unlawful every contract, combination or conspiracy in restraint of trade or commerce, conduct which is prohibited by *§ 1* of the Sherman Act, *15 U.S.C. § 1 (1976)*. ***HN2***[] Section 416.031.2 of the Act makes unlawful monopolization, attempted monopolization, and conspiracy to monopolize trade or commerce, conduct which is prohibited by *§ 2* of the Sherman Act, *15 U.S.C. § 2 (1976)*. ***HN3***[] Section 416.031.3 **[*313]** of the Act makes unlawful specified acts that substantially lessen competition or tend to create a monopoly, conduct which is prohibited by § 3 of the Clayton Act, *15 U.S.C. § 14 (1976)*. Like the federal antitrust laws, ***HN4***[] the Act applies to "any individual, corporation, **[**8]** firm, partnership, incorporated or unincorporated association of any other legal or commercial entity", *§ 416.021 (2), RSMo 1978*, and "any economic activity involving or relating to any commodity or service." *§ 416.021 (4), RSMo 1978*.

HN5[] The Act expressly exempts, with some qualifications, labor, agricultural and horticultural organizations in *§ 416.041.1, RSMo 1978*, the same organizations expressly exempted from federal antitrust laws by § 6 of the Clayton Act, *15 U.S.C. § 17 (1976)*. ***HN6***[] In § 416.041.2, the Act exempts "activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of this state or of the United States." At issue is whether this provision is a codification of the "state action" doctrine of federal ***antitrust law***, which exempts anticompetitive conduct which is required or approved by state law, or whether, as respondents contend, this provision exempts the insurance industry because its activities are regulated by state law.

HN7[] The Act directs that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." *§ 416.141, RSMo 1978*. The legislature, **[**9]** through this section and the Act's substantive provisions based on federal antitrust laws, intended to provide a ready body of precedent for interpreting the law and a single standard of business conduct already known and acquiesced in by businesses in Missouri. *See* Almstead and Tyler, 39 Mo. L. Rev. at 519.

The United States Supreme Court has spoken clearly as to the construction to be given to exemptions to the federal antitrust laws and therefore provides guidance for the construction to be given to exemptions under the Act. In *Abbott Laboratories v. Portland Retail Druggists Association, Inc., 425 U.S. 1, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976)*, the court most recently stated that ***HN8***[] antitrust laws are to be construed liberally and exceptions from their application are to be construed strictly. *425 U.S. at 11*. In another recent case, the Supreme Court addressed the question whether a congressional regulatory scheme serves as an implied exemption from federal ***antitrust law***. ***HN9***[] "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. National Association **[**10]** of Securities Dealers, Inc., 422 U.S. 694, 719-20, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)*. In construing the Act in harmony with these ruling judicial interpretations of comparable federal antitrust statutes, we read § 416.041.2 narrowly and find that ***HN10***[] it does not exempt the insurance industry solely because its activities are regulated. Moreover, we find that respondents have not shown that an implied exemption is justified by clear repugnancy between the antitrust laws and the regulatory system.

As noted above, the Act expressly applies to "any individual, corporation, firm, partnership, incorporated or unincorporated association or any other legal or commercial entity" and to "any economic activity involving or relating to any commodity or service." *§§ 416.021(2)*, *(4)*, RSMo 1978. In the exemption in § 416.041.2, the legislature chose the words "activities or arrangements expressly approved or regulated". To say that certain activities, otherwise proscribed by the Act, are exempt because they are approved by the state or in compliance with the legislature's regulatory scheme for a given industry, is quite a different matter from saying that because an industry is regulated, **[**11]** its activities are exempt from the Act, irrespective of whether the activities are in compliance with or in violation of the regulations applicable to the industry. Nowhere in the Act is there an express exemption for regulated businesses and industries, or the insurance industry in particular, although in § 416.041.1 the legislature specifically exempted agricultural, horticultural **[*314]** and labor organizations from the purview of the Act. Rather than interpret the scope of the exemption in § 416.041.2 so broadly as to exempt by mere implication potentially hundreds of businesses and industries, we adhere to the narrow construction given to exemptions to the federal antitrust statutes, as we are directed to do by *§ 416.141* of the Act.

HN11[] The exemption in § 416.041.2 represents a codification of the "state action" doctrine of federal ***antitrust law***, first enunciated by the United States Supreme Court in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. [1] In *Parker*, the court held that while a state may not give immunity to those who would violate the Sherman Act, legitimate statutory measures to solve economic problems through regulatory schemes will **[**12]** not violate federal antitrust laws despite their anticompetitive features. The court, in *Parker*, upheld a California statute that adopted a mandatory marketing and pricing program for the state's raisin crop. Since *Parker*, the "state action" exemption has been further explained by recent Supreme Court decisions.

In *Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*, the court found that the "state action" exemption did not apply to the Virginia Bar Association's minimum fee schedule and therefore its enforcement by the bar association constituted unlawful price fixing under the Sherman Act. The court states that ***HN12***[] "[the] threshold inquiry in determining if an anticompetitive activity is state action of the type that the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *421 U.S. at 790*. And in **[**13]** *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1966)*,

[1] *See generally* Comment, The Missouri "State Action" Antitrust Exemption, 45 U.M.K.C.L. Rev. 257 (1976).

the Supreme Court directly addressed the issue of implied exemptions from the federal antitrust laws through state regulation. In *Cantor*, the court found that despite the state's participation in and approval of a light bulb exchange program, the "state action" exemption did not apply and the program restrained competition in violation of the Sherman Act. The court explained that it "has ***HN13***[] consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory [act] work, 'and even then only to the minimum extent necessary.'" *428 U.S. at 597*.

Under the Supreme Court's interpretation of the "state action" exemption in *Goldfarb* and *Cantor*, which we use as guidance in construing the exemption in § 416.041.2 of the Act, it is clear that the alleged anticompetitive conduct of respondents does not fall within the scope of the exemption. There is no question that the state does not require the anticompetitive conduct alleged. Nor does this case involve "activities or arrangements expressly approved" **[**14]** by the state. Nor is the alleged anticompetitive activity even arguably insulated on the ground that it is in compliance with state statutes regulating the insurance industry. In sharp contrast, respondents contend that they are exempted from the Act because their allegedly anticompetitive conduct may violate insurance regulations that prohibit unfair practices and fraud under *§§ 375.930 to 375.948, RSMo 1978*. Respondents thus contend that these prohibitions against unfair practices and fraud give rise to an implied exemption from the Act for such unlawful activities. ***HN14***[] Under the "state action" exemption, anticompetitive activities are exempt if they are compelled by state regulations. The "state action" doctrine does not relieve antitrust liability for anticompetitive conduct which also violates state regulations for particular industries. This is not a case where an implied exemption from the Act is necessary "in order to make the regulatory act work" under the "state action" doctrine as articulated in *Cantor. 428 U.S. at 597*.

[*315] After applying "ruling judicial interpretations of comparable federal antitrust statutes", which we are directed to use as guidance in our construction **[**15]** of the Act by *§ 416.141*, we find that the alleged anticompetitive activities at issue do not fall within the scope of the "state action" exemption in § 416.041.2. The decision of the trial court in granting the respondents' motion to dismiss appellants' cause of action under the Act was in error.

The last issue in the case at bar is whether appellants' petition pleaded facts sufficient to state a claim upon which relief can be granted for tortious interference with business relations. Respondents contend that appellants must allege the existence of a contract or a pre-existing business relationship as an element of the cause of action. In *Downey v. United Weatherproofing, Inc., 363 Mo. 852, 253 S.W.2d 976, 980 (1953)*, this court held that a reasonable expectancy of commercial relations is protected.

> ***HN15***[] "The right of recovery for inducing a breach of contract is but one instance of the protection which the law affords against unjustified interference in business relations. An existing contract may be the basis for greater protection, but some protection is appropriate against unjustified interference with reasonable expectancies of commercial relations even where an existing **[**16]** contract is lacking."

Respondents cite *Salomon v. Crown Life Insurance Co., 536 F.2d 1233* (8th Cir.), *cert. denied*, *429 U.S. 961, 50 L. Ed. 2d 329, 97 S. Ct. 387 (1976)* as authority for their contention that a contract or a pre-existing business relationship is a necessary element of a claim of tortious interference with business relations. In *Saloman*, the Eighth Circuit correctly stated ***HN16***[] the elements of a cause of action for tortious interference with business relations under Missouri law:

> "(1) A contract or a valid business relationship *or expectancy* (not necessarily a contract);
>
> (2) Defendant's knowledge of the contract or relationship;
>
> (3) Intentional interference by the defendant inducing or causing a breach of the contract or relationship;
>
> (4) The absence of justification; and,
>
> (5) Damages resulting from defendant's conduct."

536 F.2d at 1238 (emphasis added). Respondents submit that, in any event, the trial court's dismissal of appellants' petition was proper because appellants failed to show the existence of a reasonable expectancy of commercial relations or that respondents had knowledge of the appellants' expectancy of commercial relations.

[17]** In *Scheibel v. Hillis, 531 S.W.2d 285* (Mo. banc 1976), this court held that ***HN17***[] a petition is sufficient against a motion to dismiss if it invokes the substantive principles of law which entitle plaintiff to relief and alleges facts which inform the defendant of what plaintiff will attempt to establish at trial. *531 S.W.2d at 290*. We believe that appellants have met this minimum requirement. On its face, count IV of appellants' petition alleges that appellants had an expectancy of business relations, as it claims interference with "actual and potential business relations." The count also alleges that respondents' acts were intentional and without justification, and that appellants have suffered damages as a result of respondents' intentional conduct. The only element of tortious interference with business relations which is not stated in count IV is respondents' knowledge of appellants' expectancy of business relations. Count IV does, however, incorporate by reference the allegations in the other counts of the petition which charge that respondents acted unlawfully in restraint of trade. These allegations supply the knowledge element necessary for the tort.

Appellants allege that **[**18]** respondents conspired with school districts and entered into illegal "tying" agreements, under which districts could obtain group accident and health insurance only if they purchased group life insurance, and other anticompetitive agreements that caused school districts to refuse to deal with appellants and other competitors of respondents. Appellants **[*316]** also allege that respondents gave financial contributions and gifts to school board members and employees to shut out respondents' competitors in the insurance market for the 80,000 employees of the state's school districts. While these allegations do not specifically state that respondents knew of appellants' individual expectancies of commercial relations, the allegations claim that respondents knew their activities tortiously interfered with the business relations of respondents' potential competitors, and that appellants were potential competitors.

Appellants' petition invokes the substantive principles of law which entitle appellants to relief and informs the respondents of what appellants will attempt to establish at trial. As we stated in *Scheibel*:

> "Plaintiff could be compelled by motion . . . to plead **[**19]** more specifically or by interrogatories to give more information . . . but this does not mean the petition does not state a cause of action in its present form. ***HN18***[] A pleader is required to state only the ultimate facts and it is not necessary to plead the facts or circumstances by which the ultimate facts will be established."

531 S.W.2d at 290. Appellants stated a cause of action for tortious interference with business relations and the trial court erred in dismissing count IV of appellants' petition for failure to state a claim upon which relief can be granted.

The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

Rendlen, Morgan, JJ., Welborn, Sp. J., and Finch, Sr. J., concur.

Bardgett, C.J., concurs in part and dissents in part in separate opinion filed.

Donnelly, J., not sitting.

Welliver and Higgins, JJ., not participating because not members of the court when cause was submitted.

Concur by: BARDGETT (In Part)

Dissent by: BARDGETT (In Part)

Dissent

Bardgett, C.J.

I concur in the principal opinion except as to that part which reaffirms earlier holdings that **[**20]** the "old" antitrust statutes, sections 416.010-416.040, RSMo 1969, do not apply to life, health or accident insurance contracts. I agree that the earlier cases so held but I believe those cases were wrong. In my opinion, the "old" antitrust statutes which play some part in the instant case apply to insurance industry, company, or brokerage activities in connection with all forms of insurance. I would therefore reverse and remand for further proceedings on all counts.

State v. Heritage Realty

Supreme Court of Vermont

September 13, 1979, Opinion filed

No. 49-79

Reporter

137 Vt. 425 *; 407 A.2d 509 **; 1979 Vt. LEXIS 1004 ***; 1979-2 Trade Cas. (CCH) P62,897

State of Vermont v. Heritage Realty of Vermont and Fenton-Ryan Realty

Prior History: [*1] State** appealed summary judgment for defendants in state's price-fixing action. Rutland Superior Court, *Dier*, J., presiding.

Disposition: *Reversed and remanded for discovery*.

Core Terms

discovery, summary judgment, broker, conspiracy, material fact, price-fixing, genuine, percent

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

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

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

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

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

HN1[] **Civil Procedure, Discovery & Disclosure**

Although summary judgment is available in antitrust cases, it should be used sparingly. Summary judgment may be appropriate where the facts involved in a determinative issue of law are clear, undisputed or unrefuted, but, if there is a genuine issue as to any material fact, a trial is absolutely necessary. The function of the court, at a *Fed. R. Civ. P. 56(c)* hearing, is solely to determine whether such an issue exists. Pre-discovery summary judgment involves an additional issue: whether the party against whom summary judgment is sought is entitled to develop its case through discovery, before summary disposition against it.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

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

HN2[] **Air & Space Transportation, Antitrust**

In appropriate situations, plaintiffs in antitrust cases are entitled to discovery prior to summary disposition. A plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited, however. The entitlement lives only so long as there are factors which discovery might clear up, having some bearing on whether summary judgment should be entered. When the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material fact, discovery should be ended.

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**

An agreement among competitors to fix prices is unlawful per se. Once the agreement is shown, a complete violation is proved.

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

Evidence > Admissibility > Circumstantial & Direct Evidence

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

Evidence > Types of Evidence > Circumstantial Evidence

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Proof of a price-fixing conspiracy need not be direct. While particularly true of price-fixing conspiracies, it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. Parallel business behavior, although not itself illegal, is admissible circumstantial evidence from which the fact finder may infer agreement.

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

HN5[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Uniformity of price may be and has been considered some evidence tending to establish an illegal agreement. Price uniformity among competitors does not, of itself, violate the antitrust laws, however. If it is the result of independently reached pricing decisions, the element of "agreement" necessary to establish an illegal price-fixing combination or conspiracy is absent. But it does permit an inference that the defendant's conduct stemmed from an agreement, tacit or express, rather than from independent business decisions.

Headnotes/Summary

Headnotes

1. Trade Regulation--Summary Judgment

Although summary judgment is available in antitrust cases, it should be used sparingly. V.R.C.P. 56(c).

2. Judgments--Summary Judgment--Issue of Material Fact

Summary judgment may be appropriate where the facts involved in a determinative issue of law are clear, undisputed or unrefuted, but if there is a genuine issue as to any material fact, a trial is absolutely necessary. V.R.C.P. 56(c).

3. Judgments--Summary Judgment--Issue of Material Fact

The function of the court at a hearing on a motion for summary judgment is to determine whether a genuine issue as to any material fact exists. V.R.C.P. 56(c).

4. Trade Regulation--Summary Judgment

Prediscovery summary judgment involves an issue additional to whether a genuine issue exists as to any material fact: whether the party against whom summary judgment is sought is entitled to develop its case through discovery, and in appropriate situations, plaintiffs in antitrust cases are entitled to such discovery, though the entitlement is not unlimited and lives only so long as there are factors which discovery might clear up and which have some bearing on whether summary judgment should be entered, and when the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that discovery is not likely to produce a genuine issue of material fact, discovery should be ended. V.R.C.P. 56(c).

5. Trade Regulation--Price-Fixing--Elements

An agreement among competitors to fix prices is unlawful per se, and once the agreement is shown a complete antitrust violation is proved.

6. Trade Regulation--Price-Fixing--Proof

Proof of a price-fixing conspiracy need not be direct, and like any other conspiracy can ordinarily be proved only by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants, with parallel business behavior, although not itself illegal, being admissible circumstantial evidence from which the fact finder may infer agreement.

7. Trade Regulation--Price-Fixing--Evidence

Uniformity of price may be and has been considered some evidence tending to establish an illegal price-fixing agreement; it permits an inference that conduct stemmed from an agreement, tacit or express, rather than from independent business decisions.

8. Trade Regulation--Price-Fixing--Price Uniformity

Price uniformity among competitors does not of itself violate the antitrust laws; if it is the result of independently reached pricing decisions, the element of agreement necessary to establish an illegal price-fixing combination or conspiracy is absent.

9. Trade Regulation--Summary Judgment

Where record before trial court in state's price-fixing action was not clear enough to disclose that further discovery was not needed to develop significant aspects of the case, and state's affidavits indicated that discovery might produce a genuine issue of material fact, and there was evidence of parallel pricing, discovery should have been allowed and summary judgment for defendants without allowing discovery was reversible error.

Counsel: *M. Jerome Diamond*, Attorney General, and *Jay I. Ashman* and *Glenn A. Jarrett*, Assistant Attorneys General, Montpelier, for Plaintiff.

Robinson E. Keyes of *Ryan Smith & Carbine, Ltd*., Rutland, for Heritage.

Harry R. Ryan, III, of *Ryan Smith & Carbine, Ltd*., for Fenton-Ryan.

Judges: Barney, C.J., Daley, Larrow and Hill, JJ., and Smith, J. (Ret.), Specially Assigned.

Opinion by: DALEY

Opinion

[*427] **[**510]** This action was brought, on June 15, 1978, against the Rutland County Board of Realtors (Board) and twenty-seven real estate brokers alleging that the defendants fixed prices, in violation of *9 V.S.A. § 2453(a)* of the Consumer Fraud Act. It sought an injunction, restitution, penalties and costs. Only defendants Heritage Realty of Vermont (Heritage) and Fenton-Ryan Realty (Fenton-Ryan) appeared and answered. The remaining defendants stipulated to judgment against them. On September 5, the State filed interrogatories and requests for production. Heritage and Fenton-Ryan **[***2]** responded with objections to the interrogatories and motions for more definite statement. On November 16, the State filed a motion to compel. The defendants in turn, without complying with the request for discovery, filed motions for summary judgment with supporting affidavits. The State filed counter-affidavits and, pursuant to V.R.C.P. 56(f), it also filed an affidavit claiming that it could not fully respond to the motions for summary judgment because the court had not allowed it to conduct discovery. After hearing, the court granted summary judgment in favor of the defendants. The State appeals.

The Board is a nonprofit corporation whose members are licensed brokers and others engaged in the real estate profession. It maintains a multiple listing service (MLS) for the use of its members. As a condition of membership, all brokers must submit their sales listing agreements to the MLS. It then distributes them to the other members. If the listing broker sells the property, the entire commission or fee is paid to that broker. If a broker other than the listing broker sells the property, the commission is split between the two brokers.

The State's complaint alleged that **[***3]** during February, 1977, most members of the Board attended a meeting at which, by vote of the membership, the commission for sale of residential real estate was set at seven percent, and at which it **[*428]** was also agreed that commissions between the listing and the selling broker would be split 50-50. Prior to 1977, the customary rate in Rutland County had been six percent and the split 60-40. It further alleged that the rate-setting agreement was an unfair method of competition, in violation of the Consumer Fraud Act, *9 V.S.A. § 2453(a)*, and that the defendants had participated in the agreement.

By affidavit filed in support of their motions for summary judgment, the defendants claim that they had no part in the alleged conspiracy. Heritage's affidavit shows that although it was represented at the meeting, its representative objected to **[**511]** the consideration of commission rates, and, when the matter was brought up for a vote, she refused to participate. The State's affidavit, however, claimed that no one objected to the vote, and, furthermore, that although Heritage and not listed any properties at seven percent during the preceding year, the first two properties **[***4]** it listed after the meeting were at seven percent. Fenton-Ryan's affidavit indicated that no one from its firm was present at the meeting, and that neither of its proprietors knew about the vote. The State's affidavits show, on the other hand, that although in 1976 no properties were listed at seven percent, by the next year 12 of 22 properties placed in the MLS bulletin were so listed.

The plaintiff contends that it should have been allowed to conduct discovery before the motion for summary judgment was ruled on and that, in any event, the order granting the motion was improper because its affidavits raised genuine issues of material fact.

HN1[] Although summary judgment is available in antitrust cases, it should be used sparingly. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969)* (per curiam). "[Summary] judgment may be appropriate where the facts involved in a determinative issue of law are clear, undisputed or unrefuted," *Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1145* (5th Cir.), *cert. denied*, *414 U.S. 1116 (1973)*, but, if there is a genuine issue as to any material fact, a trial is absolutely necessary. *Sykas v. Kearns **[***5]** , 135 Vt. 610, 612, 383 A.2d 621, 623 (1978)*. The function of the court, at a Rule 56(c) hearing, is solely to determine whether such an issue exists. *Fonda v. Fay, 131 Vt. 421, 422, **[*429]** 306 A.2d 97, 98 (1973)*. Prediscovery summary judgment involves an additional issue: Whether the party against whom summary judgment is sought is entitled to develop its case through discovery, before summary disposition against it. II P. Areeda & D. Turner, ***Antitrust Law*** para. 316e (1978).

HN2[] In appropriate situations, plaintiffs in antitrust cases are entitled to such discovery. *Universal Brands, Inc. v. Philip Morris Inc., 546 F.2d 30, 36 (5th Cir. 1977)*. "A plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited," however. *Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1190 (5th Cir. 1978)*. "[This] entitlement lives only so long as there are factors which discovery might clear up, having some bearing on whether summary judgment should be entered." *Universal Brands, Inc. v. Philip Morris Inc., supra, 546 F.2d at 36*. "When the record becomes clear enough to disclose that further discovery **[***6]** is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material fact, discovery should be ended." *Aviation Specialties, Inc. v. United Technologies Corp., supra, 568 F.2d at 1190*.

The gravamen of the complaint here is that the defendants agreed to fix commission rates on the sale of residential real estate. ***HN3***[] An agreement among competitors to fix prices is unlawful per se. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940)*. Once the agreement is shown, a complete violation is proved.

HN4[] Proof of a price-fixing conspiracy need not be direct. *United States v. Foley, 598 F.2d 1323, 1328 (4th Cir. 1979)*. "While particularly true of price-fixing conspiracies, it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged." *Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965)*. Parallel business behavior, although not itself illegal, is admissible circumstantial evidence from which the fact finder may infer agreement. *First National* **[***7]** *Bank v. Cities Service Co., 391 U.S. 253, 287-88 (1968)*; **[*430]** *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954)*.

[512]** ***HN5***[] "[Uniformity] of price may be and has been considered some evidence tending to establish an illegal agreement." *United States v. Chas. Pfizer & Co., 217 F. Supp. 199, 201 (S.D.N.Y. 1963)*. Price uniformity among competitors does not, of itself, violate the antitrust laws, however. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra, 346 U.S. at 540-41*. If it is the result of independently reached pricing decisions, the element of "agreement" necessary to establish an illegal price-fixing combination or conspiracy is absent. But it does permit an inference that the defendant's conduct stemmed from an agreement, tacit or express, rather than from independent business decisions. See *id. at 540*.

By granting summary judgment, the trial court here ruled that, as a matter of law, the defendants had not participated in a price-fixing agreement. Furthermore, by not allowing discovery, it implicitly ruled that discovery would not produce a genuine issue of material **[***8]** fact. While the State's affidavits are deficient in this regard, the grant of summary judgment was nonetheless inappropriate because it was premature. The State should have been allowed to develop its case before summary disposition against it. The record before the trial court was not "clear enough to disclose that further discovery [was] not needed to develop significant aspects of the case." *Aviation Specialties, Inc. v. United Technologies Corp., supra, 568 F.2d at 1190*. On the contrary, the State's affidavits indicate that discovery may produce a genuine issue of material fact.

We do not say that the evidence of parallel pricing compels an inference in this case that the defendants participated in a price-fixing conspiracy, but neither can we say, as a matter of law, and especially without discovery, that an inference of no agreement is compelled. *Esco Corp. v. United States, supra, 340 F.2d at 1007*. Summary judgment is, under the circumstances, premature. The State should not be denied the **[*431]** opportunity to assemble evidence from the defendants in support of its claim, if such evidence does, in fact, exist.

Reversed and remanded for discovery **[***9]** .

End of Document

In re Fertilizer Antitrust Litigation

United States District Court for the Eastern District of Washington.

September 14, 1979, Filed

Master File No. MF-75-1.

Reporter

1979 U.S. Dist. LEXIS 9818 *; 1979-2 Trade Cas. (CCH) P62,894

In re Fertilizer Antitrust Litigation (This document relates to: Washington, No. C-75-118; Montana, No. C-75-119; Idaho, No. C-75-120; Smith, No. C-75-121; Alaska, No. C-75-156; and Oregon, No. C-76-287).

Core Terms

fertilizer, purchasers, damages, retailers, overcharge, discovery, plaintiffs', defendants', cooperatives, fraudulent concealment, subsidiaries, anti trust law, market forces, antitrust, statute of limitations, interlocutory appeal, form of notice, allegations, concealment, indirect, circumstances, circumvented, interactions, complaints, Chemical, notice, motion to dismiss, member-patrons, regularity, violations

Opinion by: [*1] COPPLE

Opinion

Memorandum and Order

Factual Background

COPPLE, D. J.: Plaintiffs Alaska, Idaho, Montana, Oregon, Washington, and certain private individuals filed complaints alleging antitrust violations by the defendants beginning in 1965. The defendants are Chevron Chemical Co.; Collier Carbon & Chemical Corp.; Cominco American, Inc.; Phillips Pacific Chemical Co.; J. R. Simplot and Simplot Industries, Inc.; Union Oil Co. of California; Western Farm Service, Inc.; Shell Oil Co. and its subsidiaries Shell Chemical, Inc. and Ind./Ag. Chemicals, Inc.; and Phillips Petroleum Co.

The complaints allege injuries to plaintiffs arising out of a combination and conspiracy in restraint of fertilizer trade or commerce and combination and conspiracy to monopolize such trade or commerce in violation of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1 et seq. (1976)*. The complaints further allege injury to the plaintiffs arising out of acquisitions by defendants of formerly independent fertilizer dealers in violation of section 7 of the Clayton Act, *15 U.S.C. § 18 (1976)*. More specifically, the plaintiffs charge defendants with fixing and stabilizing factory, wholesale, and retail **[*2]** prices of fertilizer in the Northwest region. The Northwest region includes Alaska, Idaho, Montana, Oregon, Washington, and four Canadian provinces. The plaintiff also charge defendants with eliminating competition by exchanging trade information, adopting uniform prices, trading fertilizer among themselves at discount prices, artificially restricting the supply of fertilizer, and acquiring independent fertilizer wholesalers, distributors, and retailers.

On August 9, 1978, the Court granted the plaintiffs' motion to amend the definition of the plaintiffs' class to read as follows:

A class consisting of all persons in each of the respective states involved in this litigation who, during the period in controversy, have purchased commercially manufactured fertilizer for their own use within said (states) from a defendant, or from an entity owned or controlled by a defendant, either.

(A) directly; or

(B) indirectly under circumstances which are the economic equivalent of a pre-existing cost-plus contract; but

(C) Excluding

i) defendants and entities owned or controlled by any of them;

ii) the state of Oregon and its agencies, political subdivisions and municipalities;

[*3] iii) those whose fertilizer purchases for use within the state of Washington, Oregon, Idaho, and Montana during the period in controversy did not not equal or exceed $500 in cost; and

iv) those whose fertilizer purchases with the State of Alaska during any one year during the period in controversy did not equal or exceed $250 in cost.

The Court then certified the actions as class actions under *Rule 23(b)(3)*, but also ordered further discovery with regard to *Illinois Brick Co. v. Illinois [1977-1 TRADE CASES P61,460], 431 U.S. 720 (1977)*, in order to further delineate the plaintiffs' class. Then, on July 2, 1979, the Court ordered that the following six matters be heard:

(a) delineation of plaintiffs' class in light of Illinois Brick;

(b) defendants' motion for reconsideration of an order concerning certain Illinois Brick issues or for certification for interlocutory appeal;

(c) defendants' motion for summary judgment on the complaints of the State of Alaska and the complaint of Smith and Minoggie;

(d) defendants' motions to dismiss and to strike allegations of fraudulent concealment;

(e) the form of class notice to be approved by the Court; and

(f) plaintiffs' **[*4]** motion to compel discovery.

Each of these matters will be considered separately in the discussion that follows.

Analysis

(a) Delineation of plaintiffs' class in light of Illinois Brick

The discovery in connection with this issue was to be completed within ninety days of the August 9, 1978 order. The period has elapsed, and the parties have filed memoranda in support of their respective positions. The Court is now in a position to decide whether, in light of Illinois Brick, those who bought fertilizer (1) from retailers allegedly controlled by defendants [*], (2) from retailers who sold fertilizer on consignment from defendants, or (3) from cooperatives owned by the purchasers have standing to sue for damages as plaintiffs and thus may be included in the class of plaintiffs to be given notice. For the reasons that follow, those falling within the above-mentioned categories do not have standing to sue for damages and therefore cannot be included in plaintiffs' class.

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[*] This does not include subsidiaries or outlets wholly owned by defendants. That situation is addressed in part (b) infra .

In Illinois Brick, the Supreme Court ruled that indirect purchasers could not **[*5]** sue antitrust violators for damages. The Supreme Court reasoned that to allow indirect purchasers to sue would create a risk of double recovery, reduce the incentive of direct purchasers to sue, and impose unreasonable burdens on courts because of the difficulties of measuring, tracing, and apportioning damages. The Supreme Court indicated, however, that in situations where complex market interactions were circumvented, the indirect purchasers would be entitled to bring suit. *431 U.S. at 736* & n. 16.

The plaintiffs have not established a factual basis for concluding that defendants somehow control the independent retail companies so as to circumvent the complex interaction of market forces. The affidavits submitted by defendants establish without dispute that the defendants did not control the independent retailers by making decisions as to whom to sell and at what price. Although defendants exert some control over the price charged by the independent retailers in that the retail price is a function of the wholesale price, the retailers decide whether to absorb all or part of the overcharge or to pass on the overcharge. In either case, the independent retailers have a claim **[*6]** for damages either because of the absorbed overcharge or lost profits due to reduced sales from having passed on the entire overcharge. Thus, the Illinois Brick rule requires the exclusion from plaintiffs' class of those who purchased fertilizer from independent retailers.

The same reasoning applies in the situation where purchases were made from independent retailers who hold fertilizer on consignment from defendants. Even assuming that title to the fertilizer passed to plaintiffs directly from defendants and that defendants set the price of the fertilizer sold to plaintiffs, such an arrangement does not circumvent complex market interactions. Although the consignment agreements do give defendants considerable control over the independent retailers, the question under, Illinois Brick is whether an overcharge is borne by the plaintiffs or by some middleman. The agency relationship between defendants and these independent retailers does not mean the independents are not injured by the alleged illegal overcharge either because of lost profits due to reduced sales or because they are required to absorb all or part of the overcharge. There is no evidence that the consignee-independent **[*7]** retailers are paid by the defendant-manufacturers independently of the amount of fertilizer sold. Thus, purchases from the independent dealers who sold fertilizer on consignment from the defendants cannot give the purchasers a basis for claiming damages. Moreover, nothing bars these independent retailers from suing the defendants. To permit those who purchased from these retailers to sue for damages would reduce the incentive of the independent retailers to sue for damages to enforce the antitrust laws, create the risk of double recovery because of the difficulty of apportioning damages, and impose on the Court a considerable burden in tracing and apportioning damages.

Plaintiffs also have not established circumstances sufficient to permit plaintiffs who are members of cooperatives to sue defendants for damages. The cooperatives purchase fertilizer from the defendants. They then sell the fertilizer to the member-patrons and others. The complex interaction of market forces is circumvented to a degree because any loss the cooperatives incur from reduced sales because of passing on the overcharge is suffered indirectly and uniformly by the members of the cooperative in the form **[*8]** of reduced dividends or reduction in capital growth of the cooperative. Any overcharge borne by the cooperative would be passed on to the member-patrons in the same manner. But there remain considerable tracing and apportioning problems. This is because those who are members of the cooperatives purchase fertilizer in varying amounts. Thus, to compensate the ultimate purchasers in an equitable fashion, it must be determined how much, if any, of the alleged overcharge was passed on to the purchasers directly. If all of the overcharge was directly passed on, then those member-patrons who purchased more price-fixed fertilizer than others would receive more compensation than the others. But if all of the overcharge was absorbed by the cooperative, then the member-patrons of the cooperative would receive essentially the same amount of damages, regardless of the amount of fertilizer they purchased individually. Also, fertilizer allegedly price-fixed is mixed with fertilizer that has not been price-fixed, thus creating additional tracing problems as to the damages to be awarded individual purchasers of fertilizer from the cooperatives.

Plaintiffs' argument that the cooperative cannot **[*9]** sue because the cooperatives suffered only indirect injury at the retail level is invalid. The complaint in the present litigation seeks damages for price-fixing at the factory, wholesale, and retail price levels. Nothing prevents the cooperatives from suing for price-fixing at the wholesale level, and although the damage suffered by the cooperatives may be less than that suffered by the member-patrons, that does not prevent the cooperatives from recovering for full overcharge. See P. Areeda & D. Turner, ***Antitrust law***, P337e (1978). That a cooperative may seek recovery for the full overcharge regardless of the amount of the overcharge passed on to the member-patrons also makes irrelevant the plaintiffs' point that cooperatives may not assert the rights of its members under the antitrust laws. Given the problems of apportionment, tracing, and the possibility of double recovery, those purchased from cooperatives can not be permitted to sue merely because they are members of the cooperatives.

(b) Defendants' motion for reconsideration of an order concerning the "ownership or control" exception in Illinois Brick or for certification for interlocutory appeal

On August 9, 1978, **[*10]** the Court ruled that those who purchased or paid for commercial fertilizer from a defendant, or from an entity owned or controlled by a defendant, either (1) directly or (2) indirectly under circumstances that are the economic equivalent of a pre-existing cost-plus contract could be included within plaintiff's class. The defendants contend that this ruling is in error and ask the Court for a redetermination of whether an exception to the Illinois Brick rule exists where the direct purchaser is a wholly owned subsidiary of the defendant.

In Illinois Brick, the Supreme Court indicated that there are exceptions to the rule precluding indirect purchasers from suing for damages in antitrust actions: one is the pre-existing cost-plus contract situation, *431 U.S. at 736*, and "[another] situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customers." *Id. at 736 n. 16*. The defendants are, of course, correct in contending that the example of the circumvention of market forces set forth in footnote 16 does not expressly apply to situations where plaintiffs purchase from direct purchaser **[*11]** was completely independent by defendants. And it is true that if the direct purchaser was cmopletely independent from the defendants, only the direct purchaser and not the ultimate purchasers would be permitted to sue the defendants for overcharges under the holding and rationale of Illinois Brick. Yet, the circumvention of complex market forces is the focal point of whether suit may be maintained against sellers who do not sell directly to the buyer, and market forces will be circumvented in a sense by the defendants' ownership of businesses selling fertilizer to the plaintiffs. For three reasons, purchasers of fertilizer from subsidiaries wholly owned by defendants should be allowed to sue defendants for damages.

First, if the direct supplier to the plaintiff-purchaser is owned by the defendant, it is likely that the direct supplier will pass on the overcharge since to fail to do so would reduce the profit the supplier-subsidiary would otherwise make, which the defendant-parent corporation receives directly or indirectly through dividend or increased capitalization of the subsidiary. Presumably, the defendant-parent corporation would make no net gain from the overcharge if **[*12]** the entire overcharge were absorbed by its subsidiary.

Second, if the subsiidary is permitted to sue, to the exclusion of all others, for lost profit due to reduced sales caused by passing on the overcharge partially or completely and/or for damages from absorbing all or part of the overcharge, the defendant will in effect compensate its subsidiary for all damages from the overcharge, including the damages incurred by the plaintiff-purchasers from any overcharge passed on to them. The damages paid to the wholly owned subsidiary constitute an indirect payment by the defendant to itself, thereby defeating an objective of the antitrust laws -- to make anti-competitive activity unprofitable.

Third, to prevent the plaintiff-purchasers from suing would have a deleterious effect on the enforcement of antitrust laws. As noted by the Supreme Court in Illinois Brick, private enforcement of the antitrust laws is essential to the proper functioning of that statutory scheme. See *id. at 745-46*. Although independent retailers may be hesitant to sue their wholesalers for fear of disrupting relations, it is highly unlikely that a subsidiary would sue its parent. Therefore, it is necessary **[*13]** to allow those who purchased from the defendants' subsidiaries to sue for damages. In reaching this same conclusion, the Third Circuit Court of Appeals stated:

To adopt any other view would invite evasion [of the antitrust laws] by the simple expedient of inserting a subsidiary between the violator and the first non-controlled purchaser. The Supreme Court anticipated this situation in Illinois Brick's now famous footnote 16, commenting on exceptions to nonuse of defensive passing on… Mirroring that exception to offensive passing on reflects the situation here where the direct seller is owned by the alleged price fixer.

In re Sugar Industry Antitrust Litigation, 579 F. 2d 13, 19 (3d Cir. 1978). See also *In re Beef Industry Litigation, 1979-2 CCH TRADE CASES P62,802 at 78-676* (August 17, 1979). In a subsequent Third Circuit decision, the court concluded that those who purchased from the defendants' subsidiaries were not entitled to sue for damages. *Midwest Paper Products Co. v. Continental Group, Inc., 596 F. 2d 573, 589 (3d Cir. 1979)*. Although the court in Midwest Paper purported to distinguish its earlier decision, the basis for that distinction is not readily discernible.As **[*14]** a result, the position of the Third Circuit with respect to this question is unclear. However, the reasoning of the In re Sugar Industry Antitrust Litigation decision is sound and will be followed in the present case.

The defendants have moved that the ruling on purchases from subsidiaries wholly owned by defendants be certified for interlocutory appeal. The criteria for certification under *28 U.S.C. § 1292(b) (1976)* are that the district court is of the opinion (1) that the August 9, 1978 order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. In essence, the court must weigh the benefits and costs resulting from an immediate appeal.

Whether plaintiffs who purchase fertilizer from subsidiaries wholly owned by defendants may sue defendants for damages under Illinois Brick is clearly a controlling legal question. Resolution of the question will determine whether certain purchasers should be included in the plaintiffs' class and whether the named plaintiffs can in fact sue for damages, and if so, what transactions **[*15]** may be considered for purposes of computing damages. If the Ninth Circuit rules that those who purchase from subsidiaries wholly owned by defendants cannot sue defendants for damages, there may be no remaining plaintiffs, thereby considerably advancing the ultimate termination of the case. There is obviously substantial ground for difference of opinion on this issue as well. Thus, the order will be certified for appeal as a similar order was certified for interlocutory appeal under *28 U.S.C. § 1292(b)* in *Hanover v. United Shoe Machinery Corp., 185 F. Supp. 826, 831* (N.D. Pa.), aff'd, *281 F. 2d 481* (3d Cir.), cert. denied, *364 U.S. 901 (1960)*. It should be noted, however, that discovery with respect to matters unrelated to the issue certified for interlocutory appeal should continue while the appeal is pending.

(c) Defendants' motions for summary judgment

The facts with regard to the State of Alaska are not in dispute. The State of Alaska bases its claim for damages on purchases made by the State through local retailers and purchases made by the University of Alaska from defendant Collier Carbon & Chemical Co. These purchases are not sufficient, however, to give the State **[*16]** of Alaska standing to sue the defendants for damages.

The State of Alaska has not alleged that the retailers from whom it purchased fertilizer were owned or controlled by the defendants or that it bought fertilizer under circumstances that circumvented the complex interactions of market forces. There being no factual dispute that Alaska did not purchase fertilizer directly from defendants or in a manner otherwise circumventing complex interaction of market forces, the State of Alaska is not entitled to sue the defendants for damages on the basis of these purchases. See Illinois Brick Co. v. Illinois, supra.

Nor do purchases made by the University of Alaska give the State of Alaska standing to sue. Although the University of Alaska is an instrumentality of the state, it is an independent corporate entity holding title to all real and personal property conveyed to it, it has the capacity to sue or be sued, and the University's board of regents is responsible for the care, control, and management of all real and personal property and all money of the University. *University of Alaska v. National Aircraft Leasing, Ltd., 536 P. 2d 121, 123 (1975)*. Moreover, it cannot be said that **[*17]** the State of Alaska has incurred damages to the extent that the University of Alaska has, on the theory that the funds used to pay any overcharge came from the State of Alaska, because the University of Alaska receives substantial funds from sources other than the State of Alaska. For instance, in 1974 over one-third of the budget for the University of Alaska came from federal and private sources. Therefore, the State of Alaska cannot be considered a direct or indirect purchaser of fertilizer based on purchases made by the University of Alaska.

The facts concerning the claims of plaintiffs Smith and Minoggie are also undisputed. Vincent Dobbins, who is a tenant farmer on land owned by plaintiffs Smith and Minoggie jointly and plaintiff Smith individually, purchases fertilizer from defendants for use on plaintiffs Smith's and Minoggie's farm land. From gross profit is subtracted the expense of the fertilizer. One-third of the net profit is given to the plaintiffs and tenant farmer Dobbins retains the remaining two-thirds profit. Thus, it is clear that the tenant farmer bears two-thirds of any overcharge by the defendants, and the plaintiffs bear one-third. Apportionment and **[*18]** tracing do not present a problem, and there is no threat of double recovery. The complex interactions of market forces normally associated with the sale of a commodity by an independent middleman are not present because Dobbins is not a middleman. He is not seeking to sell fertilizer to the plaintiffs either for a profit or without regard to profit. There is no evidence that Dobbins billed plaintiffs separately for fertilizer or other evidence to suggest that Dobbins and the plaintiffs treated Dobbins' purchase of fertilizer as a transaction preceding a sale of fertilizer to Smith and Minoggie. Rather, Dobbins, as a tenant farmer, is in effect an agent of the plaintiffs: he buys fertilizer to be used on the plaintiffs' land in order to make a profit for the plaintiffs from which his efforts as a tenant farmer are compensated on a percentage basis. Plaintiffs Smith and Minoggie are not indirect purchasers and, therefore, are entitled to sue the defendants for damages.

(d) Defendants' motions to dismiss and to strike allegations of fraudulent concealment

The issues now being considered were first before the court in 1975 in connection with defendants' motions to dismiss, to **[*19]** strike, or to compel a more definite statement with respect to all plaintiffs' claims that arose more than four years before the plaintiffs filed their complaints. In its Memorandum and Order of December 3, 1975, the Court concluded that "dismissing or striking the claims antedating four years of filing would not be proper at this stage of the litigation. Instead, plaintiffs may amend to adequately plead fraudulent concealment if they can do so." Shortly thereafter, the plaintiffs filed their first amended complaint, and on January 16, 1976, defendants again moved to dismiss and to strike the fraudulent concealment allegations. Finally, in April of 1979, the plaintiffs filed their second amended complaint, and the defendants renewed their motions to dismiss and to strike by filing the present motions.

The plaintiffs seek to invoke the doctrine of fraudulent concealment in order to avoid the four-year statute of limitation for actions under federal ***antitrust law***. In support of their claim, plaintiffs have alleged that they did not discover the defendants' unlawful activities until just prior to filing the complaints for two reasons: first, the unlawful activities were self-concealing, **[*20]** and second, the defendants acted affirmatively to prevent disclosure of the defendants' unlawful activities.

The plaintiffs have failed to state with particularity the circumstances giving rise to the defendants' alleged self-concealing conduct. Thus, the Court cannot determine whether, through the exercise of ordinary diligence, the plaintiffs might have discovered the defendants' alleged unlawful activities at an earlier time. In other words, the allegation of fraudulent concealment based on conduct that was self-concealing remains conclusory and thus defective under *Rule 9(b), Federal Rules of Civil Procedure*. Cf. *Hall v. E. I. DuPont De Nemours & Co., 312 F. Supp. 358, 362 (E.D.N.Y. 1970)* (mere non-disclosure or denial does not constitute fraud or deceit for tolling purposes; otherwise, the tolling exception to the statute of limitations would eclipse the basic statute itself).

As for the affirmative acts of concealment, the plaintiffs have pleaded in subparagraph (f) of paragraph 31 of their complaint:

(f) there were affirmative acts of concealment by defendants including

(1) the submission of bids which were required to be competitive, had the appearance of regularity **[*21]** and were by their submission represented to be competitive and regular, but which in fact were not;

(2) falsely signing non-collusion affidavits and/or certificates of regularity;

(3) making false and misleading statements concerning the cause of and justification for prices and price increases and the existence of shortages; and

(4) other acts presently unknown to plaintiffs.

These specific acts of concealment do not, however, constitute fraudulent concealment or conduct that is pleaded with sufficient particularity to meet the requisites of *Rule 9(b)*. Bids that had the appearance of regularity and their submission, which allegedly inferred that the bids were complete and regular, are not affirmative acts aimed at fraudulent concealment of anticompetitive conduct; such acts are at best passive conduct of concealment, if not simply silence. The submission of bids is merely failure to disclose the existence of a possible claim for relief, and that does not constitute an affirmative act of concealment. See *Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd., 185 F. 2d 196, 209 n. 10 (9th Cir. 1950)*, cert. denied, *340 U.S. 943 (1951)* (an answer to an accusation of **[*22]** wrongdoing that is, in practical effect, no more than a failure to disclose the existence of a cause of action does not constitute fraudulent concealment, and the statute of limitations is not suspended merely by reason of the plaintiffs' ignorance of or failure to discover the existence of the cause of action). Similarly, falsely signing non-collusion affidavits or the like is not sufficient to permit an inference that the plaintiffs, who are not insensitive to the implications of the antitrust laws nor naive about the conduct of antitrust violators, would be significantly influenced by a simple denial of wrongdoing. In short, under the circumstances of the present case, such conduct would not lead a reasonable person to believe that he did not have a claim for relief, and, therefore, cannot serve as a basis for invoking the doctrine of fraudulent concealment. See *Rutledge v. Boston Woven Hose & Rubber Co., 576 F. 2d 248, 250 (9th Cir. 1978)*. In addition, signing non-collusion affidavits or certificates, of regularity amount to no more than a denial of wrongdoing, which does not constitute fraudulent concealment. *King & King Enterprises v. Champlin Petroleum Co., 446 F. Supp.* ***[*23]*** *906, 912 (E.D. Okla. 1978)*. Finally, the allegations of false and misleading statements are inadequate under *Rule 9(b)* because they are no more than conclusory allegations; plaintiffs have not identified the content of the statements, who made the statements, or when statements were made.

There are two additional reasons for granting defendants' motion to strike the allegations of fraudulent concealment. First, the plaintiffs have not stated when the alleged fraudulent concealment was discovered or what that discovery was, as expressly required by the Court in its Memorandum and Order of December 3, 1975.

Even under modern liberal rules of pleading "justice" still requires that a plaintiff seeking to escape the statute in such a case [fraudulent concealment] shall make "distinct averments as to the time when the… concealment… was discovered, and what the discovery is, so that the Court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made."

Moviecolor Ltd. v. Eastman Kodak Co., 288 F. 2d 80, 88 (2d Cir. 1961). The plaintiffs have stated that they discovered the existence of their cause of action in a report published **[*24]** by the Canadian Province of Manitoba, but they have not averred the information required by the Court in connection with the discovery of the alleged concealment.

Second, the plaintiffs have failed to explain how the facts that motivated them to file their complaint were not available to them at an earlier date, and whether or not the unavailability of such facts flowed from the defendants' conduct. This was also required by the Court in its Memorandum and Order of December 3, 1975. Although the plaintiffs alleged that they discovered the facts of a possible antitrust violation in the Manitoba report, which coucerned an investigation into the manufacture, distribution, and pricing of chemical fertilizers, there is no explanation of why the report was not discovered until nearly two years after it was published. The inference to be drawn is that plaintiffs were not diligent in discovering the basis for their claim of relief. In this type of situation, the plaintiffs cannot reply on the doctrine of fraudulent concealment to avoid the statute of limitations. See *Willmar Poultry Co. v. Morton-Norwich Products, 520 F. 2d 289, 295-96 (8th Cir. 1975)*, cert. denied, *424 U.S. 915 (1976)*; **[*25]** *Gaetzi v. Carling Brewing Co., 205 F. Supp. 615, 623 (E.D. Mich. 1962)*. In addition, the plaintiffs have not alleged that the information in the Manitoba report was not otherwise available to them prior to its publication.

The plaintiffs have been given adequate opportunity, but have failed to plead fraudulent concealment with the specificity required by *Rule 9(b)* and have failed to explain why they could not have discovered the cause of action or the concealment earlier. It is, therefore, proper to strike the allegations of fraudulent concealment and dismiss those claims antedating the fouryear period preceding the filing of plaintiffs' complaint.

(e) Form of class notice

This Court has enlisted the aid of counsel in the preparation of the notice to be given members of the class. The forms of notice proposed by the plaintiffs and the defendants meet the general requirements of *Rule 23(c)(2), Federal Rules of Civil Procedure*, but both are inadequate as formulated.

The form of notice proposed by plaintiffs assumes that resolution of the Illinois Brick issues addressed earlier in this Memorandum and Order would be deferred, perhaps until trial, and that fraudulent concealment **[*26]** tolls the statute of limitations. Neither assumption is correct, and the plaintiffs' proposed form of notice is, therefore, inconsistent with the rulings of this Court.

The form of notice proposed by the defendants contains a section requiring members of plaintiffs' class to file a statement of claim prior to litigation or be barred from recovery. Requiring class members to submit a statement of claim, as proposed by defendants, under pain of being barred from any recovery is tantamount to requiring class members to opt into this class action. Such a requirement is inappropriate and contrary to the majority view which postpones the requirement of filing a statement and proof of claim until after liability has been established. See Manual for Complex Litigation, § 1.45 at 37-38 (1973).

In all other respects, the defendants' proposed form of notice is acceptable. The form of notice permits incorporation of the rulings concerning the Illinois Brick issues by listing on the reverse side of the notice the entities (other than the defendants) from which purchases will permit a suit for damages. Thus, on the reverse side can be listed the retailers of fertilizer that are subsidiaries **[*27]** wholly owned by defendants. Notice will not be disseminated, however, until after the Ninth Circuit reviews the matter certified for interlocutory appeal.

(f) Plaintiffs' motion to compel discovery

The plaintiffs move for an order compelling answers to (1) interrogatories concerning occurrences taking place on or after January 1, 1965 affecting a geographic region composed of fourteen states and four Canadian provinces and (2) testimony by defendants J. R. Simplot Co., Inc. and Cominco American, Inc. concerning occurrences that took place on or after January 1, 1965. Defendants argue that discovery should be limited to a time period beginning on January 1, 1970 and to a geographic area consisting of the five Northwestern states involved in this action.

The plaintiffs are correct in contending that *Rule 26(b), Federal Rules of Civil Procedure*, has been liberally interpreted to permit broad discovery limited only by the requirement that the material or information sought be somehow remotely relevant to the general subject matter involved in the action. But the Federal Rules of Civil Procedure, including *Rule 26(b)*, "shall be construed to secure the just, speedy, and inexpensive **[*28]** determination of every action." *Fed. R. Civ. P. 1*. In keeping with the Rules of Civil Procedure and in the interest of facilitating the progress of this litigation, the plaintiffs' motion must be carefully scrutinized.

Plaintiffs have not advanced a persuasive reason for allowing discovery concerning occurrences taking place on or after January 1, 1965. They argue that the information they seek to discover is relevant to their claims of antitrust violations preceding the four-year statute of limitation because fraudulent concealment tolls the statute of limitation. But, as indicated previously in this Memorandum and Order, the claims based on events preceding the statute of limitations period are to be dismissed with prejudice. The plaintiffs also cite cases where courts have held that discovery can go beyond the period for damages permitted by the statute of limitations. See, e.g., *Quonset Real Estate Corp. v. Paramount Film Distributing Corp., 50 F.R.D. 240, 242 (S.D.N.Y. 1970)*. Yet other courts have recognized the need to limit the time frame of discovery. See, e.g., *Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., 373 F. Supp. 1225, 1228* ***[*29]*** *(S.D.N.Y. 1974)*. In balance, the plaintiffs have not presented sufficient justification for the burden that would be placed on the defendants and the court by extending the time frames for discovery. However, this conclusion does not preclude requests for discovery into matters occurrring on or after January 1, 1965 if a specific need can be demonstrated.

The plaintiffs' request for information concerning an area composed of four Canadian provinces and nine states in addition to Alaska, Idaho, Montana, Oregon, and Washington must also be denied. Only the five named states are involved in this litigation as parties. The alleged conspiracy involves only the above-named states and the four Canadian provinces. The request for information concerning states adjacent to the northwestern states to the south and east does not appear relevant to establishing antitrust violations and the results thereof, at least to the degree necessary to counterbalance the undue burden, delay, and possible obfuscation of issues that would result if such discovery were compelled. Other courts have not hesitated to restrict the geographic scope of discovery where such action was warranted. See, e.g., **[*30]** *Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, supra, at 1228*; *William Goldman Theatres, Inc. v. Metro-Goldwin-Mayer, Inc., 54 F.R.D. 201, 202 (E.D. Pa. 1971)*. As for the discovery of information concerning the Canadian provinces, the plaintiffs have alleged in their complaints that the conspiracy included the sales of fertilizer in four particular Canadian provinces. The defendants need not produce documents physically located in Canada, however, in order to prevent a possible conflict with Canada resulting from the Court's exercise of its power to compel discovery.

The defendants have stated that they would have this Court limit initial discovery to the geographic area composed of Alaska, Washington, Oregon, Montana, and Idaho,... and the period from January 1, 1970 through June 11, 1975, the four year statute of limitations period plus a one and one-half year period for "background" information. Defendants recognize that these initial limitations on discovery are not absolutes, and that one or more plaintiffs may have a particularized need for specific information outside these limits.

Defendants' Joint Memorandum in Opposition to Plaintiffs' **[*31]** Motions for Leave to Compel Discovery and to Propound Document Requests at 5. The limitation proposed by the defendants is reasonable, with the clarification that information that the defendants have within the five-state northwest region concerning the four Canadian provinces is discoverable. The burden on the defendants and the Court that would be caused by adopting the scope of discovery requested by the plaintiffs, the delay and possible obscuring of issues, and the possible frustration of antitrust goals are not outweighed by the remote relevance, if any, of that sought to be discovered by the plaintiffs. Therefore, their motion must be denied, but without prejudice.

It Is Ordered:

1. The plaintiffs' class is further delineated to exclude those who purchased fertilizer (a) from independent retailers, (b) from retailers who sold fertilizer on consignment from defendants, and (c) from cooperatives owned by the purchasers.

2. The order of August 9, 1979 permitting those who purchased commercial fertilizer from a defendant, or an entity owned or controlled by a defendant, either directly, or indirectly under circumstances that are the economic equivalent of a preexisting **[*32]** cost-plus contract is reaffirmed, and the matter is certified for interlocutory appeal pursuant to *28 U.S.C. § 1292(b) (1976)*.

3. Defendants' motion for summary judgment pursuant to *Rule 56, Federal Rules of Civil Procedure*, with respect to claims made by the State of Alaska is granted, and the State of Alaska's complaint and cause of action are dismissed. Defendants' motion for summary judgment pursuant to *Rule 56, Federal Rules of Civil Procedure*, with respect to claims made by plaintiffs Smith and Minoggie is denied.

4. Defendants' motion to strike allegations of fraudulent concealment is granted. Defendants' motion to dismiss claims antedating the four-year period preceding the filing of plaintiffs' complaint is granted, and the complaint and action with respect to those claims are dismissed.

5. The form of notice proposed by the defendants with the deletion of section IV of that form of notice is adopted for purposes of *Rule 23(b)(2), Federal Rules of Civil Procedure*. The notice to class members shall be disseminated following review of order numbered 2 above by the Ninth Circuit Court of Appeals on interlocutory appeal.

6. Plaintiffs' motion to compel discovery **[*33]** is denied.

United States v. Tracinda Inv. Corp.

United States District Court, Central District of California

September 14, 1979

No. CV 79-0174-AAH (SX)

Reporter

477 F. Supp. 1093 *; 1979 U.S. Dist. LEXIS 9779 **; 1979-2 Trade Cas. (CCH) P62,889

UNITED STATES OF AMERICA, Plaintiff, v. TRACINDA INVESTMENT CORPORATION and KIRK KERKORIAN, Defendants.

Core Terms

Finance, motion picture, stock, Mergers, acquisition, commerce, Firms, Concentration, producers, Statistics, Antitrust, Lecture, effects, exemption, distributors, Markets, Pricing, Managerial, Banking, picture, motion picture production, Proceedings, lessening, Clayton Act, anticompetitive, Edition, production and distribution, consultation, Industrial, Planning

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See 15 U.S.C.S. § 18.

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

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Clayton Act, Remedies**

Section 7 of the Clayton Act, 15 U.S.C.S. § 18, only extends to acquisitions made by corporations. 15 U.S.C.S. § 18.

Antitrust & Trade Law > Clayton Act > General Overview

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

A corporation may be found to be in violation of Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, where the stockholders make purchases on behalf of the corporation.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

Once a defendant demonstrates to the court that a stock purchase is solely for investment, then the burden is upon the plaintiff to prove that the defendant is not covered by the investment exemption under *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

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

The following 2-pronged test is used to determine whether a stock acquisition falls under the investment exception to the Clayton Act, *15 U.S.C.S. § 18*: (1) a factual determination of whether the acquisition is made solely for investment; and (2) a factual determination of whether the stock is being used by voting or otherwise to bring about or attempt to bring about a substantial lessening of competition.

Antitrust & Trade Law > Clayton Act > General Overview

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

To determine whether a stock acquisition is made solely for the purposes of investment, the court looks to whether the stock is purchased for the purpose of taking over the active management and control of the acquired company.

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

HN8[] **Relevant Market, Product Market Definition**

The Clayton Act, *15 U.S.C.S. § 18*, only prohibits acquisitions where the effect may be substantially to lessen competition, in any line of commerce in any section of the country. Accordingly, the court is first required to determine the relevant market, the area of effective competition. This determination is to be made by reference to a product market ("the line of commerce") and a geographic market ("the section of the country").

Antitrust & Trade Law > Clayton Act > General Overview

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

In determining whether the subject acquisition violates § 7 of the Clayton Act, *15 U.S.C.S. § 18*, a plaintiff must show that the particular acquisition is reasonably probable to effect a substantial lessening of competition or tend to create a monopoly. The court is required to look to the probable future effects of the acquisition.

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

A prima facie case of an antitrust violation is made out only if there is also proof that the industry is one where concentration is already great or has been recently increasing.

Counsel: **[**1]** Alan L. Marx, Dennis C. Cuneo, Washington, D. C., Robert J. Rose, and Leon W. Weidman, Los Angeles Field Office of the Antitrust Division, U. S. Dept. of Justice, Los Angeles, Cal., for plaintiff.

Wyman, Bautzer, Rothman & Kuchel by Frank Rothman, Terry Christensen, Los Angeles, Cal., and George Miron, Washington, D. C., for defendants.

Opinion by: HAUK

Opinion

[*1096] MEMORANDUM OF DECISION AND ORDER OF JUDGMENT FOR DEFENDANTS

Defendant Tracinda Investment Corporation (hereinafter "Tracinda") is a Nevada corporation, the stock of which is owned entirely by defendant Kirk Kerkorian (hereinafter "Kerkorian") with Kerkorian serving as its only Director. Kerkorian owns approximately 6% Of the outstanding common stock of Metro-Goldwyn-Mayer, Inc. (hereinafter MGM). Tracinda owns approximately 42% Of MGM's common stock. Thus, Kerkorian, individually, and through Tracinda, owns approximately 48% Of MGM's common stock and is its controlling shareholder.

As of November 17, 1978, Kerkorian owned 490,700 shares of the common stock of Columbia Pictures Industries, Inc., (hereinafter "Columbia"), representing approximately five percent (5%) of Columbia's outstanding common stock. On or **[**2]** about December 26, 1978, Tracinda commenced a tender offer for approximately 1,750,000 shares of the common stock of Columbia, representing approximately nineteen percent (19%) of Columbia's outstanding common stock. Tracinda's tender offer for Columbia stock was consummated on or about January 16, 1979. As a result of the tender offer and subsequent purchases, Kerkorian individually and through Tracinda now owns 2,438,700 shares of Columbia's common stock, representing approximately twenty-five percent (25%) of Columbia's outstanding common stock.

In January, 1979, plaintiff had originally sought a Temporary Restraining Order staying the Tracinda tender offer, alleging violation of Section 7 of the Clayton Act. *15 U.S.C. § 18*. [1] **[**3]** This Court denied that application for

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1. ***HN1***[] *15 U.S.C. § 18* in pertinent part provides:

Temporary Restraining Order **[*1097]** and Motion for Preliminary Injunction, [2.] but allowed plaintiff leave to amend its complaint to seek divestiture of the Columbia stock held by Tracinda. Plaintiff did amend its complaint to seek divestiture, still basing this action upon an alleged violation of Section 7 of the Clayton Act.

Court trial in this action commenced on August 1, 1979, and ended August 14, 1979. Having heard the testimony of the witnesses, having read the pleadings and all relevant papers in support of and in opposition to this action, having reviewed the evidence presented in this action and having heard from counsel for plaintiff and counsel for defendants, this court now enters its Memorandum of Decision and Order for Judgment, which shall constitute its findings of fact and conclusions of law herein pursuant to *Rule 52(a), F.R.Civ.P.*

NON-CORPORATE DEFENDANT

Plaintiff's First Amended Complaint names as defendants herein Tracinda and Kerkorian. The prayer of that complaint asks this Court to adjudge the acquisition of Columbia stock by Kerkorian And Tracinda to be in violation of Section 7 of the Clayton Act and to order Kerkorian And Tracinda to divest themselves of Their stock in Columbia. ***HN2***[] Since Section 7 of the Clayton Act only extends to acquisitions made by corporations, *Hudson Valley Asbestos Corporation v. Tougher Heating **[**4]** & Plumbing Co., Inc., 510 F.2d 1140, 1145 (2d Cir. 1975)*; *GAF Corporation v. Circle Floor Co., 329 F. Supp. 823, 829 (S.D.N.Y.1971)*, *Aff'd 463 F.2d 752 (2d Cir. 1972)*, Cert. dismissed *413 U.S. 901, 93 S. Ct. 3058, 37 L. Ed. 2d 1045 (1973)*, the first question to be confronted by this Court is whether plaintiff may properly seek divestiture under Section 7 of the Clayton Act of the Columbia stock personally purchased and owned by Kerkorian.

HN3[] A corporation may be found to be in violation of Section 7 where the stockholders made purchases on behalf of the corporation. GAF Corporation v. Circus Floor Co., supra. This case, however, does not present such a situation. Plaintiff did not allege, nor was there any evidence presented, that Kerkorian acquired any Columbia stock on behalf of Tracinda or any other corporation or that his personal acquisitions are otherwise attributable to Tracinda or any other corporation. Moreover, in its complaint, plaintiff only alleges the 19% Acquisition by Tracinda to be a violation of Section 7 and is silent in this respect upon the acquisitions by Kerkorian. [3.] Accordingly, plaintiff

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No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

[2.] *United States v. Tracinda Inv. Corp., 464 F. Supp. 660 (C.D.Cal.1979)*.

[3.] The Government's First Amended Complaint provides in pertinent part:

"V.

VIOLATION ALLEGED

17. The effect of the acquisition alleged in paragraph 6 may be substantially to lessen competition or to tend to create a monopoly in the aforesaid interstate trade and commerce in violation of Section 7 of the Clayton Act in the following ways, among others:

a. Actual and potential competition between MGM and Columbia will be substantially lessened; and

b. Concentration will be increased to the detriment of actual and potential competition."

Paragraph 6 alleges:

has not stated sufficient facts, nor presented evidence, upon which relief **[**5]** may be granted against defendant Kerkorian and, in respect to this defendant, the complaint is hereby dismissed for lack of jurisdiction. Thus this action may be properly maintained only for divestiture of the 19% Of Columbia stock acquired by Tracinda.

[6]** Even if the personal acquisitions by Kerkorian were properly before this Court, since each of the findings of fact and conclusions of law reached by this Court and contained herein apply equally to Tracinda And to Kerkorian, this Court must nevertheless **[*1098]** order judgment in favor of Kerkorian as well as Tracinda. Thus the findings and conclusions set forth below apply and cover both defendants in this action.

INVESTMENT EXEMPTION

Section 7 of the Clayton Act does not condemn every acquisition that may result in the prohibited anticompetitive consequences. An acquisition may escape a challenge under Section 7, even though it may be in violation of the section's substantive provisions, if it falls within the specific exemptions provided for in Section 7, one of which provides that acquisitions of stock where the acquisition is made solely for purposes of investment are not included in the prohibition of Section 7. [4.] 2 Von Kalinowski, Antitrust Laws and Trade Regulations § 15.03. Furthermore, it is necessary to make a clear distinction between an exemption and a defense. 7 Von Kalinowski, Supra., § 44.01(2). Some courts have made this distinction, noting that this provision **[**7]** constitutes an exemption rather than a defense, United States v. du *Pont & Co., 353 U.S. 586, 589, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*; *Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1218 (S.D.N.Y.1975)*, while another Court has failed to make this distinction, *Gulf & Western Indus., Inc. v. Great A. & P. Tea Co., Inc., 476 F.2d 687, 693 (2d Cir. 1973)*. In view of the specific language of this section it would appear that the former cases are correct.

HN5[] Once a defendant has demonstrated to the Court that a stock purchase was solely for investment, then the burden is upon the plaintiff to prove that the defendant is not covered by the investment exemption. As stated in *Anaconda Co. v. Crane Co., [**8] 411 F. Supp. 1210, 1219 (S.D.N.Y.1975)*:

> In cases where the "solely for investment" exemption does not apply, a plaintiff need only show a reasonable probability of a lessening of competition. . . . Thus the anti-competitive effects may be attacked in their incipiency. The statutory exemption, however, conspicuously omits this language. Once it is established to the satisfaction of the Court that the acquisition is "solely for investment," the statute requires a showing that the defendant is "using the (stock) by voting or otherwise to bring about or in attempting to bring about, the substantial lessening of competition . . . ."

Thus, whenever the pleadings of the parties and the evidence adduced at trial in a Section 7 action bring forth facts which reasonably support a determination that the purchase of stock was "solely for investment," then this exemption issue must be addressed by the Court, regardless of whether it has been raised as an affirmative defense by defendants.

Here plaintiff submitted as Exhibit 262, the "Stockholders' Agreement" a contract entered into by Kerkorian and Tracinda, and by Columbia, at the time the tender offer was extended. This contract **[**9]** specifically recites that the acquisition of Columbia stock was "solely for investment" and "not with a view to exercising control over the Company" (Columbia). This contract also limits the extent to which Kerkorian may utilize the newly acquired stock, specifically providing that in a shareholders vote for directors, Kerkorian shall vote his stock in favor of the nominees for election of directors as proposed by the management of Columbia, and shall cast this vote proportionately to the other shares present at the meeting and voting in favor of such nominees. Additionally, the contract places a limit on Tracinda and Kerkorian's Columbia stock ownership at 25.5%. Accordingly, this contract

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"6. On or about December 26, 1978, defendant Tracinda began its tender offer for approximately 1,750,000 shares of the common stock of Columbia Pictures Industries, Inc. (hereinafter referred to as "Columbia'), representing approximately 19% Of Columbia's outstanding common stock. The tender offer is scheduled to be consummated on or about January 16, 1979."

4. ***HN4***[] *15 U.S.C. § 18* in pertinent part provides in the first sentence of paragraph three thereof:

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.

in and of itself raises the issue of the investment exemption in the first sentence of the third paragraph of Section 7 of the Clayton Act, which the Court is then required to determine at the onset, before it **[*1099]** takes up or engages in any meaningful examination of the substantive prohibitions contained in the first and second paragraphs of Section 7.

In discussing this investment exemption, the cases have not specifically used any particular approach. The statute and the cases, however, **[**10]** do support ***HN6***[] a 2-pronged test: (1) a factual determination of whether the acquisition was made solely for investment; and (2) a factual determination of whether the stock is being used by voting or otherwise to bring about or attempt to bring about a substantial lessening of competition. United States v. du *Pont & Co., supra*; *Pennsylvania R. Co. v. Interstate Commerce Commission, 66 F.2d 37, 39-40 (3d Cir. 1933)* Aff'd per curiam, *291 U.S. 651, 54 S. Ct. 559, 78 L. Ed. 1045 (1934)*; *Swift & Co. v. Federal Trade Commission, 8 F.2d 595, 599 (7th Cir. 1925)*; *Anaconda Co. v. Crane Co., supra, at 1218-1219*; *Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 314 (D.Conn.1953)*.

Before the Court can make a determination of whether the stock acquisition here was made solely for the purpose of investment, it is necessary to determine what is meant by the term "investment" as used in the context of Section 7. In one case it was noted that the word "investment" is one of broad application, including in its various uses purchases of practically every kind and description and for every purpose. It ordinarily signifies the use of money to purchase property, personal or real, for any purpose from **[**11]** which income or profit is expected, presently or in the future, speculatively or permanently. [5.] **[**12]** *Pennsylvania R. Co., v. Interstate Commerce Commission, supra, at 39*. The factors courts have viewed to make this factual determination are as varied as the extent of human endeavor. Courts have looked at such factors as subsequent agreements restricting the use of the newly acquired stock, *Anaconda Co. v. Crane Co., supra, at 1218*; and the extent to which the defendant already maintains a diversified investment portfolio as well as the price paid for the stock in comparison to the market value of the stock. *Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 316 (D.Conn.1953)*. The ultimate definitive factor ***HN7***[] the courts have looked to, however, is whether the stock was purchased for the purpose of taking over the active management and control of the acquired company. [6.] *Anaconda Co. v. Crane Co., supra, at 1218-19*; *Hamilton Watch Co. v. Benrus Watch Co., supra, at 316*; *United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 556 (N.D.Ill.1968)*; Gulf & Western Indus., Inc. v. Great A. & P. Tea Co., Inc., supra, at 674; *Swift & Co. v. Federal Trade Commission, supra, at 598*.

Acquiring the stock of a company for the purpose of control and acquiring the stock for the purpose of investment are not necessarily inconsistent, nor are they mutually exclusive concepts in the practical business world. The use of these concepts in the context of Section 7, however, must be restrained by the legislative intent of that statute. The purpose of Section 7 was to arrest combinations in their incipiency and before consummation. United States v. du **[*1100]** *Pont & Co., supra, 353 U.S. at 597, 77 S. Ct. 872*. **[**13]** Where by stock acquisition one corporation controls another, a combination of the two companies is necessarily created. Where control is nonexistent, there is no combination. Accordingly, in the context of a Section 7 action, this control-investment distinction is not only a valid dichotomy, but is a most useful judicial tool in tackling the investment exemption issue.

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5. The Government asserts that the test for "investment" should turn solely on whether the effect of the acquisition is or may be substantially to lessen competition. Such an interpretation would give absolutely no meaning to the 2-pronged specific language Congress deliberately chose to include in the investment exemption and it would completely obliterate the investment exemption. Thus this Court doubts the validity of such an approach. In view of this Court's conclusions in respect to the effect of this acquisition, even if this approach were taken, the Court's decision for defendants herein would not change on this investment exemption issue.

6. This is not to say that the only two possible purposes are investment or control. In United States v. du *Pont & Co., 353 U.S. 586, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)*, the Court found that the acquisition by du Pont of General Motors stock was not made solely for investment based upon du Pont's use of its General Motors stock position to remain a major supplier to General Motors. In the present action, however, since the Government's position is that defendants purchased this stock for control as opposed to investment, this control-investment distinction is relevant.

We find that there has been absolutely no showing that the stock acquisition herein in question was made for the purpose or even with the slightest intent of controlling Columbia. The evidence clearly shows that both Kerkorian and Tracinda made their stock acquisitions solely for investment, and with no intention of controlling Columbia. Central to this finding is the already mentioned contract between the defendants and Columbia, placing in concrete written form the assurances Kerkorian and Tracinda had previously orally given to the Columbia directors and management. We also properly rely upon and cite Kerkorian's reaffirmation of that contract during his testimony at the trial.

The contract bears a striking resemblance to the consent order submitted by the defendants in the case of *Anaconda Co. v. Crane Co., 411 **[**14]** F. Supp. 1210 (S.D.N.Y.1975)*. That case arose out of an offer by Crane Company to exchange certain subordinate debentures to be issued by it for five million common shares (22.6%) of the Anaconda Company, a corporation which owned a major competitor of Crane. In response to an action filed by Anaconda to restrain that offer, Crane submitted a consent order providing that Crane would be limited to the 22.6% Acquisition and that Crane would not seek representation on the Board of Directors of Anaconda. *Id. at 1217*. On the basis of the consent order, the Court in that case determined that Crane did intend to hold the Anaconda stock solely as an investment. *Id. at 1218*.

As in the Anaconda case, the defendants here have voluntarily restricted themselves in the amount of stock they can acquire and in the extent to which they may utilize their stock to vote for directors. Moreover, unlike the Anaconda case where the consent order was submitted only after the offer was challenged, the contract here was agreed to well before Court action was instituted herein, and serves as even stronger evidence that at the time of the acquisition, the stock purchase was made solely for investment.

The Government **[**15]** attempts to rebut this overwhelming demonstration by arguing that the contract, upon defendants' insistence, will expire in three years. [7.] The Government claims that defendants' insistence upon this time limitation shows an intent other than solely for investment. Additionally, the Government asserts that since the defendants will be free of these restrictions at the end of the three year period, they are of little effect and the Court should make a determination based upon the circumstances that will exist After the termination of the three year period. The fact that this contract will last three years, as opposed to ten, twenty or fifty years, bears very little weight upon the ultimate determination of intent at the time of acquisition, although the Court does take it into consideration. Defendants' willingness to enter into any such agreement providing for such restrictions for a reasonable period of time clearly shows defendants' intent at the time of the acquisition. There is no special magic to a ten year or a five year or even a three year commitment. Furthermore, the fact that Kerkorian wanted a definite time limit only shows that he did not wish to be restricted in perpetuity, **[**16]** foreclosing all choices in the future. An unwillingness so to restrict oneself in order to maintain some flexibility is not inconsistent with a present intent to purchase solely for investment. Furthermore, this Court will not engage in the **[*1101]** guessing game argued by the Government. We do not know, in fact no one knows or can know, what conditions will exist upon the termination of this contract, and we refuse to base any judgment on pure speculation. [8.]

[17]** The Government further argues against the applicability of the investment exemption here by pointing to a consultation provision in the Stockholders' Agreement. This provision requires Columbia to consult with Kerkorian on certain major and material financial matters and any changes in top management. The Government seems to argue that this shows an intent to control, and that through such consultation and other business and social meetings Kerkorian will or could dominate the present directors and management to such an extent that he would control Columbia. The Government, however, ignores that portion of the Agreement that provides that "(n)othing in

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[7.] Columbia wanted the restrictions to last ten (10) years. The defendants would only agree to a three (3) year period.

[8.] The Government also pointed out that the restrictions on Kerkorian and Tracinda could terminate at any time because the contract provides for an early termination in the event of the withdrawal of certain key managerial persons from employment at Columbia. Yet here again for the Court to base its judgment on this possibility would call for speculation: speculation concerning whether these key persons will ever withdraw, and speculation concerning the conditions that would exist at the time of any such withdrawal. Actually, this contract provision gives us further evidence of defendants' investment intent, since it clearly illustrates defendants' undoubted commitment and loyalty to the present management of Columbia.

this section shall limit the absolute and unfettered discretion of (Columbia) after such advice and consultation to act on such matters in any manner it deems appropriate." Plaintiff's Exhibit 262, at p. 5. This provision clearly convinces us that the power to control always has been, now is, and will continue to be in the present top management and Board of Directors. Furthermore, a consultation provision such as this one is not inconsistent with a present intent that the acquisition is solely for investment. Any substantial investor, **[**18]** acting reasonably, would want to be kept informed about the possible major financial and top management changes contemplated in any corporation where he has placed his money.

Likewise, the Court gives little credence to the second main thrust of plaintiff's argument here, that Kerkorian will control Columbia through his influence over the present management and directors of Columbia. The Court has had the opportunity to observe two members of this group testifying during the course of this trial, Francis T. Vincent, Jr., President of Columbia, and Herbert A. Allen, a member of the Board of Directors of Columbia. Both of these men are confident, intelligent, articulate, self-assured, alert and responsible men. It is inconceivable to this Court how anyone could argue that these men could be mere "toadies" or "lackies" serving anyone, even Kerkorian. It is true that both of these men testified that they will listen to Kerkorian's advice and consultation. This inclination, however, is not the result of Kerkorian's stock position, but is in recognition of Kerkorian's vast knowledge and experience in the business world. [9.] Accordingly, the uncontradicted evidence clearly shows that the **[**19]** stock acquisition in question was made solely for investment purposes and was not made with any intent to take over active managerial control of Columbia, or for any purpose other than investment.

As to the second prong of the investment exemption test, there can be no doubt. The Government failed to produce a single scintilla of evidence to show **[**20]** that Kerkorian has used, is using, or is threatening **[*1102]** to use, the stock by voting or otherwise, to bring about or in attempting to bring about, the substantial lessening of competition. [10.] On the contrary, all the witnesses testified that there has been no actual or threatened lessening of competition since the acquisition. Accordingly, it is the determination of this Court that this acquisition of Columbia stock comes squarely within the investment exemption and thus no violation of Section 7 of the Clayton Act can be shown. And in fact none has been shown.

[21]** POTENTIAL ANTICOMPETITIVE EFFECTS

This Court could but does not rest its decision and judgment solely on the investment exemption. The evidence clearly has shown that there will be no reasonably probable anticompetitive effects of the acquisition in question. In arriving at this conclusion it is necessary to review the evidence and applicable law with respect to the substantive prohibitions contained in the first two paragraphs of Section 7.

A. INTERFACE BETWEEN COLUMBIA AND MGM

Columbia is engaged in the production and distribution of theatrical motion pictures, television series and features, and phonograph records and tapes. Columbia also manufactures and sells amusement games through its Gottlieb

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[9.] When one considers that even if divestiture were granted with respect to the Tracinda stock, Kerkorian would still be a substantial stockholder with 5% And as such would have access to the management in order to voice his opinion, the Government's position that the additional 19% Of Columbia stock gives Kerkorian a greater voice is absurd in view of the stature of the people in the management of Columbia. Indeed the acquisition by Tracinda actually undermines Kerkorian's position since the Stockholders' Agreement restricts the use of Kerkorian's stock, as well as Tracinda's, while prior to that Agreement there were no restrictions on Kerkorian's personal holdings.

[10.] In the substantive provisions of the first two paragraphs of Section 7, Congress showed concern for the probable future consequences of the acquisition by utilizing the language "May be substantially to lessen competition." On the other hand, with the investment exemption, Congress exhibited a concern for the past and present effect of the acquisition by utilizing the language "and not Using the same . . . to bring about . . . the substantial lessening of competition." Thus while evidence of competitive conduct since the acquisition may not be a determining factor when discussing whether a violation of the substantive provisions of Section 7 has occurred, *Ash Grove Cement Co. v. F.T.C., 577 F.2d 1368, 1378-1380 (9th Cir. 1978)*, this evidence is of primary concern when determining the application of the investment exemption. See *Anaconda Co. v. Crane Co., 411 F. Supp. 1210, 1219 (S.D.N.Y.1975)*.

division, prints and sells sheet music, and operates radio and television stations. Columbia distributes both motion pictures produced by others and motion pictures which Columbia itself produces. In recent years, approximately one-fourth to almost one-half of the motion pictures distributed by Columbia have been produced by others.

MGM owns and operates two hotel-casinos in Nevada, has begun construction of a third hotel-casino in New Jersey, owns and operates a laboratory which **[**22]** processes motion picture film, owns and operates a sound studio where space is leased to others, owns an office building where space is leased to others, owns a library of motion pictures, produces motion pictures and other programs intended for initial viewing on television, and produces theatrical motion pictures. The theatrical motion pictures produced by MGM are distributed in the United States and Canada by United Artists Corporation (hereinafter "UA"). Cinema International Corporation (hereinafter "CIC") distributes MGM pictures in other countries.

MGM was a distributor of motion pictures to theatres until it went out of that business in approximately October 1973. Since that time MGM has not distributed to any theatre any motion picture, whether produced by MGM or by any other producer. When MGM went out of the distribution business it sold all its distribution facilities located in the United States and abroad and severed its employment relationship with every one of the persons employed in its distribution operations, except for a few persons who were offered positions in other parts of MGM's business. In accordance with a contract entered into between MGM and UA in October **[**23]** 1973, MGM pays UA 22.5 percent of the gross film rentals of each MGM-produced picture, as a fee for UA's distribution of the picture. None of MGM's capital is invested in any facility for the distribution of motion pictures. Since it went out of the distribution business, MGM has not entered into any **[*1103]** contract with any exhibitor of motion pictures to license the exhibition of any motion picture.

At the time MGM left the business of distribution, it made a major change in its production arm as well. At that time, MGM decided to reduce substantially its production of motion pictures. From late 1973 to date MGM has produced only two to five pictures in each year, while in the past MGM had produced three to four times that many motion pictures in each of the prior five years. MGM hoped that by this action it could maintain better control of the quality of its product.

It is in the context of potential competition between these two companies that this acquisition is to be judged. As noted in *Brown Shoe v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, ***HN8***[] the Clayton Act only prohibits acquisitions where the effect may be substantially to lessen competition, **[**24]** "in any line of commerce in any section of the country." Accordingly, this Court is first required to determine the relevant market, the area of effective competition. This determination is to be made by reference to a product market ("the line of commerce") and a geographic market ("the section of the country"). *Brown Shoe Co. v. United States, supra, at 324, 82 S. Ct. 1502, 1523*.

B. THE PRODUCT MARKET

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Within this broad market, however, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Brown Shoe Co. v. United States, supra, at 325, 82 S. Ct. 1502*.

Throughout its complaint, plaintiff referred to the product **[**25]** market as the production and distribution of motion pictures. In pretrial and in trial, plaintiff attempted to narrow this product market in two respects: (1) to motion pictures grossing over one million dollars and (2) to "quality" motion pictures. This Court finds both of these attempts to narrow the product market inappropriate when measured against the Brown Shoe criteria.

Plaintiff's contention that only motion pictures grossing over one million dollars are in the effective area of competition draws an arbitrary distinction with no basis in fact. Relative success of a particular product is not a factor contained in the Brown Shoe analysis. To argue that motion pictures grossing one million dollars compete with each other while motion pictures grossing $ 999,999 do not compete is a flight of fantasy this Court will not take. This distinction is not recognized by the public; whether grossing more than one million dollars, or grossing less, each motion picture is manufactured with the same facilities; as a product line, each does not have characteristics peculiar to itself rendering it generally noncompetitive with others; and each is not directed toward a distinct class of customers.

[26]** This same analysis is equally applicable to the "quality" distinction asserted by plaintiff. Again, this distinction bears little relation to reality. Time and again this Court was presented with examples of low-budget or "non-quality" motion pictures made by independent or minor producers that were very successful in the market place and that effectively competed with the high budget or "quality" motion pictures produced by various of the major producers. The distinctions plaintiff has attempted to draw are as unrealistic in this case as the "price/quality" differences rejected in the Brown Shoe case. Accordingly, this Court finds the relevant product market to encompass motion pictures generally.

Plaintiff also has maintained throughout this action that production And distribution **[*1104]** of motion pictures represents a cluster of activities composing a single line of commerce. The concept of a "cluster of activities" giving rise to a single line of commerce has previously been raised in *United States v. Philadelphia National Bank, 374 U.S. 321, 356, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*, and in *United States v. Phillipsburg National Bank, 399 U.S. 350, 359, 90 S. Ct. 2035, **[**27]** 26 L. Ed. 2d 658 (1970)*. In these cases, the cluster of activities, such as demand deposits, savings and time deposits, consumer loans, commercial and industrial loans, real estate mortgages, trust services, safe deposit boxes and escrow services were customarily provided by commercial banks, the Court finding the line of commerce to be "commercial banking."

A review of these facts leads to the conclusion that plaintiff herein has not properly applied this concept of a "cluster of activities." The activities in the two bank cases were all activities that would be provided a customer at the same level of a vertical chain of a particular product. In the present action, however, the activities involved, production and distribution, are not on the same level but are on two different vertical steps leading ultimately to the exhibition of motion pictures to the public. Thus this action is more closely aligned with the Brown Shoe case. The Brown Shoe case dealt with the merger of two large shoe companies. Each shoe company engaged in both the manufacturing and retailing of shoes, again two different steps in the vertical chain of this particular product. The Court in Brown Shoe did not define **[**28]** the line of commerce as the manufacture and retail of shoes. Rather the line of commerce was defined by the product itself, men's, women's and children's shoes, separately. It is interesting to note, moreover, that in discussing the horizontal effects of the merger, both the lower court and the Supreme Court considered manufacturing and retailing separately and not jointly. Thus, implicitly, if not expressly, both courts by their analysis found these two different steps on the vertical chain of this product to be two separate and distinct lines of commerce.

In the present action, the evidence is overwhelming and virtually without contradiction that motion picture production, motion picture distribution, and motion picture exhibition are each separate and distinct lines of commerce within the commercial realities of the motion picture industries. The evidence is equally overwhelming and again virtually uncontradicted that the production and distribution of motion pictures, taken together, is not a single line of commerce within the commercial realities of the motion picture industry. Production and distribution are recognized as separate and distinct activities; each utilizes separate **[**29]** and distinct facilities; and each has characteristics peculiar to itself rendering it generally noncompetitive with the other.

In the present action, production of motion pictures is the only relevant line of commerce. As stated earlier, in determining the relevant line of commerce, the Court's attention should be directed to the effective area of competition. Columbia engages in both the production and distribution of motion pictures. There is no question, however, that since 1974, MGM has not engaged in motion picture distribution.

Plaintiff has attempted to assert that MGM still is in the business of distribution of motion pictures based upon its relationship with UA. Under the terms of the distribution contract between MGM and UA, the power of approval of the policy decisions is mutual while UA has control over the day to day operation of the distribution of MGM motion pictures. It is common in the motion picture industry for producers to participate with their distributors in making the decisions regarding key aspects of the distribution process, such as the release date, the release pattern, the selection of theaters to exhibit the picture, the advertising budget, and the terms **[**30]** of contracts with exhibitors. That practice is reflected in the contracts between producers and distributors, such as MGM's distribution agreements with UA and CIC; a producer **[*1105]** such as MGM does not become a distributor by reason of such joint participation with its distributor in such distribution decisions.

Some producers engage independent contractors called "producers' representatives" to assist them in dealing with distributors on such matters as release patterns, advertising campaigns, marketing strategies, and other matters relating to the distribution of the producer's picture. MGM uses several of its employees to perform these same functions. The use of "producers' representatives," whether they be independent contractors or employees, does not transform a producer into a distributor.

It is clear from the evidence at trial that MGM does not compete with Columbia in distribution and has not done so since late 1973. Accordingly, the only effective area of competition herein involved is the production of motion pictures. It inevitably follows that the relevant product market, or line of commerce, is production; Not production And distribution.

C. GEOGRAPHIC MARKET

[31]** The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant. *Brown Shoe Co. v. United States, supra, 370 U.S. at 336, 82 S. Ct. 1502*. The Court has also looked to the area where the effect of the merger on competition will be direct and immediate. *United States v. Marine Bancorporation, 418 U.S. 602, 619, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1973)*. Additionally, the relevant geographic market is the market area in which the seller operates "and to which the purchaser can practically turn for supplies." *United States v. Phillipsburg National Bank & Trust Co., supra, 399 U.S. at 357-358, 90 S. Ct. at 2043*; *United States v. Philadelphia National Bank, supra, 374 U.S. at 359, 83 S. Ct. 1715*; *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

The evidence shows in the present action that **[**32]** the market for production of motion pictures is world-wide. Foreign produced motion pictures directly compete in the United States with films domestically produced. Furthermore, domestic production companies derive a substantial portion of their income from foreign distribution and this in turn substantially affects the ability of these companies to compete domestically. Accordingly, the most relevant geographic market for motion picture production in this action is the entire world, since that is the market area in which motion picture producers operate and to which the distributors of motion pictures can practically turn for supplies of motion pictures. [11.]

[33]** D. ABSENCE OF ANTICOMPETITIVE EFFECT OR PROBABLE ANTICOMPETITIVE EFFECT

HN9[] In determining whether the subject acquisition violates Section 7, this Court is bound by prior case law which has held that a plaintiff must show that the particular acquisition is reasonably probable to effect a substantial lessening of competition or tend to create a monopoly. This section does not require certainty concerning the proscribed effect, neither does the statute deal with ephemeral possibilities. This Court is required to look to the probable future effects of the acquisition. *Brown Shoe, supra, 370 U.S. at 323, 82 S. Ct. 1502*.

[11.] This is not to say that this Court will look to the world-wide effects for all purposes. This Court is well aware of the limits contained within Section 7 when it refers to any section of the Country. The Court's conclusion with respect to the geographic market rests in a recognition of the extent to which the world-wide nature of this industry effects competition here in the United States.

Prior cases have looked at various factors in making this determination. The Brown Shoe case was primarily concerned with the **[*1106]** relative market share which companies may control by merger and also the trend in that particular industry toward an increased concentration of the market by the top producers and retailers. *Brown Shoe Co. v. United States, supra, 370 U.S. at 343, 82 S. Ct. 1502*. Later cases, however, have moved away from this strict reliance on statistics and toward a more comprehensive view of the industry. The Court has stated that Congress indicated **[**34]** plainly that a merger had to be functionally viewed, in the context of its particular industry. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market its structure, history and probable future can provide the appropriate setting for judging the probable anticompetitive effect of the merger. *United States v. General Dynamics Corp., 415 U.S. 486, 498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1973)*. The primary question then is the effect on competition generally in an economically significant market.

In the present action, plaintiff has utterly failed to show any anticompetitive effect. All the credible evidence points to the opposite direction, that there will be no substantial lessening of competition as a result of the subject acquisition. There has been no evidence that competition between MGM and Columbia will be affected, let alone evidence that competition in the line of commerce would be affected. Much of the prior case law speaks in terms of merger. While defendants have effective control of MGM, they do not control Columbia **[**35]** by reason of this acquisition. As discussed earlier, defendants are limited in their use of the stock in question and the day to day operation of Columbia is and will remain in the hands of the present management. Accordingly, at the present time it is absurd to talk of merger. The evidence clearly and uncontradictorily points to the conclusion that these two companies will remain separate companies, operating separately and competing against each other.

Plaintiff has suggested the existence of anticompetitive effects in only two particulars: (1) defendants will use their position to gain access to competitively sensitive information to better the position of one company to the detriment of the other; and (2) defendants will use their control of MGM to cease production of motion pictures in that company. [12.] **[**37]** Neither of these fears are supported by the evidence. The Stockholders' Agreement entered into by the defendants and Columbia specifically restricts the defendants' access to competitively sensitive information. [13.] Furthermore, it is ludicrous to argue that the defendants, who have substantial investments in both companies, would do anything that would competitively hurt either **[**36]** company. This is not a situation where the investment in the acquired company is minor compared to the investment in the acquiring company. Additionally, it is equally illogical to suggest that the management of Columbia would allow the defendants access to competitively damaging information when they are not required to do so. In regard to the second alleged anticompetitive effect, all the credible evidence showed that both Columbia and MGM are still in the motion picture **[*1107]** production business with no proclivities to lessening production below present levels. Accordingly, the Court is absolutely convinced that the subject stock acquisition will not result in a substantial lessening of competition.

Even assuming a merger of MGM and Columbia, plaintiff has failed to show the requisite anticompetitive effect. Plaintiff primarily relied upon a statistical showing of relative market shares. These statistics were taken from data published annually by Variety, a newspaper specializing in news events in the entertainment industry. Annually, Variety publishes lists purporting to show all motion pictures having gross rentals [14.] in the United States and

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12. The possible vertical aspects of this acquisition have never been raised by the Government and are not properly before the Court. Even if these effects were before the Court, this decision would not be altered. The present contract between MGM and UA prevents any vertical consolidation between MGM and Columbia. This contract runs through 1983. This Court will not speculate with respect to what conditions will exist at that time and will not base this ruling on such speculation. Furthermore, the vertical aspects are taken into consideration later in the Court's conclusions with regard to the competitive effect of this acquisition even if the line of commerce is assumed to be production And distribution, which it is not.

13. If divestiture were to be ordered with respect to Tracinda's holdings, Kerkorian would still retain a substantial interest in Columbia and possibly would no longer be restricted by the Stockholders' Agreement. Thus there might arguably be less of a likelihood that competitively sensitive information will fall into the wrong hands so long as Tracinda retains its stock and the Stockholders' Agreement remains in effect.

14. As used in the context of the Variety lists, gross rentals means the total amount a distributor receives from an exhibitor for one particular motion picture.

Canada of one million dollars or more, together with a figure purporting to be the gross rentals for each particular picture.

[38]** This data, however, is totally irrelevant for use in this action. The effective area of competition herein relevant is the production of motion pictures. This data does not even purport to represent relative market shares in this line of commerce. The figures contained in the Variety data are the rentals received by the Distributors not the producers. It may be argued that the Court could extrapolate upon this data to determine various producers' market share, since many of the major producers distribute their product through their own company and as a result the distribution figures are relevant in determining production figures. This, however, is folly, because while some major producers distribute through their own companies, the distribution arms of these major companies also distribute many motion pictures produced by other companies. Additionally, the terms of these distribution agreements between the distribution arms of major companies and the independent producers vary considerably; as a result, any sort of factual division of these revenues between distribution and production is impossible without more specific data. The use of the Variety lists as a proxy for dollar volume **[**39]** of commerce would ignore these facts and attribute to each distributor the full rentals, even if that distributor kept only its fee and its expenses, and remitted the balance to an unrelated and independent producer. Two important distortions would occur: (1) A highly disproportionate amount of the dollar volume of commerce would be attributed to distributors and therefore improperly imply a degree of concentration among those firms; and (2) Columbia's market position would be overstated because it would incorrectly attribute to Columbia as a producer the revenues Columbia remits to the independent producers whose many pictures it distributes.

In any event, Variety lumps together the totals for the United States and Canada, whereas the uncontradicted testimony of one of plaintiff's own witnesses was that there can be very sharp differences in the popularity of particular pictures in the United States and in Canada. [15.] Since this data does not represent a measure of the relevant line of commerce, it is irrelevant for these proceedings.

[40]** Assuming this data is relevant, its obvious unreliability leads this Court to totally discount it. This data is derived from lists compiled by Variety reporters from data supplied voluntarily by some, but not all distributors, on a non-uniform basis, subject to no systematic verification, but subject to such adjustments as the intuitive judgments of Variety reporters dictate. Mistakes are common. For example, the 1978 Variety list of annual film rentals, while purporting to report every motion picture having rentals in the United States and Canada of one million dollars or more in 1978, omitted at least 29 pictures having **[*1108]** total rentals of $ 195.3 million, including "Saturday Night Fever," a Paramount picture having gross rentals of about $ 71.5 million. "Saturday Night Fever," if not omitted, would have been Variety's second ranking picture of 1978.

Plaintiff's efforts to supply some of the omitted film rental data during trial, and after defendants had pointed out many Variety deficiencies, failed to discharge plaintiff's burden to show the volume of commerce in the relevant line of commerce. The corrections were themselves based on other stories appearing in Variety, **[**41]** the accuracy of which is subject to many of the doubts which apply to the Variety lists initially relied on by plaintiff.

In this case, there is no market share data at all on production; and only totally unreliable data has been offered by plaintiff as to distribution, and as to "production and distribution." Moreover, plaintiff's so-called "production and distribution" data, as modified at trial, would not, even if reliable, make out a Prima facie violation of Section 7. Even plaintiff's revised data, as shown on plaintiff's exhibit 315, set forth for the period 1975-1978 an MGM average share of 2.2% And a Columbia average share of 9.7%, well below the level normally considered by plaintiff for legal action under its Merger Guidelines. 1 CCH 1977 Trade Reg. Rptr. P 4510, at 1, 6, pp. 6881, 6884. Furthermore, the data, as shown on defendant's exhibit GGGG, set forth for the period 1974-1978 an MGM average share of 1.75% And a Columbia average share of 6.72%, even further below plaintiff's Merger Guidelines. While those Guidelines do not bind this Court, they reinforce this Court's conclusion that no tendency toward a lessening a competition will ensue

[15.] In its complaint, the Government alleged other uses for motion pictures to be for commercial television broadcasts, pay cable television broadcasts, and for use in the home video disc and cassette playback units. The Variety lists do not purport to measure the income from these sources. Thus, again, the relevance of this data must be questioned.

from the subject acquisition. **[**42]** Accordingly, while the Court has rejected plaintiff's theory that the production and distribution of motion pictures constitutes a single line of commerce, if the Court were to assume the existence of such line of commerce and if the Court were to assume the merger of MGM and Columbia, there would be no reasonable probability of a substantial lessening of competition or any tendency to create a monopoly in any geographic market, either in the United States, any section of the United States or throughout the world.

The history, structure and probable future of the motion picture industry support this Court's conclusions. There are hundreds of firms (even thousands) engaged in motion picture production and many new firms have entered motion picture production recently. There are no barriers to entry into the business of motion picture production. A relatively small investment is required to enter motion picture production, and all of the elements necessary to carry on the business of motion picture production are in plentiful supply and easily available, including numerous sources for financing production. Approximately four hundred theatrical motion pictures are produced in the United **[**43]** States alone each year and rated by the Motion Picture Association of America Rating Service. According to the Motion Picture Association of America, about three-fourths of the rated motion pictures are released each year.

Motion picture producers individually and as a whole lack significant market power because many other forms of entertainment and leisure collectively constitute a good substitute for consumer expenditures on motion pictures. Any numerical expression of a firm's share of the motion picture production market, while not provided by plaintiff at the trial herein, would necessarily depict significantly less market power than the same numerical expression would depict in industries where there are no individual or collective substitutes for the product. There are no dominant firms engaged in the production of motion pictures who engage in interdependent or parallel behavior with the capacity effectively to determine price and total output of goods and services.

Plaintiff attempted to show a dominance by eight major companies. Plaintiff's data, however, failed to show a highly concentrated market. On the contrary, the evidence has shown a dynamic market with heavy competition **[**44]** from outside these major **[*1109]** eight and within these majors, with one additional company, American International Pictures, on the verge of being recognized, and indeed being recognized, as a "major" and an additional company, Associated Film Distributors, thereby entering the market on the scale of a "major" company.

In ranking the various companies plaintiff has placed Columbia fifth and MGM ninth among the major companies. There is little argument concerning the placing of Columbia within the "major" companies. MGM's placement, however, is based on nostalgia rather than present day fact. MGM, since 1974, [16.] has produced approximately four theatrical motion pictures per year, or approximately one percent or less of the total number of theatrical motion pictures produced in the United States alone. While MGM is an important producer, it is by choice no longer one of the major companies, as compared to other production companies.

[45]** Even taking into consideration the distribution of motion pictures, the structure and history of this market shows dynamic competition. Entry into motion picture distribution, while not as easy as entry into motion picture production, is also relatively easy. There are a large number of firms, probably more than one hundred, engaged in motion picture distribution in the United States alone. Recent entrants into motion picture distribution, such as Associated Film Distributors, demonstrate that entry is not difficult. This healthy competition, and lack of substantial barriers to entry, limit the ability of any company or companies to establish a monopoly or exert market power. Motion picture distributors individually and as a whole lack significant market power because many other forms of entertainment and leisure collectively constitute a good substitute for consumer expenditures on motion pictures. There are no dominant firms engaged in the distribution of motion pictures who engage in interdependent or parallel behavior with the capacity effectively to determine price and total output of goods and services.

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16. In determining whether there has been a violation of Section 7, this Court is primarily concerned with the probable future effects of the acquisition. The present condition of the industry and the participants to the acquisition is of chief importance. Evidence of past conditions can also be helpful in determining future effects. The further one retreats into the past, however, the less relevant will be the evidence retrieved. In view of MGM's major reorganization of late 1973, this Court holds that the statistics and other evidence alleged to show the volume of commerce and the market shares of individual firms in the motion picture industry in years prior to 1974 do not represent current conditions and do not aid in predicting the probable competitive effects of defendants' acquisition of Columbia stock. Accordingly, such evidence of years prior to 1974 is held to be inadmissible.

Plaintiff has failed to prove that there is concentration in the relevant **[**46]** market. Plaintiff has therefore failed to make out ***HN10***[] a Prima facie case of an antitrust violation. Such a case is made out only if there is also proof that the industry is one "where concentration is already great or has been recently increasing . . . ." *United States v. General Dynamics Corp., 415 U.S. 486, 497, 94 S. Ct. 1186, 1194, 39 L. Ed. 2d 530 (1974)*. In any event the production of motion pictures is not an industry where concentration is already great or has been recently increasing. Thus, no Prima facie case could have been made solely by the use of statistics asserted by plaintiff to show MGM's and Columbia's shares of "production and distribution."

Even if plaintiff had shown that motion picture production were greatly concentrated or recently increasing in concentration, and even if plaintiff had shown the combined share of MGM and Columbia of either of such markets, such market-share statistics would have given "an inaccurate account of the acquisition's probable effects on competition." *United States v. Citizens and Southern National Bank, 422 U.S. 86, 121-122, 95 S. Ct. 2099, 2119, 45 L. Ed. 2d 41 (1975)*; *United States v. Marine Bancorporation, 418 U.S. 602, 631, 94* ***[**47]*** *S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*; *United States v. General Dynamics Corp., 415 U.S. 486, 497-498, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)*. Even if **[*1110]** the statistical data offered by plaintiff were reliable, all relevant industrial facts show that the subject acquisition would not lessen competition in violation of section 7 of the Clayton Act. Id.

At this point, the Court perhaps should indicate that both during the trial and in the decisional process it discounted as unreliable and unscientific much of the expert testimony offered by the plaintiff, while relying heavily upon the technical economic skills and knowledge of the defense expert and the two Court appointed experts. The reasons for this preferential conclusion of the Court on expert credibility is best illustrated by a comparison of the Curricula vitae and expertise of the Government witnesses, Gerald Hellerman, a "Financial Analyst" and Philip M. Eisenstat, an "Applied Statistics" expert, both employees of the Antitrust Division of the United States Department of Justice, on the one hand, with those of the defense witness, James Mack Folsom, Vice-President of Glassman-Oliver Economic Consultants, Inc., and **[**48]** the Court appointed witnesses, Dr. Robert Wayne Clower, U.C.L.A. Professor of Economics, and Dr. J. Fred Weston, Professor, Graduate School of Management at U.C.L.A.

It is informative and interesting to compare the resume of Eisenstat, and testimony of Hellerman (Appendix A), With Curriculum Vitae of Folsom, Biographical Summary, etc., of Clower, and Bio-Bibliography of Weston (Appendix B). Moreover, their respective testimonial statements confirm the Court's belief in the superior knowledge and expertise of Folsom, Clower and Weston, as conclusively becomes evident when one compares the testimony of Hellerman, Rep. Tr. pp. 1356-1440, and Eisenstat, Rep. Tr. pp. 1709-1932, With the testimony of Folsom, Rep. Tr. pp. 1935-2100, Clower, Rep. Tr. pp. 2111-2263, and Weston, Rep. Tr. pp. 2264-2411.

Plaintiff has not shown that the production or the distribution of motion pictures is either concentrated or recently increasing in concentration. The statistical showing by plaintiff of MGM and Columbia combined market shares MGM 2.2% Plus Columbia 9.7%, combined shares 11.9% For the years 1975-1978 (Ex. 315), or MGM 1.75% Plus Columbia 6.72%, combined shares 8.47% For the years 1974-1978 (Ex. **[**49]** GGGG) even if reliable, does not make out a violation of Section 7 of the *Clayton Act. United States v. General Dynamics Corp., 415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)*. In *United States v. Tidewater Marine Service, Inc., 284 F. Supp. 324, 338-342 (E.D.La.1968)*, the court held that even if the combined shares were 31 percent, the merger would not be unlawful because the market was not concentrated but was vigorously competitive, and entry was not difficult. To like effect is United States v. International Harvester Co., 1976-2 Trade Cases P 61,028 at 69,527 (N.D.Ill.1976), *Aff'd, 564 F.2d 769, 773 (7th Cir. 1977)*, Reh. denied and Reh. en banc denied (1978), where the court ruled that the combination of market shares of 8 percent and 14 percent of four-wheel drive tractors was not unlawful in context, where the top four firms had a 73 percent share, where one of the participants had a weak financial position (but was not a failing company), and where the industry was vigorously competitive and trending away from concentration. See also *United States v. Crowell, Collier & MacMillan, Inc., 361 F. Supp. 983 (S.D.N.Y.1973)* (combination of firms of 41.9% And 0.6% Not barred); **[**50]** *United States v. M.P.M., Inc., 397 F. Supp. 78 (D.Col.1975)* (combined market share of 31.6% Held not anticompetitive); *United States v. Consolidated Foods Corp., 455 F. Supp. 108, 134-141 (E.D.Pa.1978)* (combining nation's fourth largest firm in industry having a 7% Share with the eleventh firm having a 3% Share, where top three ranking firms after the merger would control 62.5% Of the market, held not anticompetitive); In re the Pillsbury Company and Fox Deluxe Foods, FTC Dkt. 9091, opinion of the Commission, 17-18 (June 15, 1979) (combining 15.4% With 1.7% Is not unlawful, even though industry was "concentrated").

Conditions in the production of motion pictures differ from conditions in the grocery industry as described in *United States v. Von's Grocery Co., 384 U.S. 270, 86 S. Ct. **[*1111]** 1478, 16 L. Ed. 2d 555 (1966)*, conditions in the beer brewing industry as described in *United States v. Pabst Brewing Co., 384 U.S. 546, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)* and conditions in the business of manufacturing aluminum and copper conductors as described in *United States v. Aluminum Co. of America, 377 U.S. 271, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)*, in these important ways: **[**51]** (a) there is no trend in concentration in the production of motion pictures; (b) there is no trend toward horizontal integration in the production of motion pictures; (c) there are no significant economic barriers to entry into motion picture production; and (d) there is no shrinkage in the number of firms engaged in motion picture production. Further, in Alcoa, the products in question were made by the leading firm (27.8% And 32.5% Of the relevant markets) in a highly oligopolistic industry.

CONCLUSION AND ORDER

The Government attempted to shape the contours of the action by referring to the profiles of totally unreliable statistics which happened to be readily available. The slavish reliance placed on this unreliable data by the Government is not warranted when one looks at the realities of this industry and, specifically, the realities of the two motion picture production companies, MGM and Columbia. These realities as found by this Court, based upon all the evidence before it, clearly show that neither the subject stock acquisition, nor the use of such stock by voting or granting of proxies or otherwise, nor the possible merger of Columbia and MGM does or would substantially **[**52]** lessen competition, or does or would tend to create a monopoly; nor is there any threat whatsoever that any such thing may occur.

Therefore, there is no possible violation of section 7 of the Clayton Act. And, finally, as initially found and concluded by the Court, the investment exemption set forth in the first sentence of the third paragraph of Section 7 of the Clayton Act, *15 U.S.C. § 18*, clearly and convincingly applies to this stock acquisition and takes both defendants, Kerkorian, and Tracinda, out of its prohibitory parameters. [17.]

[53]** It ineluctably follows that the plaintiff is not entitled to any order requiring the defendants or either of them to divest themselves of any of the stock of Columbia purchased and now held by them.

One last matter remains and that is the question of whether to award the usual allowable costs to defendants and against plaintiff. All parties agree that this determination is within the discretionary power of the Court. After consideration of the entire case, its complexity, the difficult **[*1112]** questions of law involved, and the tremendous factual work load and legal burden undertaken and so successfully carried by defendants, the Court exercises its

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17. Incidentally, the Government's non-expert witnesses were drawn chiefly from small film exhibitors and all of these witnesses, curiously enough, testified that they had no evidence of any act or threat, that could by the wildest imagination be traced to either of the defendants, that would tend to show that the defendants had purchased any portion of the Columbia stock other than solely for investment, or that the defendants had used, were using, or threatened in any way to use the stock by voting or otherwise to bring about or in attempting to bring about the substantial lessening of competition. Nor could the Government witnesses give a shred of credible evidence that the effect of the Columbia stock acquisition was, could be, may be, or might even possibly be, substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Moreover, these Government witnesses, which ran the gamut from an admitted pornographer, through small, middle size and one or two fairly large film exhibitors, to retired financial experts without any recent expertise other than occasional consultations, and the chief of the "Star Wars" producer, in every instance but one or two vague guesses or opinions, admitted that the relevant line of commerce was production, Not production And distribution, and that there is no concentration, monopoly or denial of access to new producers in this relevant line of commerce. Even some of the Government witnesses opined that the relevant geographical market is world-wide, and not merely the United States or the United States and Canada, and that competition in production was and is being increasingly manifest, in its effect, both in increasing competition in the United States and increasing competition in every section of the United States in film production.

discretion in favor of defendants and against plaintiff, even though plaintiff is the Government. *Rule 54(d), F.R.Civ.P.*; *28 U.S.C. § 2412*; Local Rule 15, C.D.Cal.; United States v. O.K. Tire & Rubber Co., 1978-2 CCH Trade Cases, par. 62,331, p. 75,973 (D. Idaho 1978); *Subscription Television, Inc. v. Southern California Theatre Owners Assoc., 576 F.2d 230, 234 (9th Cir. 1978)*; *United California Bank v. THC Financial Corp., 557 F.2d 1351, 1361 (9th Cir. 1977)*.

LET JUDGMENT BE ENTERED ACCORDINGLY.

TABLE

HELLERMAN DIRECT

Transcript **[**54]** of his Deposition.

Mr. Weidman: That's right. Mr. Hellerman had been deposed by counsel.

The Court: Well, all right. At least I take it the defendants are aware of it, but we still don't have a curriculum vitae. Where is that little piece of paper that apparently was given to the defense. Has anybody got it?

Mr. Rothman: Your honor, we can't locate it.

The Court: All right, Mr. Hellerman, but go ahead. But I'll give you five minutes at the most. Give us your curriculum vitae.

Don't ask any questions. He can just narrate it to save time.

The Witness: In 1959, I received a Bachelor of Arts degree with a major in economics from the University of Massachusetts in Amhurst.

In 1962, I received a Masters of Business Administration, also from the University of Massachusetts.

At graduate school, I received a teaching fellowship based on class standing.

My Work: In 1962, I started to work at the Securities and Exchange Commission as a financial analyst in the branch of investment companies.

The Court: In what?

[*1113] The Witness: In the branch involved with investment company regulation.

The Court: Branch investment companies?

The Witness: The branch involving the work of **[**55]** regulating investment companies.

The Court: All right.

The Witness: Under the Investment Company Act of 1940.

The Court: All right.

The Witness: In 1967, I was promoted to Branch Chief of the Public Utility Holding Company Act of 1935.

The Court: All right.

The Witness: In 1972, I was requested by Senator Phillip A. Hart, Chairman of the Anti-Trust and Monopoly Subcommittee of the United States Senate, to be detailed to his subcommittee to act as special adviser.

The Court: Subcommittee of what?

The Witness: Of the judiciary committee.

The Court: All right.

The Witness: Of the United States Senate.

The Court: All right.

The Witness: In 1976, I joined the anti-trust division of the Department of Justice and I am presently employed there.

The Court: All right. I think that's enough. Go ahead. I think he's qualified as an expert.

By Mr. Weidman:

Q. Mr. Hellerman, as part of your duties with the anti-trust division, have you been an advisor to the trial staff of United States vs. Tracinda ?

A. That is correct.

Q. And what have you done along those lines?

A. I have made recommendations as to witnesses, potential witnesses or people knowledgeable in the industry. I have **[**56]** accompanied counsel to various interviews, and I have advised during the court proceeding on matters which dealt with finance and corporate matters.

Q. As part of your duties, did you study the financial condition of Columbia and MGM?

A. Yes. I've had a computer print out done at one point of all the companies or of many of the companies in the motion picture industry which is sort of a knee jerk reaction when assigned to an industry or asked to work on an industry.

TABLE

[*1114] (Completed all requirements for Ph.D. except thesis.)

Major Fields: Industrial Organization and Agricultural Economics

HONORS, SCHOLARSHIPS, FELLOWSHIPS:
Special Scholarship, Vanderbilt
Earhart Fellowship 2 years
Ford Foundation Dissertation Fellow
Valedictorian, UGA, Class of "53
Phi Kappa Phi National Honorary
Beta Gamma Sigma National Honorary
Distinguished Service Award, FTC

PROFESSIONAL EXPERIENCE:
Research Assistant Displaced Person's Adjustment to U.S. Economy, Gregor Sebba, UGA.
Instructor, Industrial Organization and Statistics, Vanderbilt, Summer 1959.

Instructor and Assistant Professor, Duke University, **[**57]** 1959-64. (Courses Taught: Principles of Economics, Marketing, Managerial Economics, and Industrial Organization.)
Economist, Division of Economic Evidence, Bureau of Economics, Federal Trade Commission, 1964-68.
Assistant to the Director, Bureau of Economics, Federal Trade Commission, 1969.
Chief, Division of Economic Evidence, Bureau of Economics, Federal Trade Commission, 1970-72.
Assistant Director, Bureau of Economics, Federal Trade Commission, 1972-73.

Acting Director, Bureau of Economics, Federal Trade Commission, 1973-74.
Deputy Director, Bureau of Economics, Federal Trade Commission, 1974-77 and 1978.
Acting Director, Bureau of Economics, Federal Trade Commission, 1977-78.

PUBLICATIONS AND TESTIMONY:

"Trends in Employment and Earned Income of Older Workers" with Juanita M. Kreps and C. E. Ferguson, Employment, Income, and Retirement Problems of the Aged, Duke University Press, 1963.
The Use of Games of Chance in Food and Gasoline Retailing, FTC Economic Report, 1968.
The 1973 Line of Business Report, FTC Economic Staff Report, 1967, with F. M. Scherer, et al.

Comment on State of **[**58]** Competition in Food, forthcoming in Journal of Agricultural Economics.
Testified in: S&H, Allied Chemical Jim Robbins, Great Lakes Carbon, Papercraft, Kennecott-Peabody, and General Dynamics.
Testified before several congressional committees on diverse subjects Sweepstake Promotions, Price Discrimination, Small Business Role in Economy, Food Retailing, Steel Imports and on FTC Budget.
Speeches before lawyers (e.g., Practicing Law Institute) and business groups.

ROBERT WAYNE CLOWER

I. Biographical Summary (as of August 1, 1979)

Degrees

Doctor of Letters, Oxford University, 1978

[*1115] Master of Letters, Oxford University, 1952 (Thesis: Theories of Capital Accumulation with Special Reference to their Ability to Explain the Experience of the United States since 1870)
M.A. Econ., Wash. State Univ., 1949 (Thesis: A Theory of Economic Prognosis Applied to Modern American Society)
B.A. Econ., with Highest Distinction, Wash. State Univ., 1948 (Thesis: The Keynesian Contribution to Economic Positivism)

Learned Societies and Professional Associations

American Econ. Assn. (Member of Executive Committee, 1978-80);

[59]**

Royal Econ. Society; Econometric Society (Fellow since 1978);
American Assn. of Rhodes Scholars; Phi Kappa Phi; Phi Beta Kappa;
Honorary Fellow, Brasenose College, Oxford

Professional Career

Professor of Economics, UCLA, 1971 to present
Adjunct Professor, Washington State University, 1978-
Visiting Prof. of Econ., Univ. of Western Ontario Fall, 1974 and Fall, 1977
Visiting Prof., Institute for Advanced Study, Vienna, Austria March, 1974
Visiting Prof., Bank of Italy Research Staff Seminar, Perugia, Italy Oct., 1973
Visiting Prof., Monash Univ., Summer, 1972
Dean, School of Social Studies and Prof. of Econ., Univ. of Essex 1968-69
Visiting Prof. of Econ., Makerere College, Kampala, Uganda Summer, 1965
John Maynard Keynes Visiting Prof. of Econ., Univ. of Essex 1965-66
Prof. of Econ., Northwestern Univ., 1963-71
Visitor to Faculty of Econ., Cambridge Univ., Michaelmas Term, 1962
Director, Northwestern Univ. Economic Survey of Liberia, 1961-62
Chairman, Dept. of Econ., Northwestern Univ., 1958-64

Assoc. Prof. of Econ., Northwestern Univ., **[**60]** 1957-62

Visiting Prof. of Econ., Univ. of the Punjab, Lahore, West Pakistan 1954-56
Asst. Prof. of Econ., Wash. State Univ., 1952-57
Instructor in Econ., Wash. State Univ., 1948-49

Miscellaneous

Managing Editor, Economic Inquiry, 1973 to present
Executive Committee, American Econ. Assn., 1978-81
American Consulting Editor, Penguin Books, 1966 to present
John Simon Guggenheim Memorial Foundation Fellowship, 1965-66
Editorial Board, American Economic Review, 1963-66
Ford Foundation Faculty Research Fellowship, 1960-61
Chairman, Oxford-London-Cambridge Joint Economic Seminars, 1950-52
Nuffield College Studentship, 1950-52
Rhodes Scholarship, 1949-52
Honorary Fellow, Brasenose College, Oxford, 1978-

Personal Data

Date of Birth: Feb. 13, 1926; Married, 6 children
Office: Dept. of Economics, UCLA, Los Angeles, Calif. 90024 (213-825-4422)
Home: 3136 Barry Ave., Los Angeles, Calif. 90066 (213-390-3225)
Military Service: U.S. Army, 1943-46, final rank of Warrant Officer (JG)

II. Publications

A. Books

Introduction to Mathematical Economics **[**61]** (with D. W. Bushaw), Richard D. Irwin, Inc., Homewood, Ill., 1957.
Intermediate Economic Analysis (with J. F. Due), Richard D. Irwin, Inc., 4th edition, 1961; 5th edition, 1966.

[*1116] Puerto Rico Shipping and the U.S. Maritime Laws, Transportation Center, Northwestern University (with John Harris), 1965.
Growth Without Development, An Economic Survey of Liberia (with G. Dalton, A. Walters and M. Harwitz), Northwestern University Press, Evanston, Ill., 1966.
Monetary Theory (editor), Penguin Books, Ltd., London, 1969, (Italian translation, La Teoria Monetaria, Franco Angeli, ed., Milan, 1972).
Microeconomics (with J. F. Due), Richard D. Irwin, 1972 (Spanish translation, Biblioteca Technos de Ciencias Economicas, Madrid, 1978.

B. Articles

"Professor Duesenberry and Traditional Theory," Review of Economic Studies, Vol. XX, 1952-53, pp. 165-178.
"An Investigation into the Dynamics of Investment," American Economic Review, March, 1954, pp. 64-81.
"Productivity, Thrift and the Rate of Interest," Economic Journal, March, 1954, pp. 107-15.

"Price Determination in a Stock-Flow Economy" (with D. W. Bushaw) **[**62]** Econometrica, July, 1954, pp. 328-343.
"Competition, Monopoly, and the Theory of Price," Pakistan Economic Journal, September, 1955, pp. 219-226.
"Some Theory of an Ignorant Monopolist," Economic Journal, December, 1959, pp. 705-16.
"Keynes and the Classics: A Dynamical Perspective," Quarterly Journal of Economics, May, 1960, pp. 318-323.
"On the Invariance of the Demand for Cash and Other Assets" (with M. L. Burstein), Review of Economic Studies, October, 1960, pp. 32-36.
"Mathematics and Economics: The Contemporary Prospect," Quarterly Review of Economics and Business, May, 1961, pp. 37-45.

"Statistics and Development Policy Decisions" (with A. Walters and G. Dalton), Development Research Review, July, 1962, pp. 65-74.
"Die Keynesianische Gegenrevolution: eine theoretische Kritik," Schweizerische Zeitschrift, Heft 1, 1963, pp. 8-31.
"Classical Monetary Theory Revisited," Economica, May, 1963, pp. 165-70.
"Permanent Income and Transitory Balances: Hahn's Paradox," Oxford Economic Papers, July, pp. 177-90.

"Monetary History and Positive Economics," (review article), Journal of Economic History, **[**63]** September, 1964, pp. 364-80 (reprinted in Gibson & Kaufman, Monetary Economics, McGraw-Hill, 1971, pp. 22-23).
"The Keynesian Counterrevolution: A Theoretical Appraisal," The Theory of Interest Rates (Hahn & Brechling, eds.), The MacMillan Co., London, 1965, pp. 103-125 (reprinted in Surrey, Macroeconomic Themes, OUP, 1976, pp. 400-420; also in La Nueva Teoria Monetaria, Saltes, ed., Madrid, 1978, pp. 11-57).
"Effective Control through Coherent Decentralization with Preemptive Goals," Econometrica (with Charnes and Kortanek), April, 1967, pp. 294-320.
"A Reconsideration of the Microfoundations of Monetary Theory," Western Economic Journal, December, 1967, pp. 1-8.
"The Present State of International Liquidity Theory" (with R. G. Lipsey), American Economic Review, May, 1968, pp. 586-95.
"Stock-Flow Analysis," International Encyclopedia of the Social Sciences, 1968, pp. 273-77.
"Income, Wealth, and the Theory of Consumption," (with M. B. Johnson) Essays in Honour of Sir John Hicks, Edinburgh University Press, 1968, pp. 45-96 (reprinted in Surrey, Macroeconomic Themes, OUP, 1976, pp. 101-115).

"Conditions for African Economic **[**64]** Progress," Melville J. Herskovitz Memorial Lecture, University of Edingurgh, Centre for African Studies, 1968 (14 pp.).
"What Traditional Monetary Theory Really Wasn't," Canadian Journal of Economics, Vol. II, May, 1969, pp. 199-202.

[*1117] "Is There an Optimal Money Supply?" Journal of Finance, XXV, No. 2, May, 1970, pp. 425-433 (reprinted in Frontiers of Quantitative Economics, M. Intrilligator, ed., N. Holland (1970).
"Theoretical Foundations of Monetary Policy," Monetary Theory and Monetary Policy in the 1970's, Clayton Et al., eds. (London: Oxford Press, 1971), pp. 15-28.
"The Ideas of Economists," Monash Lecture, 1972, Monash University, Clayton, Victoria, 1973, 23 pp.
"Snarks, Quarks and Other Fictions: The Role of Formal Theory in Economic History," Business Enterprise & Economic Change, L.P. Cain and P.J. Uselding, eds., (Kent State University Press, 1973), pp. 3-14.
"Say's Principle: What It Means and Doesn't Mean," (with Axel Leijonhufvud), Intermountain Econ. Review, Fall, 1973, pp. 1-16.
"Reflections on Science and Economics," Intermountain Econ. Review, Spring, 1974, pp. 1-12.

"The Coordination **[**65]** of Economic Activities: A Keynesian Perspective," American Economic Review (Proc.), 65, May, 1975, pp. 182-188.
"Reflections on the Keynesian Perplex," Zeitschrift fur Nationalokonomie, 35, July, 1975, pp. 1-24.
"A Reconsideration of the Theory of Inflation," Resource Allocation and Economic Policy, M. Allingham and M. L. Burstein, eds., London, Macmillan, 1976, pp. 14-25.
"The Anatomy of Monetary Theory," American Economic Review (Proc.), 67, May, 1977, pp. 206-12.
"The Transactions Theory of the Demand for Money: A Reconsideration" (with Peter W. Howitt), Journal of Political Economy, June, 1978, pp. 449-466.
"The Genesis and Control of Inflation," The Stability of Contemporary Economic Systems, Oldrich Kyn and Wolfram Schrettl, eds., Germany, Vandenhoeck & Ruprecht, 1979.

C. Notes and Comments
"Mr. Graaff's Producer-Consumption Theory: A Restatement and Correction," Review of Economic Studies, Vol. XX, 1952-53, pp. 84-5.

"The Analogy Between Ordinary and Relative Preference Analysis," Review of Economics and Statistics, November, 1953, pp. 353-4.
"Stock and Flow Quantities," Economica, August, 1959, pp. 251-2.

[66]**

"Business Investment and the Theory of Price," Proceedings of the Western Economic Association, 1953, pp. 22-4.
"Oligopoly Theory: A Dynamical Approach," Proceedings of the Western Economic Association, 1959, pp. 16-19.
"Causal Systems and Stability," Econometrica, Vol. 33, No. 3 (July, 1965), pp. 241-2.
"Comment: The Optimal Growth Rate of Money," Journal of Political Economy, Vol. 76, No. 4, Part II, July/August, 1968, pp. 876-880.
"Foundations of Money Illusion in a Neoclassical Micro-Monetary Model: Comment," (with J. G. Riley), American Economic Review, 66, March, 1976, pp. 184-5.
"Marshall on Deposit Multipliers," Economic Inquiry, 13, June, 1975, p. 252.

D. Book Reviews

"Introduction to Mathematical Analysis, by Daus and Whyburn," Econometrica, October, 1959, pp. 751-61.
"Problems and Practices of Development Banks, by S. Boskey," Journal of Political Economy, June, 1961, p. 313.
"Economic Development of Libya, International Banks for Reconstruction and Development," Journal of Political Economy, October 1961, p. 521.
"The Theory of Capital," Southern Economic Journal, July, 1962, pp. 44-5.

[67]**

"Exercises in Economic Analysis, by Joan Robinson," American Economic Review, September, 1961, pp. 701-2.
"Monetary History and Positive Economics," see item B14, above.

[*1118] "Asset Prices in Economic Analysis, by Samuel B. Chase, Jr.," Annals of the American Academy of Political and Social Science, 1964.
"Macroeconomics and Programming, by K. K. Kurihara," American Economic Review, September, 1965, p. 889.
"Measuring Benefits of Government Investments, edited by Robert Dorfman," Annals of the American Academy of Political and Social Science, November, 1965, p. 178.
"Foundations of Money and Banking," by Pesek and Saving, Economica, XXXVI, No. 141 (February 1969), pp. 84-8.
"Forecasting and Recognizing Business Cycle Turning Points, by Fels and Hinshaw," Annals of the American Academy of Political and Social Science, January, 1969, pp. 207-8.
"Critical Essays in Monetary Theory, by Sir John Hicks," Journal of Political Economy, May, 1970.
"The Theory of Imperfect Competition: A Radical Reconstruction, by Donald Dewey," Journal of Economic Literature, Dec. 1970, pp. 1212-1213.

"Money and **[**68]** Markets: A Monetarist View," by Beryl W. Sprinkel, Economica, August, 1972 (Vol. XXXIX, No. 155), p. 340.
"The Obscurantist Approach to Economics: Shackle on Keynes," Eastern Economic Journal, 2, Jan., 1975, pp. 99-101.

E. Miscellaneous

"Some Views on University Education in Pakistan," Al-Iqtisad, Hailey College of Commerce, Lahore, Pakistan, June, 1955, pp. 1-6.
"The Future of Banking in Pakistan," Al-Iqtisad, March, 1956, pp. 5-10.
"On the Microdynamics of Price Formation in n-Seller Markets," abstract of paper delivered at 1958 meetings of Econometric Society, Econometrica, April, 1959, pp. 312-313.

"Inductive Inference and Business Behavior," abstract of paper delivered at 1959 meetings of Econometric Society, Econometrica, July, 1960, pp. 685-6.
"A Study of Elementary Learning and Response Mechanisms in Dynamical Monopoly Models," Office of Naval Research, Research Memorandum No. 12, Northwestern University Technological Institute, December, 1958.
Foreword to Sir John Hicks' The Crisis in Keynesian Economics (New York: Basic Books, Inc. 1974).

Foreword to The Political Economy of Policy-Making, Dooley, Kaufman **[**69]** and Lombra, eds., (Beverly Hills, Sage Publications, 1979).

BIO-BIBLIOGRAPHY

DATE: December 12, 1977

NAME: J. Fred Weston

UCLA OFFICE: Graduate School of Management, Room 6292

CAMPUS PHONE: 825-2200 or 825-2508 or 479-0136

HOME ADDRESS: 258 Tavistock Avenue, Los Angeles, 90049

HOME PHONE: 472-5110

SPOUSE'S NAME: June

BIRTHDATE: February 6, 1916

BIRTHPLACE: Fort Wayne, Indiana

DEGREES:
A.B. 1937 University of Chicago, Political Science
M.B.A. 1943 University of Chicago, Business Economics
Ph.D. 1948 University of Chicago, Finance

WORK EXPERIENCE:
1937-39 General Electric Company, Management Trainee
1941-43 Teaching Fellow, University of Chicago
1943-45 U.S. Army, Finance Department, Honorable Discharge as Senior Warrant Officer
1945-46 Economic Consultant, President of the American Bankers Association
1947-49 Instructor and Assistant Professor, University of Chicago

[*1119] 1949- Consultant to two or three firms per year

UCLA FACULTY APPOINTMENT:
Lecturer (Assistant Professor Level), 7/1/49
Professor, O/S, (above scale), 7/1/69

TEACHING:

a) Courses Taught in GSM:

[70]**
BA 100 Business Economics (formerly BA 101), 1052-53
Mgt 130 Business Finance, 1955-
BA 131 Credit Management, 1950-55
BA 132 Money and Banking, 1950-53 and 1955-
Mgt 133 Investments, Principles and Policies, 1955-

Mgt 197A Special Topics
Mgt 200 Managerial Economics, 1955-
Mgt 202A Economic Theories of Business Behavior: Marginal, Managerial and Behavioral, 1972-
Mgt 202B Principles of Industrial Organization, 1972-
Mgt 202C Empirical Studies in Industrial Organization, 1972-
Mgt 202D The Organization of Industry and Business Policy, 1972-
Mgt 230A Money and Capital Markets (formerly BA 230), 1955-
BA 231 Business Finance Theory and Policies, 1950-53
Mgt 231A Business Financial Policies (formerly BA 231), 1954-
Mgt 231B Business Financial Theory (formerly BA 231), 1953-
Mgt 231C Theory of Finance
Mgt 233A International Business Finance, 1972-
Mgt 297 Doctoral Research

b) Teaching Performed within the University in Addition to Regular Appointments:

1. XL 100 Business Economics, 1950-51

2. XL 115 Business Statistics, **[**71]** 1950-53
3. Executive Program, 1955-
4. UCLA Forecasting Conference for Executives Programs and Alumni, December 4, 1969.
5. "Corporate Strategies and Goals A Composite Case Study Approach," UCLA Conference on Mergers and Acquisitions, March 10, 1970.
6. "The Economics of Environment Improvement," UCLA Student Groups, April 1970.
7. "Financial Trends and their Implications for Management," UCLA Executive Program Association, Back-to-Campus, April 2, 1970.
8. "Macroeconomic Models for Analyzing the Effects of the War in Southeast Asia," and "Preliminary Estimates of the Cost of the War in Southeast Asia," Student Groups, UCLA, April and May 1970.
9. "How Can Aerospace Companies Adapt to the New Environment," Executive Program Association, Discussion, October 28, 1970.
10. "Economic Factors in Environmental Improvement," Lecture CED 142A Class, December 1, 1970.
11. "Summary of Economic Outlook for 1971," Executive Program Association, December 8, 1970.

c) Outside Teaching Activities:

1. Instructor and Assistant Professor, University of Chicago, 1946-49. Taught money and banking, business economics, **[**72]** business finance, and risk and risk-bearing.
2. Distinguished Lecturer in Business Economics, "The Influence of Risk on Profits," "Economic Effects of Mergers," "Empirical Studies on the Causes of Concentration," and "The Economic Consequences of Concentration," University of Utah, May 4-5 and May 17-18, 1972.

CHAIRMANSHIPS OF DOCTORAL COMMITTEES:

a) Degrees Granted and Current Status:

1. Robert Hungate, 1961, Dean, School of Business, San Diego State University, San Diego, California.

[*1120] 2. Russell Nelson, 1962, Professor of Finance, School of Business, University of Minnesota, Minneapolis, Minnesota.
3. Paul Harmon, 1963, Professor of Management, Utah State University, Salt Lake City, Utah.
4. Anelise Mosich, 1963, Professor of Accounting, School of Commerce, University of Southern California.
5. Robert McKenzie, 1965, Associate Professor of Finance, School of Commerce, New York University, at time of death, 1967.
6. Bart Sorge, 1965, Associate Professor of Finance, School of Commerce, University of Southern California.
7. Joseph Buchwald, 1965, Professor of Accounting, San Fernando Valley State College.

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8. Guilford Babcock, 1965, Professor of Finance, Graduate School of Business, University of California, Berkeley, California.
9. Earl Beecher, 1965, Associate Professor of Finance, Long Beach State College, Long Beach, California.
10. James Bray, 1967, Assistant Professor of Finance, University of British Columbia; Visiting Assistant Professor of Finance, University of California, Berkeley, 1967-68.
11. Manek Gupta, 1967, Associate Professor of Finance, Pennsylvania State University, College Station, Pennsylvania.
12. Craig Johnson, 1968, Assistant Professor of Finance, Columbia University, New York City.
13. Prakash Lohani, 1968, Government Position, Nepal.
14. Richardson Pettit, 1969, Associate Professor, Purdue University.
15. James M. Warren, 1969, Assistant Professor, University of California, Los Angeles, California.
16. Clement G. Krouse, 1969, Associate Professor, University of California, Los Angeles, California.
17. George N. Engler, 1970, Assistant Professor, University of Southern California.
18. Michael F. Dunn, 1971, Professor, San Fernando Valley State College.

19. **[**74]** Surendra K. Mansinghka, 1971, Assistant Professor, University of California, Riverside.
20. Steven Howard Lustgarten, 1971, Associate Professor, City College of New York.
21. James E. McCourt, 1971, Private Consultant.
22. Mark Edward Rubinstein, 1971, Assistant Professor of Finance, University of California, Berkeley, California.
23. Ronald Edward Shrieves, 1971, Assistant Professor of Business Economics and Finance, University of Tennessee.
24. Jerome B. Baesel, 1972, Assistant Professor of Business Economics and Finance, York University, Ontario, Canada.
25. Alfred Gregory Buckman, 1972, Assistant Professor of Accounting, University of California, Berkeley, California.
26. Nathan Hasson, 1975, Assistant Professor, University of Haifa, Haifa, Israel.
27. Patrick Smith, 1976, Catholic University, Washington, D.C.
28. Robert Trout, 1978, Consulting Firm
29. Edwin Eckard, 1977, General Motors Corp.
30. Richard L. Smith, 1979, Case Western Reserve University

b) Students Advanced to Candidacy:

1. Wayne Lieu, Spring 1973

c) Guidance Committees: Three to five per year, nine since **[**75]** 1969.

CHAIRMANSHIPS OF MASTER'S THESIS COMMITTEES:

None

MEMBERSHIP ON DOCTORAL AND MASTER'S THESIS COMMITTEES:

Doctoral:

1. Larry Y. Dann

[*1121] 2. Harry Charles DeAngelo
3. David Glasner
4. G. Kroon
5. Stanley Jayson Liebowitz
6. Stephen Margolis
7. Andrew James McLaughlin
8. Thomas Thayer Nagle

9. Edward M. Rice
10. James William Henry Watson

Masters:
1. Robert Vernon Bowden
2. Kwang Suon Chung

COMMITTEE SERVICE:

a) Committees of the Academic Senate:
1. University Extension, Chairman, 1955-58.
2. Graduate Council, 1960-62.
3. Distinguished Teaching Committee, 1971-72. Chairman, 1972-73.

b) Administrative Committees: None

c) College, Departmental or Other University Committees:
1. Advisory Committee of Vice-Chairman, 1965-66.
2. Executive Committee, 1965-68.
3. Executive Program Advisory Committee, 1964-70.
4. Planning and Development Committee, 1966-67.
5. Research Committee, 1966-67.
6. GSM Ad Hoc Promotion Committees; 1-2 per year, 1970-77.

7. Apprentice Personnel Committee, GSM, **[**76]** 1970-71.
8. Faculty Welfare and Development Committee, 1970-71.
9. Medical School, Computer Facility, 1970-
10. Advisor to Mardi Gras, 1972-74.
11. Resource Allocation Committee, 1974- Chairman, 1974-
12. Health Sciences Computer Facility Advisory Committee, 1972-

d) Other Committees: None

SPECIAL APPOINTMENTS:

a) Administrative Posts Held, Department Officers, etc.
1. Business Economics, Vice-Chairman, 1958-62.
2. Finance, Vice-Chairman, 1963-65.
3. Vice-Chairman of Business Economics, Finance, Insurance, Real Estate, Urban Land Economics, 1966-67.
4. Assistant Dean for Student Affairs, 1952-53.
5. Associate Dean, 1964.
6. Acting Chairman of the Department of Business Administration, 1954-55.
7. Director of Research Program in Competition and Business Policy, 1969-
8. Director, Study Center on Finance and Business Economics, 1971-

PROFESSIONAL ACTIVITIES:

a) Consultative or Similar Service to Civic, State or National Governmental Agencies:
1. Testimony before Subcommittee on Monopoly of the Senate Judiciary Committee, 1953, 1962, 1965, 1973, 1975.

[77]**

2. Testimony before Joint Economic Committee of Congress, 1962, 1965, 1967 and 1974.
3. Consultations with Small Business Administration, 1967-69.
4. Testimony before Committee on Product Safety, 1970.

5. Advisor on Ph.D. programs to University of Utah and Texas Christian University, 1970-71.
6. Testimony before Special Committee on Bankruptcy, 1971.
7. Testimony to the Price Commission, 1972.
8. Chairman, Advisory Committee to the Legislature of the State of California on "Noise Pollution," 1971-73.
9. Reviewer of annual program of plans, National Science Foundation, Office of National R & D Assessments, 1973-76.

[*1122] 10. Consultant, General Accounting Office, U.S. Government, 1976-

b) Other Consultative or Professional Activity:
1. Council of Reserve Bank Presidents, 1958-59.
2. Committee for Economic Development, 1959-60.
3. National Bureau of Economic Research, 1960-62.
4. Commission on Money and Credit, 1960-62.
5. Ford Foundation, Committee for award of Faculty Fellowship Grants, 1959, 1964, 1966.

6. Ford Foundation, Committee for award of **[**78]** the Ph.D. Dissertation Grants, 1963, 1964, 1965, 1966.
7. Sloan Foundation, 1966-67.
8. Reviewer, Ford Foundation Energy Policy Project, 1973-74.

c) Participation on Public Lectures or Forums:
1. Lectures to community or business groups, average 6-7 per year, 1955-69.
2. Special lectures on invitation to other universities, average about two each year, 1962-69.
3. Lectures to University of California Executive Program Alumni Group, average 1.5 per year, 1964-68.
4. "Vertical Integration in the Telecommunications Industry," Stanford University, July 8, 1969.
5. "Financial Planning in Large Organizations," presented to a meeting of the Institute of the World Economy, USSR, Moscow, July 28, 1969.
6. "Financial Planning and Control to Improve Management Performance," to Japan Management Association, August 11, 1969.
7. "International Economic and Financial Development," lectures to Conference of American Dairy Association, Phoenix, Arizona, August 19, 1969.
8. "Evaluating the Outlook for Key Areas of the Economy," Credit Managers' Association of Southern California, September 15, 1969.

9. **[**79]** "A Review of the NABE Forecasts for 1970," UCLA Forecasting Session, September 19, 1969.
10. Paper presented on "Public Policy Toward Bank Mergers," to Federal Reserve Bank of Chicago Conference on Banking Markets and Structure, October 13 and 14, 1969.
11. "Financial Planning and Control," New York University, November 1, 1969.
12. "Financial Management," Instituto de Administracion de las Empresas, Mexico City, November 18-20, 1969.
13. "A Summary View," UCLA Forecasting Conference, December 2, 1969.
14. UCLA Forecasting Conference for Executive Programs and Alumni, December 4, 1969.
15. "Role of Mergers in Planning Business Growth," Presidents' Association, Boca Raton, Florida, December 10, 1969.
16. "Economic Efficiency Evaluation of Conglomerate Firms," Subcommittee on Antitrust of the Senate Judiciary Committee, January 20, 1970.
17. "Economic Aspects of Consumer Product Safety," National Commission on Product Safety, March 4, 1970. Reprinted in Business and Society References and Cases, Steiner, G.A. (Ed.).

18. "Changing Environments and New Concepts of Firms and Markets," National Industrial **[**80]** Conference Board, Antitrust Conference, March 6, 1970.
19. "The Industrial Economics Background of the Penn Central Bankruptcy," American Finance Association, December 28, 1970. (Also see No. 45 under Professional Journal Articles Published).

20. "New Developments in Acquiring, Merging and Selling Companies," **[*1123]** Advanced Management Research Conference, April 31, 1970.
21. "Fundamental Trends in the Financial Environment Affecting Credit Management," National Institute of Credit, October 19, 1970.
22. "Conglomerate Performance," Research Program in Competition and Business Policy, Graduate School of Business Administration, UCLA, November 5, 1970.
23. "CPM in the Measurement of Business Risk for Public Utility Regulation," Michigan State University, Conference on Public Utility Economics, February 27, 1971.
24. "Aspects of Consumer Bankruptcy," Commission on the Bankruptcy Laws of the United States, August 23, 1971.
25. Eighth Conference on Bank Structure and Competition, Federal Reserve Bank of Chicago, October 14-15, 1971.
26. "Forecast Summary," Forecast "72, UCLA, December 8, 1971.

27. "Economic **[**81]** Trends and their Implications for Credit Managers," The National Institute of Credit, January 12, 1972.
28. "Multinational Corporations," "Conglomerate Firms in Perspective," and "Conglomerate Performance Measured by the Capital Asset Pricing Model," Mississippi State University, March 13-14, 1972.
29. "The Bases of Regulation," Western Conference of Public Utility Commissioners, March 20-21, 1972.
30. "The Influence of Risk on Profits," "Economic Effects of Mergers," "Empirical Studies on the Causes of Concentration," and "The Economic Consequences of Concentration," Distinguished lectures in Business Economics, University of Utah, May 4-5, and May 17-18, 1972.
31. "International Outlook," International Institute of Credit, January 18, 1974.
32. "Current Trends in Anti-Trust Policy," presentation to the UCLA Conference on "Business in a Changing Environment," August 13, 1974.
33. "Pricing in Business Theory & Practice," sponsored by the Alcoa Foundation, UCLA, August 14, 1974.
34. Speaker, "The Economic Performance of Large Firms," Conference on Changing Business Society Relationships, UCLA, August 1974.

35. Discussant **[**82]** for presentation, "Peak Load Pricing Subject to Regulatory constraint," by David McNicol, Public Utilities: Economics and Finance Seminar, AT&T Seminar, UCLA, August 18-23, 1974.
36. "An Anti-Inflation Program," Joint Economic Committee, U.S. Congress, September 4, 1974.
37. "Inflation, Restrictive Practices, and Large Corporations," California Conference on Inflation, October 23, 1974.
38. "The Outlook for the Financial Markets," National Institute of Credit, January 15, 1975.
39. "Appraisal of Different Acquisition Patterns," Antitrust Conference, The Conference Board, New York, March 1975.
40. Participant in Council on Wage and Price Stability Conference on "Concentration, Administered Prices, and Inflation," Washington, D.C., April 14, 1975.
41. "Prices and Profits in Relation to Industry Structure," Association of General Counsel, Williamsburg, Virginia, May 12, 1975.
42. "Inflation and Big Business," Town Hall of California Meeting, Los Angeles, California, May 20, 1975.
43. "Current Issues in the Government's Anti-Trust Policy," The Changing Role of Business in Society Conference, UCLA, July 1975.

[83]**

44. Conferee, "Diversification, Vertical Integration and Mergers," Public Utilities: Economics and Finance Seminar, UCLA, August 13, 1975.

[*1124] 45. Discussant, Antitrust Seminar, American Telephone and Telegraph Company, Western Electric Corporate Education Center, Princeton, New Jersey, October 9-10, 1975.
46. Chairman, "Evaluation of Capital Investment Decisions," Financial Management Association, Kansas City, Missouri, October 17, 1975.

47. "Are MNC's Using Their Market Power to Overprice?" National Conference on Multinational Corporations for Corporate Leaders, sponsored by the National Chamber Foundation, Washington, D.C., November 25-26, 1975.
48. Pharmaceutical Industry Conference at American University, December 15-16, 1975.
49. "The Economic Outlook," Credit Managers' Association of Southern California, Roger Young Auditorium, Los Angeles, California, January 19, 1976.
50. Presentation to the Federal Trade Commission, "Mergers and Economies of Scale," Los Angeles, California, March 11, 1976.
51. "The Managerial Finance Theory Course," San Jose, California, March 26, 1976.

52. "The FTC LOB **[**84]** Program," PMM Partner Development Program, Coto de Caza, July 1976.

d) Papers Presented at Professional Societies:
1. Presentations to meetings of professional associations, average one every two years, 1960-69.
2. "Pricing Policy of Large Corporations," Western Economic Association, August 27, 1970.
3. "Discussion of Vertical and Conglomerate Aspects of Market Imperfection," American Economic Association, December 27, 1970.
4. "Merger and Diversification Trends," National Association of Business Economists, September 19, 1969.
5. "The Industrial Economics Background of the Penn Central Bankruptcy," American Finance Association, December 1970.
6. "Current Trends in Financial Theory and Practice" Southwestern Finance Association Meetings, March 18, 1974.
7. "Trends in Financial Markets," Western Finance Association, June 16, 1974.
8. "An Econometric Model of Industrial Organization," Western Economic Association, June 16, 1974.
9. "The Content of the Basic Finance Course," Western Finance Association, June 28, 1975.

10. "Pricing and Management Science," National ORSA/TIMS Joint Meeting, Las Vegas, **[**85]** Nevada, November 19, 1975.
11. Discussant, "Mergers, Regulated Firms," American Finance Association Meeting, Dallas, Texas, December 27-30, 1975.
12. Discussant, Western Economic Association Annual Conference, San Francisco, California, June 24-27, 1976.

e) Service to the Staff or Editorial Board of Scholarly Journals or Other Publications:
1. Journal of Finance, Associate Editor, 1948-55.
2. Financial Analysis Journal, Board of Editors, 1965-70.
3. Business Economics, Board of Editors, 1965-
4. Western Economic Journal, Board of Editors, 1963-
5. Journal of Financial and Quantitative Analysis, Board of Editors, 1969-
6. Journal of Business Research, Board of Editors, 1973-
7. Journal of Economics and Business, Associate Editor, 1975-
8. Western Finance Association's Nominations Committee, Member, 1976.
9. Journal of Corporate Accounting and Finance, Advisory Board, 1977-

[*1125] f) Membership in Professional Associations and Scholarly Societies:
1. Phi Beta Kappa, 1937-
Treasurer, 1973-
2. American Finance Association, 1942-

Board of Directors, **[**86]** 1961-62
President, 1966
Advisory Board, 1967-71
3. American Economic Association, 1943-
Advisory Committee to the U.S. Census,

Washington, D.C., 1973-75.
4. Western Economic Association, 1949-
President, 1962
5. Econometric Society, 1950-
6. Royal Economic Society, 1955-
7. Financial Analysts Society, 1960-
8. American Statistical Association, 1960-

g) Community Service Activities:
1. Lectures to community groups, average 2 to 3 per year.
2. Educational Director, Credit Managers Association of Southern California, 1958-
3. "The Campaign for Corporate Responsibility," KTLA TV Channel 28, June 1970.

AWARDS AND HONORS:

a) Commendations, Honors, Foreign Decorations, Honorary Degrees:
1. Cardinal O'Hara Memorial Lecturer, Notre Dame University, 1965.
2. Distinguished Lecture Series, University of Oklahoma, 1967.
3. Distinguished Lecture Series, Mississippi State University, 1972.
4. Distinguished Lecture Series, University of Utah, 1972.
5. Distinguished Lecture Series, Wright State University, 1975.

6. Distinguished **[**87]** Lecture Series, Miami State University, 1975.
7. A runner up for GSM, Alumni Association's Outstanding Teaching Award, June 1975.
8. Nominee from GSM for Campus Teaching Award, 1977.
9. Winner, Campus Teaching Award, 1978.

b) Contracts, Grants, Fellowships:
1. Principal Investigator, Ford Foundation, Faculty Research Fellowship, 1961-62.
2. Principal Investigator, McKinsey Foundation Grant of $ 17,500 to study "Corporate Resource Allocation," 1965-68.
3. Principal Investigator, General Electric Company, $ 10,000 grant for study of "Public Policy Toward Mergers," 1967.
4. Principal Investigator, Research program in competition and business policy, 1970-

RESEARCH IN PROGRESS:
1. The development of the large diversified corporation and its implications for the theory of the firm, 1972-
2. The Research Program in Competition and Business Policy is engaged in a large scale empirical effort to test theories of market behavior with new approaches, new data and new specifications of the models.
Econometric Model of Industrial Organization
Studies of Auto, Drug, Steel and Telecommunication Industries.

[88]** OTHER RELEVANT INFORMATION:

None

PUBLICATIONS:

a) Books Published:
1. Weston, J. F., The Role of Mergers in the Growth of Large Firms, Berkeley: University of California Press, (1953).

2. Weston, J. F. and Jacoby, N. H., Procurement and Profit Renegotiation, San Francisco: Wadsworth Publishing Company, Inc., (1960). Author of **[*1126]** Chapters 1 and 12, co-author (with Jacoby, N. H.) of Chapter 9, "Profit Standards for Renegotiation."

3. Weston, J. F., Managerial Finance, New York: Holt, Rinehart and Winston, Inc., (1962).
Appendix to Chapter 22 ("Some Theoretical Aspects of Convertible Securities") reprinted in Readings in Essentials of Managerial Finance, Brigham, E. F., Ricks, R. B., (Eds.), New York: Holt, Rinehart and Winston, (1968).
Second Edition, New York: Holt, Rinehart and Winston, 1966.
Third Edition (with Eugene F. Brigham), New York: Holt, Rinehart and Winston, (1969).
Fourth Edition, (with Eugene F. Brigham), New York: Holt, Rinehart and Winston, Inc., (1972).
Fifth Edition, (with Eugene F. Brigham), New York: Holt, Rinehart and Winston, Inc., (1975).

4. Weston, J. F., Defense-Space Market **[**89]** Research, Cambridge, Mass.: The M.I.T. Press, (1964).
5. Weston, J. F., Financial Management in the 1960's: New Challenges and Responsibilities, New York: Holt, Rinehart and Winston, (1966).
6. Weston, J. F. and Woods, D.H., Basic Financial Management, Belmont, California: Wadsworth Publishing Co., (1967).
7. Weston, J. F. and Woods, D. H., Theory of Finance, Readings, Belmont, California: Wadsworth Publishing Company, (1967).
8. Weston, J. F. and Brigham, E. F., Essentials of Managerial Finance, New York: Holt, Rinehart and Winston, Inc., Second Edition, (1968), Third Edition, (1974).
9. Weston, J. F., and Brigham, E. F., Study Guide for Essentials of Managerial Finance, Third Edition, Managerial Finance, Fourth Edition, New York: Holt, Rinehart, and Winston, Inc., (1968, 1971, 1974).
10. Weston, J. F. and Peltzman, S., Public Policy Toward Mergers, Pacific Palisades, California: Goodyear Publishing Company, Inc., (1969).
11. Weston, J. F. and Sorge, B. W., International Managerial Finance, Homewood, Ill.: R. D. Irwin, Inc., (1972).

12. Weston, J. F. and Ornstein, S. I., The Impact of Large Firms on the U.S. Economy, **[**90]** Lexington, Mass.: D.C. Heath & Co. (1973).
13. Weston, J. F. and Brigham, E. F., Administracion Financiera de Empresas, Cedro, Mexico: Nueva Editorial Interamericana, S.A. de C.V., (1973).
14. Goldschmid, H. J., Mann, H. M., Weston, J. F., Industrial Concentration: The New Learning, Boston: Little Brown and Co., (1974). Also author with Lustgarten, S. H., of Chapter, "Concentration and Wage-Price Changes," 307-338.
15. Weston, J. F., (Ed.), Large Corporations in a Changing Society, New York: New York University Press, (1975).
16. Weston, J. F. and Goudzwaard, M. G. (Eds.), Treasurer's Handbook, Homewood, Illinois: Dow Jones-Irwin, (1976).
17. Weston, J. F., and Bart W. Sorge, Guide to International Financial Management, New York: McGraw-Hill Book Company, (1977).

b) Books Accepted for Publication:

1. Weston, J. F. and Goudzwaard, M. G., (Eds.), Treasurer's Handbook, Richard D. Irwin, Inc.

c) Chapters in Books:

1. Jacoby, N. H. and Weston, J. F., "Factors Influencing Managerial Decisions in Determining Forms of Business Financing: An Exploratory Study," in Conference on Research in Business Finance, National Bureau of Economic **[**91]** Research, 1952.

[*1127] Reprinted in Financial Management, Corrigan, F. J. and Ward, H. A., (Eds.), Houghton Mifflin Co., (1963).
2. Jacoby, N. H. and Weston, J. F., "Financial Policies for Regularizing Business Investment," in Conference on Investment Regularization, National Bureau of Economic Research, (1954).
3. Weston, J. F., "Financial Provisions of the E.E.C.," 459-487 in International Manual on the European Economic Community, Junckerstoriff, H. K. (Ed.), St. Louis: St. Louis University Press, (1963).

4. Weston, J. F., "Analysis of the Technical Components of the Federal Credit Programs," Chapter 7, in Federal Credit Programs (Research Studies for the Commission on Money and Credit); Englewood Cliffs, New Jersey: Prentice-Hall, (1963).
5. Weston, J. F., "California's Future: Some Open Questions," Chapter 9, 55-68 in California's Future Economic Growth, Werner, Z. H. and Baisden, R. N., (Eds.), Berkeley: Diablo Press, (1965).
6. Weston, J. F., "The Determination of Share Exchange Ratios in Mergers," Chapter 6, in The Corporate Merger, Alberts, W. W. and Segall, J. E., (Eds.), Chicago: University of Chicago Press, (1966).

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7. Weston, J. F., "Sources and Costs of Obtaining Funds," in Profits in the Modern Economy, Minneapolis, Minn.: University of Minnesota Press, (1967).
8. Weston, J. F., "Valuation of the Firm and Its Relation to Financial Management," Chapter 1, 10-33, in Financial Research and Management Decisions, Robichek, A. A. (Ed.), New York: John Wiley and Sons, Inc., (1967).
9. Weston, J. F., "Evaluating Company Performance," Chapter 7, in Handbook of Business Administration, Maynard, H. B., (Ed.), New York: McGraw-Hill, (1967).
10. Weston, J. F., "The Position of Small Business in the American Economy," Chapter 2, in The Financing of Small Business, Peffer, I. (Ed.), New York: Macmillan Co., (1967).
11. Weston, J. F., "Discussion of papers on Equity, Capital, Leverage and Taxes," 117-125 in Rate of Return Under Regulation; New Directions and Perspectives, Trebing, H. M., and Howard, R. H., (Eds.), East Lansing: Michigan State University, (1969).
12. Weston, J. F., "The Nature and Significance of Conglomerate Firms," St. John's Law Review, 44, 66-80, Special Edition, Brooklyn, N. Y., (1970).

13. Weston, J. F., "Changing Environments **[**93]** and New Concepts of Firms and Markets," 9-15 in New Technologies, Competition, and Antitrust, National Industrial Conference Board, Ninth Conference on Antitrust Issues in Today's Economy, (1970).
14. Weston, J. F., "Business Power Over Markets and Consumers The Facts," and Economic Consequences of Industrial Concentration," chapters 20 and 21, Contemporary Challenges in the Business Society Relationship, Steiner, G. A., (Ed.), Los Angeles, California, Graduate School of Management, (1972).
15. Weston, J. F., "Economic Aspects of Consumer Product Safety," 487-500 in Issues in Business and Society, Steiner, G. A. (Ed.), New York: Random House (1972).
16. Weston, J. F. and Dunn, M. F., "CAPM and the Measurement of Business Risk," 47-81 in Risk and Regulated Firms, Howard, R. H., (Ed.), Graduate School of Business Administration, Michigan State University (1973).
17. Weston, J. Fred, "Investment Decisions Using the Capital Asset Pricing Model," in Financial Management, by Clark, J. J., Clark, M. and Elgers, P., Boston, Mass.: Holbrook Press, 1976.

[*1128] 18. Weston, J. Fred, "Do Multinational Corporations Have Market Power to Overprice?" **[**94]** in The Case for the Multinational Corporation: Six Scholarly Views, Madden, C. (Ed.), New York: Praeger Publishers, 1977, pp. 10-69.
19. Weston, J. Fred, "Comment: The Integrated Firm Under Regulatory Constraint," in New Dimensions in Public Utility Pricing, Trebing, H. M., (ed.), MSU Public Utilities Studies, Division of Research, Graduate School of Business Administration, Michigan State University, 1976, pp. 608-619.

d) Monographs:

1. Weston, J. F., Economics of Competitive Bidding on New Issues of Corporate Securities, Chicago: University of Chicago Press, 1942.
2. Weston, J. F., The Scope and Methodology of Finance, Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1966.

c) Professional Journal Articles Published:

1. Weston, J.F., "Profit as the Payment for Uncertainty-Bearing," Journal of Business, 22, 2, 106-118, (1949).
2. Weston, J.F., "Enterprise and Profit," Journal of Business 22, 3, 141-159, (1949).

3. Weston, J.F., "Consistency and Changing Price Levels," Accounting Review, 24, 4, 379-386, (1949).

4. Weston, J.F., "Some Theoretical Aspects of the Construction of Formula Timing Plans," Journal of Business, 22, **[**95]** 4, 249-270, (1949).
5. Weston, J.F., "Incidence and Effects of the Corporate Income Tax," National Tax Journal, 2, 4, 300-315, (1949).
6. Weston, J.F., "A Generalized Uncertainty Theory of Profit," American Economic Review, 40, 1, 40-60, (1950).
7. Weston, J.F., "Comment on the Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration, 1940-1947," Review of Economics and Statistics, 33, 1, 72-73, (1951).
8. Weston, J.F., "An Uncertainty Theory of Profit," (comments and rejoinder included), American Economic Review, 41, 1, 165-181, (1951).
9. Weston, J.F., "The Recent Merger Movement," Journal of Business, 25, 1, 30-38, (1952).
10. Weston, J.F., "Discussion: Investment and Economic Effects of Growth of Private Pension Plans," Journal of Finance, 281-284, (1952).
11. Jacoby, N.H. and Weston, J.F., "Profit Standards," Quarterly Journal of Economics, 66, 224-250, (1952).
12. Weston, J.F., "Revaluations of Fixed Assets," Accounting Review, 28, 4, 482-490, (1953).
Reprinted in Readings in Accounting Theory Carl T. Devine (Ed.), Universitas Indonesia, (January 1963).

13. Weston, J.F., **[**96]** "The Profit Concept and Theory: A Restatement," Journal of Political Economy, (April 1954).
Reprinted in Readings in Microeconomics, David R. Kamerschen (Ed.), World Publishing Co., (1967).
Reprinted in Readings in the Development of Economic Theory, I. Rima (Ed.), Holt, Rinehart and Winston, (1970).
14. Weston, J.F., "Norms for Debt Levels," Journal of Finance, 9, 2, 124-135 (1954).
15. Weston, J.F., Karrenbrock, W.E., "Profit Determination in Renegotiation," Controller, 216-245 (1954).
16. Weston, J.F., "The Finance Function," Journal of Finance, 9, 3, 265-282 (1954).
17. Weston, J.F., Beranck, W., "Programming Investment Portfolio Construction," Analysts Journal, (1955).
18. Weston, J.F., "Toward Theories of Financial Policy," Journal of Finance, (1955).

[*1129] 19. Weston, J.F., "The Stock Market in Perspective," Harvard Business Review, 71-80 (1966).
20. Weston, J.F., "Financial Implications of Growth," Controller, 118-120 (1958).
21. Weston, J.F., "Forecasting Financial Requirements," Accounting Review, 427-440, (1958).

Reprinted in Elements of Financial Administration, O'Donnel, **[**97]** J.L., Goldberg, M.S., (Eds.), Charles E. Merrill Books, Inc., (1962).
Reprinted in Administrative Control and Executive Action, Lemke, B.C., Edwards, J.D., Charles E. Merrill Books, Inc., (1961).
22. Weston, J.F., Craig, R., "Understanding Lease Financing," California Management Review, 2, 2, 67-75, (1960).
23. Weston, J.F., "A Not-So-New Era in the Stock Market," Financial Analysts Journal, 57-64, (1960).
Reprinted in Readings in Financial Analysis and Investment Management, Lerner, E.M., (Ed.), R.D. Irwin, Inc. (1963).
Reprinted in Readings in Investments, Crary, H. and Lishan (Eds.).
24. Weston, J.F., "The Management of Corporate Capital: A Review Article," Journal of Business, 34, 2, 129-139, (1961).
25. Weston, J.F., "The Timing of Financial Policy," The Controller, 29, 12, 596-600 Ff., (1961).
26. Ansoff, H.I., Weston, J.F., "Merger Objectives and Organization Structure," Quarterly Review of Economics and Business, 2, 3, 49-58, (1962).
Reprinted in Management in Perspective, Schlender, W.E., Scott, W.G., Filley, A.C., (Eds.), Houghton Mifflin and Company, (1965).

27. Weston, J.F., "Planning **[**98]** for Corporate Merger," California Management Review, 25-29, (1963).

Reprinted in Business Policy Readings and Commentaries, Gross, A. and Gross, W., (Eds.), The Ronald Press Company, (1967).
Reprinted in Readings on Mergers, Gross, A., (Ed.).
28. Weston, J.F., Jacoby, N.H., "Economic Problems of In Lieu Taxation of Banks," National Tax Journal, 16, 1, 1-10, (1963).
29. Weston, J.F., "The Measurement of Comparative Tax Burdens of Firms in Different Industries," National Tax Journal, 16, 3, 230-237, (1963).
30. Weston, J.F., "A Test of Cost of Capital Propositions," The Southern Economics Journal, 30, 2, 105-112, (1963).
Reprinted in Readings in Financial Management, Mock, E.J., (Ed.), International Textbook Company, (1964).
Reprinted in Theory of Managerial Finance, Selected Readings, Ball, R.E. and Melnyk, Z.L., (Eds.), Allyn and Bacon, Inc., (January 1967).
Reprinted in The Theory of Business Finance: A Book of Readings, Archer, S.H. and D'Ambrosio, C.A., (Eds.), MacMillan Company, (1967).

31. Weston, J.F., and Reisman, A., "Teorias Del Dessarollo Economico y Estrategia de las Empresas," Boletin de Estudios **[**99]** Economicos, 18, 60, 621-637, (1963).
32. Weston, J.F. and Eiteman, D.K., "Economic Trends and Security Values A Bleak or Bountiful Future for Investors?," in Financial Analysts Journal, (January-February 1965).
33. Weston, J.F., "Financial Analysis, Planning, and Control," Financial Executive, 75, 40-48, (1965).
Reprinted in Financial Decision-Making, Mock, E.J. (Ed.), International Textbook Co., (1967).
34. Ricks, R.B. and Weston, J.F. "Land As a Growth Investment," Financial Analysts Journal, 1-10, (1966).

35. Reisman, A., Weston, J.F., and Buffa, E.S., "beitrag zu eintar Theorie der optimalen Finanzstruktur," Zeitschrift **[*1130]** Fur Betreibswirtschaft, Wiesbaden: Betriebswirtschaftlicher Verlag, Dr. Th. Gabler, 568-577 (1966).
36. Weston, J.F., "Comment on Cost of Capital Studies by Miller-Modigliani and by Lintner," in Determinants of Investment Behavior, Ferber, R. (Ed.), New York: Columbia University Press, (1967).
37. Weston, J.F., "The State of the Finance Field," Journal of Finance, 22, 4, 539-40 (1967).
38. Weston, J.F., "Antitrust Standards for 1975," Nebraska Law Review, 46, 3, 646-679, (1967).

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39. Weston, J.F. and Sorge, B., "Export Insurance: Why the U.S. Lags," Columbia Journal of World Business, 2, 5, 67-76, (1967).
40. Weston, J.F., "Reply on Merger Valuation," Journal of Finance, 23, 3, 535-536, (1968).

41. Weston, J.F., "Comment on Professor Shepherd's Conglomerate Mergers in Perspective," ***Antitrust Law*** and Economics Review, 2, 1, 33-42, (1968).
42. Weston, J.F. and Hoskins, W.L., "Line of Commerce and Commercial Banking," Southern California Law Review, 42, 2, 225-244, (1969).
43. Weston, J.F., "Diversification and Merger Trends," Business Economics, 5, 1, 50-57 (1970).
44. Weston, J.F., "Mergers and Acquisitions in Business Planning," Rivista internizionale di Science Economiche e Commerciali, 17, 4, 309-320 (1976).
45. Weston, J.F., "The Industrial Economics Background of the Penn Central Bankruptcy," The Journal of Finance, 26, 2, 311-326 (1971). (Also see No. 19 under Participation on Public Lectures or Forums.)
46. Weston, J.F., "Responses to Market Imperfections Decisions," American Economic Review, 61, 2, 125-127 (1971).

47. Weston, J.F., and Mansingnka, S.K., "Tests of the Efficiency **[**101]** Performance of Conglomerate Firms," The Journal of Finance, 26, 4, 919-936 (1971).
Reprinted in Readings on Mergers and Takeovers, Samuels, J.M., (Ed.), London: Paul Elek Books Ltd. (1972).
48. Weston, J.F., "Pricing Behavior of Large Firms," Western Economic Journal, 10, 1, 1-18 (1972).
49. Weston, J.F., "ROI Planning and Control," Business Horizons, 15, 4, 35-42 (1972).
Reprinted in Budgeting for Profits, Chandra, G. and Singhvi, S.S., (Eds.), Planning Executives Institute (1975).

50. Weston, J.F., Smith, K.V. and Shrieves, R.E., "Conglomerate Performance Using the Capital Asset Pricing Model," The Review of Economics and Statistics, 54, 4, 357-363 (1972).

51. Weston, J.F., "Implications of Recent Research for the Structural Approach to Oligopoly," ***Antitrust Law*** Journal, 41, 3, 623-634, (1972).
52. Adizes, I. and Weston, J.F., "Comparative Models of Social Responsibility, Academy of Management Journal, 16, 1, 112-128, (1973).
Reprinted in Social Issues in Business, 2nd Ed., Luthans, F. and Hodgetts, R.M., (Eds.), New York: Macmillan and Company (1975).

53. Ornstein, S.I., Weston, J.F., Intriligator, **[**102]** M.D., and Shrieves, R.E., "Determinants of Market Structure," The Southern Economic Journal, 4, 612-625 (1973).
54. Weston, J.F., "Conglomerate Firms in Perspective," Intermountain Economic Review, 4, 1, 1-13, (1973).
55. Weston, J.F. and Hoskins, W.L., "Geographic Aspects of Market Structure and Performance in Banking," Journal of Business Research, 1, 1, 31-42, (1973).
56. Weston, J.F., "Investment Decisions Using the Capital Asset Pricing Model," Financial Management, 2, 25-33, (1973).

[*1131] 57. Lebell, D., Schultz, K., and Weston, J.F., "Small-Scale Industries and Developing Countries," California Management Review, 17, 1, 3240 (1974).
58. Weston, J.F., Lustgarten, S., and Grottke, N., "The Administered Price Thesis Denied," American Economic Review, 64, 1, 232-234, (1974).
59. Weston, J.F., "New Themes in Finance," The Journal of Finance, 29, 237-244, (1974).
60. Weston, J.F., and Mansinghka, S.K., "Conglomerate Performance Measurement: Comment," The Journal of Finance, 29, 1011-1012 (1974).

61. Weston, J.F., "A Managerial Orientation in the First Finance Course," Journal of Financial and Quantitative **[**103]** Analysis, 10, 699-704 (1975).
62. Weston, J.F., and Edward M. Rice, "Value of the Firm Under Regulation: Mergers and Stockholder Returns, Discussion," The Journal of Finance, 31, 743-47 (1976).
63. Weston, J.F., "Asset Expansion Decisions in the Framework of the Capital Asset Pricing Model," Bedrijfskunde. Tijdschrift voor Modern Management, 48, 197-207 (197 6/3).
64. Weston, J.F., and Rice, E.M., "Do Steel Producers Administer Prices?" Challenge, 19-24 (1976).
65. Weston, J.F., Smith, K.V., "Further Evaluation of Conglomerate Performance," Journal of Business Research, 5, 5-14 (1977).

f) Professional Journal Articles Accepted:
1. Weston, J.F., Lee, W.Y., "Cost of Capital for a Division: Note," Journal of Finance, forthcoming.

g) Professional Journal Articles Submitted:
1. Weston, J.F., Dann, L.Y., "A Framework for the Analysis of Leasing."

h) Conference Proceedings Published:
1. Weston, J.F., "Some Perspectives on Capital Theory," Proceedings Issue of The American Economic Review, 41, 2, 129-144, (1951).

2. Weston, J.F., "Criteria for Judging Mergers," Proceedings of the Thirty-Second Annual Conference of the Western **[**104]** Economic Association, 82-84, (1957).
3. Weston, J.F., "An Appraisal of Recent Contributions to the Theory of the Cost of Capital," Proceedings of the Thirty-Fourth Annual Conference of the Western Economic Association, (April 1959).
4. Weston, J.F., "The Good Financial Society," Proceedings of the Thirty-Fifth Annual Conference of the Western Economic Association, (August 1960).
5. Weston, J.F., "The Characteristics of Postwar Business Fluctuations," in Effective Marketing Coordination, Proceedings of the Forty-fourth National Conference of the American Marketing Association, 441-454, (1961).

6. Weston, J.F., "Influence of Stages of Development on Growth Rates," Proceedings of the 1961 Meetings of the American Statistical Association, 62-73, (1961).
7. Weston, J.F., "The Measurement of Cost of Capital," Proceedings of the 1962 Summer Symposium of the American Society for Engineering Education, Lesser, A. Jr. (Ed.), 80-90, (1962).
8. Weston, J.F., "Discussion of Papers on Capital Markets," The 1963 Proceedings of the Business and Economic Statistics Section of the American Statistical Association, 177-179, (1963).

9. Weston, **[**105]** J.F., "The Economic Performance of Large Firms," Proceedings of the Conference on Changing Business-Society Relationships, Stenner, G.A. (Ed.), Graduate School of Management, UCLA, Los Angeles, (1974).

10. Weston, J.F., "Comment: Regulatory Reform for the Deposit Financial Institutions Retrospect and **[*1132]** Prospects," Journal of Financial and Quantitative Analysis, 1974 Proceedings, 831-833, (November 1974).

i) Book Reviews:
1. Review of Economic Mobilization for War, a group of Brown University Economists, Chicago: Richard D. Irwin, Inc., in The Journal of Business of the University of Chicago, 15, pp. 234, (July, 1942).
2. Review of Readings in the Theory of Income Distribution, Selection Committee: Fellner, W. and Haley, B.E., Philadelphia: The Blakiston Company, in The Journal of Business of the University of Chicago, 20, 179-181, (July 1947).
3. Review of The Regulation of the Security Market, Atkins, W.E., Edwards, G.N. and Moulton, H.G., Washington: Brookings Institution, in The Journal of Political Economy, 55, 377-378, (August 1947).

4. Review of Insurance, Ackerman, S.B., New York: Ronald Press Company, the University of **[**106]** Chicago, in The Journal of Business, 22, 204-205, (July 1949).
5. Review of Problem Manual in Corporation Finance, Van Arsdell, P.M., New York: Ronald Press Company, in Accounting Review, 25, 478-479 (October 1950).
6. Review of Cyclical Diversities in the Fortune of Industrial Corporations, Hultgren, T., New York: National Bureau of Economic Research, in Journal of American Statistical Association, 46, 131-138 (1951).
7. Review or Changing Concepts of Business Income Report of Study Group on Business Income, New York: MacMillan, in American Economic Review, 42, 662-665 (September 1952).
8. Review of The Theory of Investment of the Firm, Lutz, F. and V., Princeton: Princeton University Press, in Journal of Business of the University of Chicago, 25, 269-271 (October 1952).
9. Review of Case Problems in Finance, Hunt, P. and Williams, C.M., Homewood: Irwin, in Accounting Review, (January 1955).
10. Review of The 20th Century Capitalist Revolution, Berle, Adolph, A., Jr., In Journal of Political Economy, (February, 1956).

11. Review of Common Stock Financing, Stevenson, H.W., University of Michigan Press, in Accounting Review, **[**107]** 716-717 (October 1958).
12. Review of The Scholastic Analysis of Usury, Noonan, J.T., Jr., Harvard University Press, in Journal of Finance, 14, 1, (March 1969).
13. Review of Railroad Equipment Financing, Street, D.M., in Journal of Finance, 15, 1 (March 1960).
14. Review of Financial Institutions in Journal of Finance, 16, 3, 461-462 (September 1961).
15. Review of Growth Yields on Common Stock, Soldofsky, R., in Accounting Review, (July 1964).
16. Review of California Banking in a Growing Economy, Minsky, H., in National Banking Review, 586-590, (1966).
17. Review of Insider Trading and the Stock Market, Manne, N., in George Washington Law Review, 140-145, (1967).
18. Review of The Corporate Economy, Marris, R. and Wood, A., Cambridge, Mass.: Harvard University Press, in The Journal of Finance, 27, 1, 157-159 (March 1972).
19. Review of Economic Concentration: Structure, Behavior and Public Policy, Blair, J.M., in Monthly Labor Review, 79, (October 1972).

20. Review of the FTC Staff's Economic Report on Conglomerate Merger Performance in The Bell Journal of Economics and Management Science, 4, 2, 635-639 **[**108]** (1973).

21. Review of Financial Control: A Systems Approach, Wilson, R.M.S., McGraw-Hill Co., (UK), Ltd., Maidenhead, **[*1133]** England, 1974, in The Bankers Magazine, 158, 5, (Summer 1975).

j) Reports: None

k) Working Papers:

1. Weston, J.F., Intriligator, M.D., and DeAngelo, H., "An Econometric Test of the Structure Conduct-Performance Paradigm in Industrial Organization."

l) Abstracts: None

OTHER CREATIVE ACTIVITY:

a) Video Tapes: (Written and Recorded)

1. Lectures on Finance Function, Financial Forecasting, Bankruptcy for Learning Centre Course in Managerial Finance.

b) Cases: None

c) Hearings: (Senate Hearings)

1. J. Fred Weston, "Conglomerate Firms and Economic Efficiency," presentation to U.S. Subcommittee on Antitrust and Monopoly, Senator Philip A. Hart, Chairman, Washington, D.C., January 28, 1970.
2. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary United States Senate, 93rd Congress, S. 1167, March and May 1973.
3. "Anti-Inflation Program," Hearings on Pricing by Concentrated Industries, Joint Economic Committee, U.S. Government Printing Office, 13-30, September 4, 1974.

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4. "Some Economic Statistics Related to the Prenotification Bill S. 409," Hearings on Council on Wage and Price Stability Act Amendments of 1975, Committee on Banking, Housing and Urban Affairs, United States Senate, Ninety-Fourth Congress, First Session, 317-333, March 7, 1975.
5. "Industrial Concentration and Stabilization Efforts," in Oversight of Antitrust Enforcement, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary United States Senate, Ninety-Fifth Congress, First Session, 558-571, May 11, 1977.

d) Other:

1. "Finance Business," Encyclopedia Britannica, Fifteenth Edition, 298-302 (1974).

JUDGMENT FOR DEFENDANTS AND AGAINST PLAINTIFF

This action came on for trial before the Court, the Honorable A. Andrew Hauk, United States District Judge, presiding, on August 1, 1979, and the issues having been duly tried, and the Court having rendered and entered its Memorandum of Decision and Order of Judgment, constituting the Court's findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That defendant Kerkorian be, and he hereby is, dismissed from and out of the Complaint, First Amended **[**110]** Complaint, and each and every cause of action therein alleged or attempted to be alleged therein, for lack of jurisdiction.

2. That defendant Tracinda be, and it is hereby, dismissed from and out of the Complaint, First Amended Complaint and each and every cause of action alleged or attempted to be alleged therein, because said defendant Tracinda is exempted from Section 7 of the Clayton Act, *15 U.S.C. 18*, by the first sentence of paragraph three thereof.

3. That plaintiff take nothing of or from defendants or either of them, and defendants have judgment against plaintiff on the merits.

4. That the Complaint, First Amended Complaint and each and every cause of action alleged or attempted to be alleged therein against defendants or either of them, be and the same are dismissed on the merits.

[*1134] 5. That defendants shall have and recover its and his respective costs of suit incurred herein.

International Asso. of Machinists & Aerospace Workers, ("IAM") v. Organization of Petroleum Exporting Countries ("OPEC")

United States District Court, Central District of California

September 18, 1979

No. 78-5012-AAH (SX)

Reporter

477 F. Supp. 553 *; 1979 U.S. Dist. LEXIS 9713 **; 1979-2 Trade Cas. (CCH) P62,868

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ("IAM"), An Association, Plaintiff, v. THE ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES ("OPEC"); THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA, ("ALGERIA"); THE REPUBLIC OF ECUADOR, ("ECUADOR"); THE GABONESE REPUBLIC, ("GABON"); REPUBLIC OF INDONESIA, ("INDONESIA"); IMPERIAL GOVERNMENT OF IRAN, ("IRAN"); REPUBLIC OF IRAQ, ("IRAQ"); STATE OF KUWAIT, ("KUWAIT"); LIBYAN ARAB REPUBLIC, ("LIBYA"); FEDERAL REPUBLIC OF NIGERIA, ("NIGERIA"); STATE OF QATAR, ("QATAR"); KINGDOM OF SAUDI ARABIA, ("SAUDI ARABIA"); STATE OF UNITED ARAB EMIRATES, ("UNITED ARAB EMIRATES"); AND THE REPUBLIC OF VENEZUELA, ("VENEZUELA"), Defendants.

Core Terms

crude oil, purchaser, gasoline, domestic, foreign state, prices, damages, anti trust law, immunity, injunctive relief, indirect, oil, preliminary injunction, commercial activity, gasoline price, regulations, sovereign, Energy, sovereign immunity, default, lawsuit, Sherman Act, sovereignties, antitrust, injunction, Clayton Act, refiners, evidentiary hearing, legislative history, price fixing

LexisNexis® Headnotes

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

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

See *15 U.S.C.S. § 1*.

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

HN2[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se category of antitrust violations is made up of 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 precise harm they have caused or business excuse for their use.

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

HN3[] US Department of Justice Actions, Civil Actions

See 15 U.S.C.S. § 15.

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

HN4[] US Department of Justice Actions, Civil Actions

See 15 U.S.C.S. § 26.

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN5[] Foreign & International Immunity, Sovereign Immunity

See 28 U.S.C.S. § 1605(a)(2).

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Relief From Default

HN6[] Injunctions, Preliminary & Temporary Injunctions

No judgment by default shall be entered by the court unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. 28 U.S.C.S. § 1608(e).

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Energy & Utilities Law > Antitrust Issues > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN7[] Purchasers, Direct Purchasers

A plaintiff in a price fixing case may recover only if it purchased directly from the alleged price fixer. An indirect purchaser may not recover on the basis of the so-called pass-on or pass-through doctrine.

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

HN8[] Private Actions, Purchasers

The evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution.

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

HN9[] Private Actions, Purchasers

The two primary features of the cost-plus contract are: (1) a direct and easily measurable pass-on of costs; and (2) a commitment for a fixed quantity, precluding evidentiary complexities due to considerations of decreasing sales.

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

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

See 15 U.S.C.S. § 753(b)(2).

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN11[] US Department of Justice Actions, Civil Actions

See *15 U.S.C.S. § 26*.

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

HN12[] Private Actions, Purchasers

Illinois Brick and Hanover Shoe do not preclude an indirect purchaser from seeking injunctive relief. In contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses that the supreme court emphasized when limiting the availability of treble damages.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

HN13[] Remedies, Damages

15 U.S.C.S. § 15 of the Clayton Act, which provides for damages for any person who shall be injured by conduct in violation of the antitrust laws, and *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, which allows injunctive relief against threatened loss or damage. For purposes of *§ 16* the complainant need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Antitrust & Trade Law > Clayton Act > General Overview

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

HN14[] Antitrust & Trade Law, Clayton Act

The test for standing under *§ 16* of the Clayton Act, *15 U.S.C.S. § 26* has been framed in terms of a proximate cause standard that is less constrained than that under *§ 4* and which might in fact be no more rigorous than the general rule of standing.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

HN15[] Purchasers, Indirect Purchasers

The multiplicity of suit problem does not exist in the context of *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, injunctive relief. The remedy of an injunction does not give rise to recovery of a fund from which a court would have the impossible task of attempting to apportion the recovery among a long line of indirect purchasers on a chain of distribution. An indirect purchaser may sue for injunctive relief under the antitrust laws.

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

International Law > ... > Foreign Sovereign Immunities Act > Jurisdiction > Subject Matter Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN16[] Subject Matter Jurisdiction, Jurisdiction Over Actions

Subject matter jurisdiction is granted to the district courts to hear actions against foreign states under 28 U.S.C.S. § 1330(a). District courts only have jurisdiction to hear such actions when the foreign state is not entitled to immunity. Consequently, the question of sovereign immunity has been given jurisdictional status by its express inclusion in the statute.

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN17[] Foreign & International Immunity, Sovereign Immunity

See 28 U.S.C.S. § 1330(a).

International Law > Dispute Resolution > General Overview

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN18[] International Law, Dispute Resolution

Sovereign immunity is a doctrine of international law under which domestic courts must refrain from asserting jurisdiction over a foreign state.

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN19[] Foreign & International Immunity, Sovereign Immunity

Under the absolute sovereign immunity theory, a foreign state could not be sued whatsoever without its consent. Under the restrictive theory, foreign states and sovereignties are not immune insofar as their commercial activities are concerned. The immunity of the sovereign is recognized with regard to sovereign or public acts of a state, but not with respect to private acts.

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

International Law > Foreign & International Immunity > General Overview

HN20[] Foreign & International Immunity, Sovereign Immunity

Any claim of sovereign immunity must be decided in conformity with principles set forth in the Foreign Sovereign Immunities Act. 28 U.S.C.S. § 1602.

International Law > ... > Exceptions > Commercial Activities > Direct Effects

International Law > Foreign & International Immunity > General Overview

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

International Law > ... > Foreign Sovereign Immunities Act > Exceptions > General Overview

International Law > ... > Foreign Sovereign Immunities Act > Jurisdiction > General Overview

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN21[] **Commercial Activities, Direct Effects**

Under the Foreign Sovereign Immunities Act (FSIA), foreign states are granted immunity from the jurisdiction of American courts subject to certain exceptions. *28 U.S.C.S. § 1604*. The only exception to immunity upon which plaintiff relies provides that foreign states are not immune in any case: in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and the act causes a direct effect in the United States. *28 U.S.C.S. § 1605(a)(2)*.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

HN22[] **Sovereign Immunity, Foreign Sovereign Immunities Act**

See *28 U.S.C.S. § 1604*.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

HN23[] **Sovereign Immunity, Foreign Sovereign Immunities Act**

28 U.S.C.S. § 1603(d).

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

HN24[] **Sovereign Immunity, Foreign Sovereign Immunities Act**

A foreign state's commercial acts as those which private persons normally perform, and of the same character as might be made by a private person. If the activity is one which normally could be engaged in by a private party, it is a commercial activity and the foreign state is not entitled to immunity. If the activity is one in which only a sovereign can engage, the activity is noncommercial.

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

International Law > ... > Foreign Sovereign Immunities Act > Jurisdiction > In Personam Jurisdiction

HN25[] **Foreign & International Immunity, Sovereign Immunity**

See *28 U.S.C.S. § 1330(b)*.

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

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

HN26[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Section 1 of the Sherman Act provides in part that 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. Any person guilty of such a felony is subject to liability for treble damages. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN27[] **Antitrust & Trade Law, Sherman Act**

Section 8 of the Sherman Act, *15 U.S.C.S. § 7*, and *section 1* of the Clayton Act, *15 U.S.C. § 12*, define person or persons, to include corporations and associations existing under or authorized by the laws of the territories, the laws of any state, or the laws of a foreign country.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN28[] **International Aspects, International Application of US Law**

Foreign sovereigns are not persons subject to Sherman Act liability.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN29[] **International Aspects, International Application of US Law**

The Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations. The Sherman Act refers only to persons, not to states or nations, and both the Sherman Act and the constitution would be badly misinterpreted to permit liability for acts of a sovereign.

Antitrust & Trade Law > Clayton Act > General Overview

HN30[] **Antitrust & Trade Law, Clayton Act**

Plaintiff in an injunctive action under 15 U.S.C.S. § 26 is required to show only threatened loss or damage, this damage must be proximately caused by the alleged anticompetitive actions of the defendants.

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN31[] Foreign & International Immunity, Sovereign Immunity

Mere approximation of occurrence, however, does not demonstrate causation, in and of itself. Plaintiff is required to present specific evidence satisfactory to the court to establish this causation. 28 U.S.C.S. § 1608(e).

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

International Law > Foreign & International Immunity > General Overview

HN32[] Default Judgments, Entry of Default Judgments

Under 28 U.S.C.S. § 1608(e) the court cannot enter a default judgment automatically upon failure or refusal of a foreign sovereign to appear after being served as required by the Foreign Sovereign Immunities Act.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

International Law > Foreign & International Immunity > General Overview

HN33[] Default & Default Judgments, Default Judgments

See 28 U.S.C. S. § 1608(e).

Counsel: [1]** James H. Davis, Los Angeles, Cal., Albert E. Levy, San Francisco, Cal., Ackerman, Ling & Russell by James H. Ackerman, Long Beach, Cal., Plato E. Papps, Washington, D.C., Schwartz, Alschuler & Grossman by Benjamin F. Schwartz, Los Angeles, Cal., and Klinger & Leevan by Tobias G. Klinger, Los Angeles, Cal., for plaintiff.

Richard I. Fine, Arthur Soll, and Barry Cohen, Los Angeles, Cal., as amicus curiae, in pro. per., urging the granting of the injunction.

S. C. Yuter, New York City, as amicus curiae, in pro. per., urging the granting of the injunction.

Latham & Watkins by Philip F. Belleville, Los Angeles, Cal., and Antonin Scalia, Chicago, Ill., for Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry, as amicus curiae urging dismissal.

Holmes & Warden by Khalid Abdullah Tariq Al Mansour, San Francisco, Cal., and Faisal Bin Fahad Al Talal, San Francisco, Cal., for Concerned Black Americans in Support of Africa and the Middle East as amicus curiae urging dismissal. *

[2]**

Opinion by: HAUK

Opinion

[*558] MEMORANDUM OF DECISION AND ORDER OF JUDGMENT FOR DEFENDANTS

INTRODUCTORY

In September, 1960, defendants Iran, Iraq, Kuwait, Saudi Arabia and Venezuela met in Baghdad, Iraq. The result of this meeting and subsequent meetings was the Organization of Petroleum Exporting Countries (hereinafter "OPEC"). Thereafter, defendants Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar and The United Arab Emirates joined OPEC, bringing to 13 the number of member nations. The principal aim of this organization was stated as "the unification of petroleum policies for the Member Countries and the determination of the best means for safeguarding the interests of Member Countries individually and collectively." Resolution of the First Conference, Resolution 1.2(4). To accomplish this goal, the organization expressed the desire to "formulate a system to ensure the stabilization of prices by, among other means, the regulation of production, with regard to the interests of the producing and of the consuming nations, and to the necessity of securing a steady income to the producing countries, an efficient economic and regular supply of this source of energy to **[**3]** consuming nations. . . . " Id. Resolution 1.1(3). The system that was implemented by OPEC included, among other features, the setting of prices for the sale of their crude oil.

Plaintiff International Association of Machinists and Aerospace Workers (hereinafter "IAM") filed this action in December 1978, by way of Complaint and then a day later by way of First Amended Complaint, challenging the price setting activities of OPEC and its 13 member nations, naming each nation and OPEC as defendants. Plaintiff alleged that these price setting activities violated *Section 1* of the Sherman Act, *15 U.S.C. § 1*, [1] under which price

* Briefs of amici curiae urging granting of the injunction were filed by Joel D. Joseph, and Daniel J. Popeo, Washington, D.C., for the Washington Legal Foundation, Washington, D.C.; by Congressman Jim Leach, Washington, D.C., in pro. per. with general agreement by Congressman Tom Railsback, Washington, D.C.; by Public Advocates, Inc., San Francisco, Cal. by Angela Glover Blackwell and Robert L. Gnaizda, San Francisco, Cal., for American-G.I. Forum; by Simpson, Thacher & Bartlett, by Donald Oresman, New York City, for Gulf & Western Industries, Inc.; by Atty. Gen. Carl R. Ajello, and Asst. Atty. Gen. John R. Lacey, Hartford, Conn., for the Attorney General's Office of the State of Connecticut;

An additional joint Memorandum of Law urging the Court not to dismiss the case was filed by Charles A. Graddick, Atty. Gen. for the State of Alabama, Montgomery, Ala., Avrum M. Gross, Atty. Gen. for the State of Alaska, Juneau, Alaska, Robert K. Corbin, Atty. Gen. for the State of Arizona, Phoenix, Ariz., Carl R. Ajello, Atty. Gen. for the State of Connecticut, Hartford, Conn., Jim Smith, Atty. Gen. for the State of Florida, Tallahassee, Fla., Tom Miller, Atty. Gen. for the State of Iowa, Des Moines, Iowa, Robert F. Stephens, Atty. Gen. for the State of Kansas, Frankfort, Ky., Warren R. Spannaus, Atty. Gen. for State of Minn., St. Paul, Minn., Paul L. Douglas, Atty. Gen. for the State of Nebraska, Lincoln, Neb., Richard H. Bryan, Atty Gen. for the State of Nevada, Carson City, Nev., Allen I. Olson, Atty. Gen. for the State of North Dakota, Bismarck, N.D., James A. Redden, Atty. Gen. for the State of Oregon, Salem, Or., William M. Leech, Jr., Atty. Gen. for the State of Tennessee, Nashville, Tenn., Mark White, Atty. Gen. for the State of Texas, Austin, Tex., Slade Gorton, Atty. Gen. for the State of Washington, Olympia, Wash., Bronson C. LaFollette, Atty. Gen. for the State of Wisconsin, Madison, Wis., and Chauncey H. Browning, Atty. Gen. for the State of West Virginia, Charleston, W.Va.

1 ***HN1***[] *15 U.S.C. § 1* provides:

fixing has, in a long line of cases, [2] **[**5]** **[*559]** been ruled a Per se violation. [3] The injury plaintiff has allegedly received is the payment of higher prices for gasoline at the service station pumps, by virtue of the anticompetitive actions taken by defendants and the antitrust violations involved. In this action, plaintiff asks for damages under *Section 4* of the Clayton Act, *15 U.S.C. § 15*, [4] and injunctive relief under *Section 16* of the Clayton Act, *15 U.S.C. § 26*, [5] **[**6]** praying this Court to enjoin the price setting activities of these defendants, OPEC and **[**4]** member nations. Plaintiff claims that jurisdiction of this Court is based upon the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), *28 U.S.C. § 1602, Et seq.*, particularly *28 U.S.C. § 1605(a)(2)*, [6] as well as upon the Sherman and Clayton Acts.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[2] See *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)*, Reh. den. ***390 U.S. 1018, 88 S. Ct. 1258, 20 L. Ed. 2d 169***; *United States v. General Motors, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Northern Pac. R. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *United States v. McKesson & Robbins, 351 U.S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 (1956)*; *Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951)*, Reh. den. ***341 U.S. 956, 71 S. Ct. 1011, 95 L. Ed. 1377***; *United States v. Paramount Pictures, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*; *Moore v. Jas. H. Matthews & Co., 473 F.2d 328 (9th Cir. 1972)*; Local 36 of *Intern. Fishermen & Allied Workers of America v. United States, 177 F.2d 320 (9th Cir. 1949)*.

[3] ***HN2***[] The Per se category of antitrust violations is made up of 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 precise harm they have caused or business excuse for their use. *Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440, 446 (3d Cir. 1978)*.

[4] ***HN3***[] *15 U.S.C. § 15* provides:

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

[5] ***HN4***[] *15 U.S.C. § 26* provides:

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, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

[6] ***HN5***[] *28 U.S.C. § 1605(a)(2)* provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

On June 25, 1979, plaintiff moved for a preliminary injunction. At that time, none of the defendants had made an appearance in this action or had filed an opposition to that motion. Since default had been entered by the Clerk on only three of the defendants, and since the remainder of the defendants still had time within which they could file an answer, the motion for preliminary injunction was continued. This Court wanted to give each and every defendant a full opportunity to be heard prior to ruling on the motion for preliminary **[**7]** injunction. Furthermore, the Court was aware of the constraints of the FSIA, in particular the provision that ***HN6***[] "No judgment by default shall be entered by the court . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to **[*560]** the court." *28 U.S.C. § 1608(e)*. Since the preliminary injunction sought by plaintiff would have given plaintiff a good measure of what it sought, it would have been inappropriate for this Court to proceed on an incomplete record without a full hearing. So the Court ordered the evidentiary hearing on the motion for preliminary injunction consolidated with the trial on the final injunction under *Rule 65 of the Federal Rules of Civil Procedure*, together with the evidentiary hearing on the motion for default judgment, all to be heard on August 20, 1979. In this manner, the requirements of *28 U.S.C. § 1608(e)* could be fulfilled while allowing defendants sufficient time to appear and oppose this action and at the same time allowing plaintiff sufficient time to prepare and gather evidence in support of the injunction. Moreover, the Court also issued an Order To Show Cause asking for factual and legal assistance on some **[**8]** eighteen basic questions from the defendants, and from any other knowledgeable sources as Amici curiae, with the requirements that plaintiff effect service on the defendants and on numerous Federal and State officials and agencies, and make copies available to the news media. See Appendix A.

In response, 11 briefs were submitted, and plaintiff and four Amici curiae appeared by counsel. As ordered, the consolidated hearings and trial proceeded on August 20, 1979. As of that date, each of the 13 member nations had been validly served. Each, however, had chosen not to make an appearance in this action, and as a result, a default entry had been made by the Clerk of Court against each of the 13 member nations, with determination of whether the Court would make and enter a default judgment to abide the outcome of the hearings and trial.

What follows now shall constitute the Court's written findings of fact and conclusions of law, pursuant to *Rule 52(a), F.R.Civ.P.*

At the outset, the Court pointed out that OPEC could not legally be served either under FSIA, *28 U.S.C. § 1602* ff., or under the International Organizations Immunities Act, (hereinafter "IOIA"), *22 U.S.C. § 288 Et seq.*, or **[**9]** otherwise, holding that FSIA applies only to foreign sovereignties, which OPEC is not; and, IOIA applies only to those international organizations "in which the United States participates," and the United States does not participate in OPEC. The Court added its doubts that OPEC could ever be legally served with process. But, in any event, plaintiff and its counsel admitted that OPEC could not be and had not been legally served. Whereupon the Court dismissed OPEC from the lawsuit and out of the case entirely.

Thereupon the consolidated hearings and trial commenced and ran four days and four evenings, usually from 9:30 a.m. to anywhere from 8:30 p.m., to 11:30 p.m., with appropriate recesses for rest, physical relief and meals. At the conclusion of a full day of argument, the Court issued its oral decision from the Bench dismissing the case as against all the remaining defendants, to wit, the 13 nations, members of OPEC, and ordering judgment against the plaintiff.

PLAINTIFF AS "INDIRECT PURCHASER"

1. Damages

In the early stages of the proceedings, the Court dismissed the damage portion of plaintiff's complaint. Plaintiff did not allege any direct purchase from defendants. The injury **[**10]** claimed allegedly resulted from the purchase of gasoline here in the United States. Since plaintiff did not allege or show that it purchased any crude oil or gasoline from the defendants, or had any dealings with the defendants at all, it necessarily had to be and was and is an "indirect purchaser" of and from the defendants with respect to the gasoline it purchased in the United States. The most that plaintiff could show or claim was that it purchased in the United States, at service station pumps, gasoline which in part may have been refined in the United States by American companies from defendants' crude. Viewing the facts in a light most favorable **[*561]** to plaintiff, it is clear that since the defendants' crude oil passed f. o. b. the particular defendant country's port, was sold and title passed from defendants to purchasers at such ports, was sold again and title passed again and again through crude buyers, crude shippers, crude resellers, refineries, was re-refined into gasoline, then went through gasoline distributors and marketing wholesalers and gasoline retailers until the gasoline was purchased by plaintiff at the service station pumps, plaintiff was and is at the **[**11]** very best an indirect purchaser, eight times removed from the defendants, that is, an indirect purchaser of domestic gasoline eight times removed from defendants, and not a direct purchaser of defendants' foreign crude.

As an indirect purchaser, plaintiff is precluded from seeking damages. In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court held that ***HN7***[] a plaintiff in a price fixing case may recover only if it purchased directly from the alleged price fixer. An indirect purchaser may not recover on the basis of the so-called pass-on or pass-through doctrine, urged by plaintiff. Plaintiff cannot establish antitrust injury by showing that the additional cost imposed on crude oil by the price fixing defendants has been passed on to the plaintiff by the first direct purchaser from the defendants and any intermediate purchasers along the line through the refineries and on to the service station pumps as gasoline.

The Illinois Brick case followed the earlier decision of *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In the Hanover Shoe case, the defendant, accused of monopolizing **[**12]** shoe machinery, attempted to defend against this charge by asserting that plaintiff was not injured by any acts committed by the defendant because the plaintiff, a shoe manufacturer, passed the additional costs along to the ultimate consumer. The Supreme Court rejected this pass-on or pass-through doctrine as a defense which could be asserted in an action for treble damages under *§ 4* of the Sherman Act, *15 U.S.C. § 4*. The Supreme Court based its holding on the difficulties and uncertainties of proof concerning such a defense when it stated:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are **[**13]** hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher prices had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

Hanover Shoe v. United Shoe Mach., supra, 392 U.S. at 492-493, 88 S. Ct. at 2231.

Additionally, the Court was concerned about the antitrust laws losing their effectiveness if such a defense were allowed. If this defense was carried to the extreme, the only possible plaintiffs would necessarily be the ultimate customers who, in the instances in Hanover Shoe, were buyers of single pairs of shoes. Since such individuals would only have a tiny stake in a lawsuit and, therefore, little interest in it, those who violate the antitrust laws by price fixing **[**14]** or monopolizing would retain the fruits of their illegality because no one would be available to bring and prosecute vigorously **[*562]** any class action against them. *Id. at 494, 88 S. Ct. 2224*.

In Illinois Brick, the Court was faced with the choice of either carving out an exception to Hanover Shoe, or disallowing the use of the pass-on doctrine both offensively and defensively. In disallowing its use, offensively and defensively, the Court noted that "The principal basis for the decision in Hanover Shoe was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions "in the real economic world rather than an economist's hypothetical model,' *392 U.S., at 493, (88 S. Ct. at 2231*), and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick Co. v. Illinois, supra, 431 U.S. at 731-732, 97 S. Ct. at 2068*. The Court went on to find that "***HN8***[] the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed **[**15]** from the defendant in the chain of distribution." *Id. at 732, 97 S. Ct. at 2068*. Thus, the evidentiary complexities of the pass-on doctrine, where one could become mired in a determination of how much damage to apportion to each purchaser in a long chain of distribution, led the Court to reject the offensive use of this doctrine. Additionally, the Court was concerned with exposing defendants to multiple liability if the pass-on doctrine were allowed to be used offensively, but not defensively, because in such a situation, each purchaser in the chain of distribution could recover the full measure of his own injury, and damages, as well as the injury and damages of each purchaser below him, and yet the defendant could not offset the recovery of the first purchaser against the recovery of the second purchaser, or the recovery of any subsequent purchaser against any recovery of further subsequent purchasers, or Vice versa. *Id. at 730-731, 97 S. Ct. 2061*.

The Court was also concerned about the problems of joinder inherent in such a situation, such as impossibility of joinder, frustrating attempts at class actions, difficulties in properly apportioning recoveries, and other inherent problems. **[**16]** *Id. at 737-741, 97 S. Ct. 2061*.

The Court did recognize that there may be instances where an indirect purchaser could be a proper plaintiff. A pre-existing cost-plus contract was cited as such an exception to the Court's opposition to application of the pass-on doctrine. The interaction of supply and demand would not complicate the damage determination in such a situation since the indirect purchaser would be tied to a fixed quantity with the overcharge being directly passed on. *Id. at 736, 97 S. Ct. 2061*. The Court also recognized that another situation where the pass-on doctrine might be allowed is where the direct purchaser is owned or controlled by its customer. *Id. at 736 n. 16, 97 S. Ct. 2061*.

In the present action, plaintiff does not even allege that it is a direct purchaser, and it is clearly an indirect purchaser. Plaintiff, however, asserts that it falls into the exceptions of Illinois Brick and has the right to maintain the action for damages. Plaintiff attempts to support this assertion based on three theories: (1) that certain Federal pass-through regulations are analogous to the cost-plus contract; (2) that domestic oil companies have conspired with the defendants; **[**17]** and (3) that the defendants control the United States oil companies with which plaintiff deals.

HN9[] The two primary features of the cost-plus contract which led the Court to cite this as a possible exception to Illinois Brick are: (1) a direct and easily measurable pass-on of costs; and (2) a commitment for a fixed quantity, precluding evidentiary complexities due to considerations of decreasing sales. The Federal pass-through regulations upon which plaintiff relies have neither of these characteristics. Plaintiff alleges that consumer prices for gasoline directly reflect any price increase by the OPEC nations, based on the pass-through **[*563]** statute, 15 U.S.C. § 753(b)(2), [7] which allows a dollar-for-dollar pass-through of net increases in the cost of crude oil. Plaintiff's exhibits in support of its motion for preliminary injunction, however, irrefutably establish that the actual pass-through is accomplished in a banking mechanism. The oil companies "bank" these pass-throughs until such time, as they believe, the market will allow an increase in the price of gasoline. The pass-through, if it occurs at all, is not direct and is not easily measurable. Furthermore, consumers are **[**18]** not required to buy a fixed quantity of gasoline. Consequently, evidentiary problems much the same as in Illinois Brick could and most surely would arise. Therefore, this pass-through statute and the regulations of the Department of Energy thereunder, 10 C.F.R. 212.83, pp. 277-290 (1978), are not in any way analogous to a true cost-plus contract and cannot serve as an exception to Illinois Brick.

Plaintiff's contentions with respect to conspiracy with "certain private companies and other entities" (Plaintiff's First Amended Complaint, par. 24, page 11, lines 15-21), and control of them by the OPEC countries are **[**19]** equally

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[7] ***HN10***[] 15 U.S.C. § 753(b)(2) provides in pertinent part:

(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section

(A) shall provide for a dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level;

frivolous. While plaintiff does allege a conspiracy in its complaint, the allegation is extremely general and vague. Plaintiff utterly fails to allege any facts to support a conspiracy charge, and does not even name any domestic oil companies as engaging in any such conspiracy, or being controlled in any way by OPEC or its members. Furthermore, plaintiff's complaint contains absolutely no allegations concerning control. Moreover, no evidence of any kind was adduced at the hearings and trial to show any kind of such conspiracy or control. Consequently, these contentions must fall.

The Court, therefore, must and does strike and dismiss from the First Amended Complaint the prayer for damages.

2. Injunctive Relief

Aside from seeking damages, plaintiff has prayed the Court to enjoin the defendants from continuing to conspire to fix prices. This claim is based on *Section 16* of the Clayton Act, ***HN11***[] *15 U.S.C. § 26*, which states in part:

> 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 **[**20]** . . . 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 . . . . [8]

While the Supreme Court has spoken clearly and definitively concerning an indirect purchaser's right to seek damages in Illinois Brick, the Court has not made a definitive statement concerning the right of an indirect purchaser to seek injunctive relief. Both Illinois Brick and Hanover Shoe involved damage actions only, and the Supreme Court limited its ruling to the question of damages. Thus, whether an indirect purchaser may properly seek injunctive relief for an antitrust violation remains an open question.

In *Mid-West Paper Products Company v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979)*, the Court of Appeals for the Third Circuit held that ***HN12***[] Illinois Brick and Hanover Shoe do not preclude an indirect purchaser from seeking injunctive relief. The Court based this holding on the finding, at 590, that

> in contrast to the treble damage action, a claim **[**21]** for injunctive relief does not present the countervailing considerations such as the risk of duplicative or **[*564]** ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses that the Supreme Court emphasized when limiting the availability of treble damages.

In support of this ruling the Court draws a distinction between *Section 4* of ***HN13***[] the Clayton Act (*15 U.S.C. § 15*) which provides for damages for any person who shall be injured by conduct in violation of the antitrust laws, and *Section 16* (*15 U.S.C. § 26*) which allows injunctive relief against threatened loss or damage. The Court went on to state that

> for purposes of *§ 16* the complainant "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur" . . . . *Id. at 591* (footnote omitted).

This distinction between the plaintiff's obligation to show that he has actually been injured under *Section 4*, and plaintiff's obligation to show only threatened injury under *Section 16*, led the Court to conclude that

> ***HN14***[] the test for standing under *Section 16* has been framed in terms of **[**22]** a proximate cause standard that is "less constrained" than that under *§ 4* and which might in fact be no more rigorous than the general rule of standing. *Id. at 591-592* (footnotes omitted).

[8] For full text of *15 U.S.C. § 26*, see footnote 5, Supra.

The Court also showed concern for plaintiffs that have obviously been damaged yet have been foreclosed from seeking relief, and additional concern for the enforcement mechanisms of the antitrust laws if these plaintiffs should be completely barred from seeking redress. *Id. at 593*.

A suit for injunctive relief does not present many of the problems that led the Court in Illinois Brick to preclude an indirect purchaser from seeking damages. For instance, as stated in *Hawaii v. Standard Oil Co., 405 U.S. 251, 261, 92 S. Ct. 885, 891, 31 L. Ed. 2d 184 (1972)*, "100 injunctions are no more effective than one." Thus ***HN15***[] the multiplicity of suit problem does not exist in the context of *Section 16*, injunctive relief. The remedy of an injunction does not give rise to recovery of a fund from which a Court would have the impossible task of attempting to apportion the recovery among a long line of indirect purchasers on a chain of distribution. Accordingly, some of the evidentiary and joinder problems that perplexed **[**23]** the Court in Illinois Brick are not present in an injunctive action. This is not to say, however, that all the evidentiary problems are nonexistent. The dynamics of the marketplace could still lead to extremely complex and complicated evidentiary problems in determining whether an indirect purchaser has been injured by the prohibited action. Counterbalanced against this possible difficulty of proof, however, is the recognition that should the indirect purchaser be precluded from seeking injunctive relief, he would be totally without any remedy for an injury that is many times all too real. In view of the desire of Congress for effective enforcement procedures under the ***antitrust law***, this Court does not believe that Congress intended to totally exclude such a large class of potential plaintiffs from the protection of the antitrust laws. Accordingly, this Court agrees with the Mid-West Paper decision and concludes that an indirect purchaser may sue for injunctive relief under the antitrust laws. But this does not end the matter in some way favorable to plaintiff because we must look for and find jurisdiction if plaintiff is to prevail.

JURISDICTION

HN16[] Subject matter jurisdiction is granted **[**24]** to the district courts to hear actions against foreign states under *28 U.S.C. § 1330(a)*. [9] As explicitly provided by this **[*565]** statute, however, district courts only have jurisdiction to hear such actions when the foreign state is not entitled to immunity. Consequently, the question of sovereign immunity has been given jurisdictional status by its express inclusion in this statute and must be the first question addressed by this court in determining whether this Court has been presented evidence satisfactory to support its jurisdiction to grant plaintiff's claim for relief. [10]

[25]**

HN18[] Sovereign immunity is a doctrine of international law under which domestic courts must refrain from asserting jurisdiction over a foreign state. This doctrine was first recognized in the case of *The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812)*. Until recently, when a foreign state wished to assert immunity, it would request the Department of State to make a formal suggestion of immunity to the court. The courts had begun to rely quite heavily on the practices and policies of the State Department and to place less emphasis on whether immunity was supported by the law and practice of nations, that is, international law.

The theory of absolute sovereign immunity initially predominated all judicial discussion and decision. ***HN19***[] Under this theory, a foreign state could not be sued whatsoever without its consent. But as the law evolved in this area, a restrictive theory of immunity began to gather growing support. Under the restrictive theory, foreign states

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9 ***HN17***[] *28 U.S.C. § 1330(a)* provides:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in *section 1603(a)* of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

10 A Federal Court in every case must first determine, on its own motion if the question is not otherwise suggested, whether the court has jurisdiction. *Warner v. Territory of Hawaii, 206 F.2d 851, 852 (9th Cir. 1953)*. Accordingly, whenever the question of lack of jurisdiction arises, whether it be by the parties, by the court itself, or by the suggestion of Amici curiae as in this case, it is the duty of the court to review this issue of jurisdiction.

and sovereignties are not immune insofar as their commercial activities are concerned. This theory was first stated as United States policy in 1952 in a letter ("the Tate Letter") from the Acting Legal Advisor **[**26]** of the Department of State, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman:

> . . . . (T)he immunity of the sovereign is recognized with regard to sovereign or public acts (Jure imperii) of a state, but not with respect to private acts (Jure gestionis). 26 Dep't State Bull. 984 (1952).

In 1976, Congress enacted the Foreign Sovereign Immunities Act. The legislative history is clear that the Act codified the restrictive theory of sovereign immunity. Additionally, a principal purpose of this act was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch thereby . . . assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report No. 94-1487, p. 7, 5 U.S.Code Cong. & Admin.News (1976), pp. 6604, 6606. After the enactment of FSIA, ***HN20***[] any claim of sovereign immunity must be decided in conformity with principles set forth in this act. ***HN21***[] *28 U.S.C. § 1602*.

Under it, the FSIA, foreign states are granted immunity from the jurisdiction of American courts subject to certain exceptions. *28 U.S.C. § 1604*. [11] The only exception to immunity upon **[**27]** which plaintiff relies provides that foreign states are not immune in any case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and the act causes a direct effect in the United States. *28 U.S.C. § 1605(a)(2)*.

[*566] Accordingly, for this court to have subject matter jurisdiction the defendant must show that the activities engaged in by the defendants are "Commercial activities." **[**28]**

As shown by the evidence, the pricing mechanism used by the member nations involves mutual agreement on what is called the "government take." The government take is the amount of money the government will receive for each barrel of oil extracted within its borders and sold. Initially, each of the OPEC member sovereignties received this "take" by levying a tax on the foreign company extracting the oil or by charging the foreign company a royalty for the oils extracted. As each country gained a greater proprietary interest in the company extracting the oil, a greater amount of the "take" was derived from "buyback," a term used to signify the amount a foreign state receives through the ownership, partial or total, of the company extracting and selling the crude oil. Today, the "government take" is accomplished and maintained by taxation and direct price quotation and demand, supported by production controls, sometimes euphemistically referred to as "conservation."

While price-fixing is the more publicized aspect of the crude oil activities carried on by the OPEC countries, it is not the heart of the pricing mechanism for crude. The foundation of these activities is the ability and willingness **[**29]** to control production of crude oil. As testified by the preeminent expert in the field of World Petroleum Economics, Dr. Morris A. Adelman, one of the two Court appointed experts: [12]

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[11] ***HN22***[] *28 U.S.C. § 1604* provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in *sections 1605 to 1607* of this chapter.

[12] The Court, dissatisfied with the apparent expertise and proposed testimony of the plaintiff's experts, Dr. Arnold E. Safer, Dr. James R. Kurth, and Dr. Stanley J. Foster, and after consulting the outstanding academic economic authorities in the United States, appointed as its own experts, Dr. M. A. Adelman, Professor of Economics at Massachusetts Institute of Technology, and Dr. Philip K. Verleger, Jr., Senior Research Scientist, School of Organization and Management, Yale University who until very recently had been working as Special Assistant to the Assistant Secretary for Economic Policy in the Department of the

[30]**

> Control of supply is the essence of monopoly; price fixing the result . . . . (T)he OPEC nations can raise or lower prices at will by controlling output. Most of the (crude oil) price increases since 1970 have in fact resulted from output restriction. Prices have also been raised by taxation and by direct price quotation. These two methods are convenient, but not necessary. Court Exhibit 26, Statement of M.A. Adelman. pp. 1, 12-13.

In order to determine whether these activities are "commercial activities," the Court must once again return to the FSIA for guidance. ***HN23***[] *Section 1603(d)* defines "commercial activity" as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the Nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. (Emphasis added.)

The legislative history in the House Report elaborates, referring to ***HN24***[] a foreign state's commercial acts as "those which private persons normally perform," and "of the same character as . . . might be made by a private person." **[**31]** House Report No. 94-1487, at pp. 14, 16 5 U.S.Code Cong. & Admin.News (1976), pp. 6613, 6615. If **[*567]** the activity is one which normally could be engaged in by a private party, it is a commercial activity and the foreign state is not entitled to immunity. House Report No. 94-1487 at 16, 5 U.S.Code Cong. & Admin.News (1976), p. 6615. If the activity is one in which only a sovereign can engage, the activity is noncommercial.

These standards are somewhat nebulous, however, in the context of a particular factual situation. As discussed by counsel for Amicus Curiae, Indonesia-U.S. Business Committee for the Indonesian Chamber of Commerce, the determining factor is how the court defines the act or activity. An act or activity can be defined broadly, such as "hiring of employees," an activity carried on by private parties, and thus, "commercial," or it can be defined narrowly, such as, "employment of diplomatic, civil service or military personnel," a governmental activity. It was suggested that in determining whether to define a particular act narrowly or broadly, the court should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch **[**32]** very closely upon the sensitive nerves of foreign countries.

This Court agrees that this "commercial activity" should be defined narrowly. This determination, while based partially on the factor mentioned above, is premised primarily on the recognition that a court must base its ruling on specific facts. By basing a ruling on a Generalized view of the evidence, a court may be basing its ruling on half-truths. This Court is required to make its ruling upon the Specific evidence presented in the evidentiary hearings and trial. From the evidence presented to this Court, it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource to wit, crude oil from its territory.

In determining whether the activities of the OPEC members are governmental or commercial in nature, the Court can and should examine the standards recognized under international law. The United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources. See, e.g., Resolution **[**33]** 1803, G.A. Res. 1803, § I(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962):

Treasury. Both of the experts were unanimously acknowledged by their peers as the two most outstanding and erudite experts in the field of both World and domestic petroleum economics.

That this action by the Court was a wise course is amply demonstrated by even a casual comparison between plaintiff's experts and the Court appointed experts, not only as to Expertise, compare the curriculum vitae of Safer, Foster and Kurth (Exhibits 1, 7 and 10) With the curriculum vitae of Adelman and Verleger (Exhibits 25 and 37); but also as to testimony, Compare testimony of Safer (Rep.Tr.552-900), testimony of Foster (Rep.Tr.903-1020) and testimony of Kurth (Rep.Tr.1022-1122, 1162-1185) With testimony of Adelman (Rep.Tr.1230-1522) and testimony of Verleger (Rep.Tr.1523-1615).

This comparison confirms the wisdom of the Court's complete reliance upon its own appointed experts as contrasted with its skeptical consideration of plaintiff's experts.

> Bearing in mind its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,
>
> Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and in respect for the economic independence of States, . . .
>
> Declares that;
>
> 1. The right of people and nations to permanent sovereignty over their national wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned. [13]

Accord, Charter of Economic Rights and Duties of States, G.A. Res. 3281, **[**34]** Ch. II, Art. 2(1), U.N. Doc. A/RES/3281 (XXIX) (1974); Declaration on the Establishment of a New International Economic Order in 1974, G.A. Res. 3201 (S-VI), *§ 4(e)*, U.N. GAOR, 6th Spec. Sess., Supp. (No. 1) 3, U.N. Doc. A/9559; Resolution 3171, G.A. Res. 3171, 28 U.N. GAOR 30 (Vol. 1) at 52, U.N. Doc. A/9030 (1973); Resolution 3016, G.A. Res. 3016, Preamble and *§ 1*, *27* U.N. GAOR, Supp. (No. 30), U.N. Doc. A/8730; Resolution 2158, G.A. Res. 2158, § I(1), 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966). The United States' endorsement of this principle derives from its control, as a sovereign, of the development of its own **[*568]** lands and resources. See, e.g., *U.S. Constitution, Art. 4, Sec. 3, Cl. 2*.

The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples. As stated by Dr. Adelman:

> It is difficult or impossible **[**35]** to separate the OPEC governments as governments from their role as oil producers. They began their price fixing role by levying taxes on foreign companies operating within their borders. The oil revenues are the great bulk of governmental revenues. Indeed for the OPEC nations supplying most of the oil, the oil revenues are the great bulk of the whole national product. Court Exhibit 26, Statement by M.A. Adelman, p. 9.

We need not look beyond our own borders for examples of a government taking a determinative role in the marketing of its wealth and natural resources. *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, involved an antitrust challenge to a California state program which controlled the marketing of raisins grown in the state, so as to restrict competition among the growers, and maintain prices. According to the defendants in that case, (California officials), the activity was for the benefit and protection of the public welfare. The Court, in reversing the grant of injunctive relief to plaintiff, held that the program was "an act of government," *Id. at 352, 63 S. Ct. 307*, and reasoned:

> It is plain that the prorate program here was never intended **[**36]** to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *Id. at 350, 63 S. Ct. at 313*.

Similar activity has been carried on by other States and the Federal Government in this country. The discovery of the East Texas Oil Field in the early 1930's led to distressing conditions in the crude oil industry. This new oil became a drug on the market and was being sold for as little as 10 cents a barrel in Texas, at a time when the price throughout the country had soared to more than $ 3.00 a barrel. The State of Texas and other States, had, in order to prevent waste, and to conserve their natural resources, passed certain statutes and imposed restrictions requiring proration, and limiting the quantities that could be taken from the wells in various fields. The Federal

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[13] The United States voted in favor of Resolution 1803, which passed by a vote of 104-0-6. Resolution 1803, G.A. Res. 1803, § I(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962).

Connally Hot Oil Act, 49 Stat. 30, *15 U.S.C. § 715, Et seq.*, was enacted by the Congress to enforce the state statutes, by prohibiting the shipment in interstate commerce of crude oil produced in violation of state laws and regulations. *United States v. Brumfield, 85* ***[**37]*** *F. Supp. 696, 699 (W.D.La.1949)*. Thus, certain States in the United States have restricted production of crude oil in order to maintain and stabilize prices and, thereafter, the Federal Government not only acquiesced in this activity, but made the States' acts effective by the assistance of Federal law enforcement.

In view of our own State and Federal domestic crude oil activities, there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity. [14] Plaintiff, **[*569]** however, asserts that, while this may be true, the actions of the OPEC nations in coming together to conspire to fix prices is commercial and, thus, not immune. Plaintiff's position, however, is untenable. It is ridiculous to suggest that the essential nature of an activity changes merely by the act of two or more countries coming together to agree upon how they will carry on that activity. The action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act. The act derives its authority and efficacy **[**38]** from the command of the sovereign nation and is not intended to operate or become effective without that command.
[39]**

In view of all the evidence presented, this Court finds that the activity carried on by the defendant OPEC member nations is Not "commercial activity;" that, therefore, defendants are entitled to immunity under *28 U.S.C. § 1604*; and that, consequently, this Court lacks subject matter jurisdiction under *28 U.S.C. § 1330(a)*.

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[14] The legislative intent of FSIA does state that a " "regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation." House Report No. 94-1487 at 16, 5 U.S.Code Cong. & Admin.News (1976) pp. 6614-6615.

Plaintiff contends that because the OPEC member nations have a proprietary interest in the oil companies which are extracting the oil from within their respective territories, the price fixing activities in which the defendants engage are necessarily "commercial" in view of this legislative intent. While it may be true that through their activities as partial or total owners of these companies, the defendant nations do engage in commercial activities, this does not mean, and the legislative intent does not support the conclusion, that all activities, even those remotely connected with these companies, are necessarily commercial. The fact that a nation owns and operates an airline company, does not mean that all government activities regulating the use of airspace, or the ingress and egress of airplanes to and from the nation's airports, are commercial activities. Accordingly, we must look to the specific activities in which the defendants engage.

Here, a clear distinction must be drawn between the activities each government engages in by virtue of its proprietary interests and the activities in which it engages by virtue of its status as a sovereign. The activities of which plaintiff complains are clearly governmental. These activities are engaged in by the defendants in their status as sovereigns and not in their status as proprietors. This determination is conclusively established by looking to the nature of these activities and comparing them with governmental activities of other nations as we have already done.

This determination is further supported by the activities of the nations herein involved. Prior to Any proprietary interest in any oil extracting company, each defendant nation set the terms of the withdrawal of its resources, through the mediums of taxation and royalties. Thus, the defendants were engaging in this governmental conduct setting terms for crude production long before they obtained any ownership in any production companies. It necessarily follows that these activities are engaged in by virtue of each defendant's status as a sovereign because these activities preceded Any proprietary interest. Therefore, the essential nature of the activity is governmental.

Furthermore, this governmental nature does not change merely because the medium through which the activity is accomplished has changed. When defendants' obtained ownership interests in their respective oil production companies, the media being utilized by the defendants to fix the terms of oil extraction were altered and were changed. Through their proprietary interests the nations could directly control the establishment of these terms. But this change in format does not change the essential nature of the activity, which is still governmental.

As a result, the conclusion is irrefutable that these activities are governmental in nature.

And, since this Court lacks subject matter jurisdiction, it also lacks personal jurisdiction, as mandated by *28 U.S.C. § 1330(b)*. [15]

In concluding this phase of our decision, it is instructive and helpful to note that the United States Government itself has implicitly recognized the activities of the OPEC member nations to be Sovereign activities in connection with the production and marketing of crude oil, when the United States entered **[**40]** into consent decrees with the so-called "Big Seven" or "Seven Sisters" the 7 largest American oil companies doing business with the OPEC member nations. These consent decrees entered into on November 14, 1960, for a period of 25 years until November 14, 1985, in the Department of Justice Antitrust Division Case No. 1163, grant specific "exceptions" and "permissive provisions" allowing these American companies to engage in price fixing, production control and market allocation programs for crude oil when required to do so by the law of any foreign nation, specifically the sovereignties which later organized and became **[*570]** members of OPEC, and which are defendants herein. United States v. Standard Oil Co. (New Jersey), 1960 CCH Trade Cases P 69,849, p. 77,335, S.D.N.Y., Civil Action No. 86-27 (Nov. 14, 1960); United States v. Gulf Oil Corp., 1960 CCH Trade Cases P 69,851, p. 77,344, S.D.N.Y., Civil Action No. 86-27 (Nov. 14, 1960).

FOREIGN SOVEREIGNTY CANNOT BE DEFENDANT IN ANTITRUST ACTION

Even if subject matter jurisdiction did exist, dismissal of the complaint would still be necessary and appropriate. ***HN26***[] *Section 1* of the Sherman Act provides in part that "(e)very Person who **[**41]** shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . ." (Emphasis added. [16]) Any person guilty of such a felony is subject to liability for treble damages. *15 U.S.C. § 15*. It is apparent from the statutory language that plaintiff is entitled to relief in the instant action only if the defendants are "persons" as that term is used in *section 1*.

HN27[] Section 8 of the Sherman Act, *15 U.S.C. § 7*, and *section 1* of the Clayton Act, *15 U.S.C. § 12*, define "person" or "persons," "to include corporations and associations existing under or authorized by the laws of the Territories, the laws of any State, or the laws of a foreign country." This statutory language does not support the conclusion that foreign sovereigns are "persons" subject to Sherman Act liability. The case law accords with this interpretation.

In *Parker v. Brown, supra, 317 U.S. 341, 63 S. Ct. 307, **[**42]** 87 L. Ed. 315 (1943)*, the Supreme Court held that a domestic State is not a person who may be sued under the antitrust laws. The Court reasoned, at 351, *63 S. Ct. at 313*:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to "persons" including corporations (*§ 7*), and it authorizes suits under it by persons and corporations (*§ 15*). A state may maintain a suit for damages under it, *Georgia v. Evans, 316 U.S. 159, (62 S. Ct. 972, 86 L. Ed. 1346*) but the United States may not sue for damages, *United States v. Cooper Corp., 312 U.S. 600, (61 S. Ct. 742, 85 L. Ed. 1071*) conclusions derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute.
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." 21 Cong.Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to **[**43]** suppress combinations to

[15] ***HN25***[] *28 U.S.C. § 1330(b)* provides:

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under *section 1608* of this title.

[16] For full text of *Section 1* of the Sherman Act see Footnote 1, Supra.

> restrain competition and attempts to monopolize by Individuals and corporations, abundantly appears from its legislative history. (Emphasis added.)

These same considerations apply with equal force to foreign nations. [17]
[44]**

[*571] In *Hunt v. Mobil Oil Corp., 550 F.2d 68, 78 n. 14 (2d Cir. 1977)*, Cert. denied, *434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977)*, the court concluded that ***HN28***[] foreign sovereigns are not "persons" subject to Sherman Act liability. Plaintiff in that case alleged, Inter alia, that certain private party defendants had entered into anticompetitive agreements with the government of Libya. Though Libya was not named as a defendant, the Second Circuit considered Libya's liability under the Sherman Act and held that "Libya cannot be guilty of a Sherman Act violation . . . because it is not a person or corporation within the terms of the Act but a sovereign state."

A similar conclusion is found in *Interamerican Refining Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D.Del.1970)*, where the court held that ***HN29***[] "(t)he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations." (footnote omitted). Later the court added: "The Sherman Act refers only to persons, not to states or nations, and both the Act and the Constitution would be badly misinterpreted **[**45]** to permit liability for acts of a sovereign." *Id. at 1298 n. 18*.

Plaintiff has asserted that this Stare decisis precedent has been altered by the FSIA. Plaintiff relies on a reference contained in the Legislative History of the FSIA, House Report No. 94-1487, p. 19, 5 U.S.Code Cong. & Admin.News (1976), p. 6618, which provides:

> Neither the term "direct effect" nor the concept of "substantial contacts" embodied in *section 1603(e)* is intended to alter the application of the Sherman Antitrust Act, *15 U.S.C. 1, Et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, (33 S. Ct. 443, 57 L. Ed. 742) (1913)*, or *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., (131 U.S.App.D.C. 226,) 404 F.2d 803 (D.C. Cir. 1968)*, cert. denied, *393 U.S. 1093, (89 S. Ct. 872, 21 L. Ed. 2d 784) (1969)*. (footnotes omitted.)

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[17] Plaintiff has argued that Parker v. Brown has lost its effect through the decisions in *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)* and *LaFayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*. Goldfarb was an action challenging under *§ 1* of the Sherman Act a minimum fee schedule published by the Fairfax County Bar Association and enforced by Virginia State Bar. The State Bar and the County Bar attempted to use the Parker v. Brown doctrine as a defense because the State Bar was a State Agency and, as argued by the County Bar, the ethical codes and the activities of the State Bar prompted it to issue fee schedules. The Court, however, rejected these arguments, holding that anticompetitive activities must be compelled by direction of the State acting as a sovereign before the Parker v. Brown doctrine may be relied upon. *421 U.S. at 791, 95 S. Ct. 2004*. The Court, finding that these activities were not compelled by the State, held that the Parker v. Brown doctrine did not apply to the activities of these State and County Bar defendants.

Here, the activities in which the OPEC defendants are engaged, are conducted by each sovereign nation itself. Thus we can only conclude that the nation by its direction has compelled these activities.

Our case here is clearly distinguishable from Goldfarb by the simple fact that we are not dealing with an agency of the state but the state itself. Accordingly, Goldfarb does not apply here except to the extent that it further supports the determination that when the state itself is conducting the activity, there is no violation of the antitrust laws.

LaFayette is equally inappropriate. The Court concluded in LaFayette that municipalities should not be excluded from the reach of the antitrust laws. The Court found that Parker v. Brown's exemption from the antitrust laws was limited to official action directed by the state. *435 U.S. at 412, 98 S. Ct. 1123*. The Court supported its ruling by stating that "States' subdivisions generally have not been treated as equivalents of the States themselves." Id. (Footnote omitted). Once again, we are not involved with any subdivisions of the OPEC nations, but the nations themselves. Accordingly, LaFayette does not apply to our suit here.

Neither of the cases cited in the legislative history, however, supports a conclusion that a foreign nation may be sued for violating our antitrust laws. *United States v. Pacific & Arctic Co., supra*, involved an alleged conspiracy between American and Canadian carriers (not foreign **[**46]** sovereignties or nations) to monopolize certain transportation partly within and partly without the United States. Since this action was brought under our Federal Antitrust laws, a crucial question in this case was the extra-territorial reach of our domestic laws. The Court held that our laws did apply. Basic to the Court's reasoning was that the monopoly consisted of

> control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations. *228 U.S. at 106, 33 S. Ct. at 448*.

[*572] The other case, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., supra*, arose from an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping. This case, just as the Pacific & Artic case, did not involve a foreign sovereign, even tangentially. Congress **[**47]** was chiefly concerned with the continuing effectiveness of these two cases when it referred to the applicability of the Sherman Act to "any defendant." Since, in neither of these cases, was there any attempt to assert jurisdiction over a foreign state, Congress' concern cannot be interpreted to authorize a judicial assertion of jurisdiction over a foreign state for violation of our antitrust laws.

In addition, the language in the legislative history clearly tells us that the FSIA was not intended to alter the application of the Sherman Act. Prior to the enactment of the FSIA, the only definitive statement on this point was the holding in *Interamerican Refining Corp., supra, 307 F. Supp. 1291 (D.Del.1970)*, that foreign nations are not "persons" who may be sued.

Therefore, this Court in this OPEC case is still bound by all the precedents to hold that the foreign sovereignties cannot be made defendants here, despite a recent Supreme Court decision allowing a foreign sovereignty to be an antitrust plaintiff.

In *Pfizer Inc. v. India, 434 U.S. 308, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)*, the Supreme Court held that a foreign nation may be a "person" under our antitrust laws as a plaintiff **[**48]** for the purpose of bringing suit. The determining factor in the result reached by the Court was that it did not "require the Judiciary in any way to interfere in sensitive matters of foreign policy." *434 U.S. at 319, 98 S. Ct. at 591*. To include foreign nations within the ambit of "persons" who may be sued as defendants, however, would require judicial interference in sensitive foreign policy matters. [18] Since Congress has never indicated any intent to extend liability of the Sherman Act to actions of a foreign sovereign, and since the accepted doctrine is that "questions of "general policy' especially with respect to foreign sovereigns and absent explicit legislative authority are beyond the province of the Judicial Branch," *Id. at 330, 98 S. Ct. at 597* (Powell, J., dissenting), this Court must refrain from extending the Pfizer ruling beyond the strict confines of that case.
[49]**

Therefore, a foreign nation may sue, but not be sued, under the United States antitrust laws [19] and, perforce, the Court is compelled here to dismiss the entire action against the defendants, members of OPEC, because they cannot be made defendants herein in this antitrust suit and no valid claim for relief can be alleged or proved against them.

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[18] Giving a foreign sovereign the Option to sue, merely allows the nation to use our judicial system if it wishes. Allowing foreign sovereigns to be sued, however, would Require their presence in our courts. Thus the latter poses the greater threat to sensitive matters of foreign policy.

[19] This determination is consistent with the Court's rulings concerning domestic States under the antitrust laws. States may sue, *Georgia v. Evans, 316 U.S. 159, 62 S. Ct. 972, 86 L. Ed. 1346 (1942)*, but not be sued, *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, under the antitrust laws.

NO PROXIMATE CAUSE, NO INJUNCTIVE RELIEF

Even if the activity of the OPEC nations were not sovereign and governmental in nature and even if a foreign state could be sued under the American Antitrust Laws, the evidence adduced at trial does not support the granting of an injunction. Plaintiff failed to show the requisite causal connection between the alleged injury **[**50]** (rise in domestic gasoline prices) and the alleged anticompetitive conduct (price fixing of OPEC crude oil prices). The evidence clearly demonstrated that the dramatic rise in prices in 1973-1974 and in 1978-1979 was primarily caused by factors other than a rise in the crude oil.

[*573] While ***HN30***[] plaintiff in an injunctive action under *§ 16* is required to show only threatened loss or damage, this damage must be proximately caused by the alleged anticompetitive actions of the defendants. *Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573, 590 (3d Cir. 1979)*; *Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976)*; *Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1132 (5th Cir. 1975)*; *Reibert v. Atlantic Richfield Company, 471 F.2d 727, 731 (10th Cir. 1973)*. In order to demonstrate that the injury or damage was proximately caused by defendants' anticompetitive conduct, the plaintiff must demonstrate by a preponderance of the evidence that: (1) the alleged prohibitive conduct of OPEC was a substantial factor in the occurrence of any injury or damage to IAM; and (2) the plaintiff is engaged in activities intended to be protected by the American antitrust laws. **[**51]** *Reibert v. Atlantic Richfield Company, supra, at 731*. Plaintiff here (IAM) has utterly failed to meet the first of these two tests.

Plaintiff alleges that it has been damaged because it had to pay higher domestic gasoline prices by reason of the higher foreign OPEC crude oil prices attributable to the price fixing activities of the defendants, members of OPEC. Particularly, plaintiff alleges that the OPEC crude oil price hikes in 1973-1974 and in 1978-1979 resulted in higher domestic gasoline prices and were responsible for injury to plaintiff. Therefore, in order for the plaintiff to satisfactorily demonstrate causation, plaintiff must prove that the crude oil price increases were a substantial factor in the occurrence of the gasoline price hikes.

Dramatic gasoline price increases and dramatic crude oil price hikes did in fact occur during these two time periods, 1973-1974 and 1978-1979. ***HN31***[] Mere approximation of occurrence, however, does not demonstrate causation, in and of itself. Plaintiff is required to present specific evidence satisfactory to the Court to establish this causation. *28 U.S.C. § 1608(e)*. This, plaintiff has failed to do. Rather the evidence clearly and convincingly **[**52]** shows that the increase of domestic gasoline prices during these time periods was not the proximate result of increase in foreign OPEC members crude oil prices.

Domestic gasoline prices of late have principally been the result of a shortage of refinery capacity, Department of Energy allocation regulations, and shortages in crude oil at domestic refineries in 1973 and 1979. Federal regulations have also greatly discouraged refiners from adding much needed refining capacity. The quota required by the Mandatory Oil Import Program discouraged construction of additional refining capacity between 1958 and 1973. After 1973, Federal Energy Administration regulations promulgated under authority granted in the Emergency Petroleum and Allocation Act discouraged refiners from adding to refinery capacity by preventing them from recovering the incremental or marginal costs of the additional capacity. These margins had been essentially frozen at their nominal 1973 levels.

At the same time these Federal regulations were restricting the expansion of refining capacity, other Federal regulations were reducing the supply of gasoline. Two regulations promulgated by the Environmental Protection Agency, **[**53]** one prohibiting use of the additive MMT in unleaded gasoline and the other reducing the level of lead in gasoline, have both resulted in reduced production and availability of domestic gasoline.

In the context of this already restrained supply situation, an unexpected surge in domestic gasoline consumption in the latter half of 1978 significantly contributed to increased domestic gasoline prices. This unexpectedly high level of fourth quarter consumption caused refiners to reduce inventories below planned levels and thus further induced gasoline price increases. Ordinarily the loss in inventories could have been made up by increased utilization of refineries. Reduction in Iranian production (completely unrelated to any price fixing activities), however, decreased the world supply of crude oil, reduced the amount of crude oil available to the United States, and prevented **[*574]** refiners from operating refineries at a level which would have enabled them to rebuild the reduced inventories. This lower level of inventories of domestic gasoline then substantially contributed to higher prices.

During this time of reduced availability of domestic gasoline due to lack of sufficient refining **[**54]** capacity and reduction of crude oil supply, additional Federal regulations increased the severity of this shortage. The Department of Energy promulgated a series of regulations for the allocation of petroleum products during a period of shortage which established a series of priorities for different types of users and established certain set aside requirements for government supply of gasoline. Because of the compulsory requirement of supplying "priority" customers and the necessity to hold aside the "set aside" gasoline under these regulations, many filling stations received only 80% of the gasoline they had received the year before. Thus, as soon as a crisis developed, both the Federal Department of Energy and various State energy offices stepped in to turn a small shortage into a large and horrendous shortage. The result was excessive price increases and long lines at domestic service stations. These increases in domestic gasoline prices once again demonstrate that Federal regulation of the petroleum market has posed a greater threat to the American consumer than any other single factor.

As can readily be seen, the rise in OPEC members' foreign crude oil prices was not a substantial **[**55]** factor in the rise of domestic gasoline prices. In fact, some respected economists believe that the increased domestic gasoline prices actually caused the rise in OPEC members' foreign crude oil prices. The increase of these crude oil prices occurred only after the gasoline price hikes. These hikes along with the Federal and State systems of controlled allocations created a climate where spot prices of foreign and even domestic petroleum were inevitably bid up. These higher prices on petroleum product markets signaled foreign crude oil exporters that the market would support higher crude oil prices. As made clearly evident by this cause and effect relationship, the rise in foreign crude oil prices, including those of OPEC members, was not a substantial factor in the increased prices of domestic gasoline, and therefore was not the proximate cause of plaintiff's injury in, like the general public, being forced to pay higher prices for domestic gasoline.

Even if plaintiff had been able to demonstrate that the increases of foreign OPEC members' crude oil prices was a substantial factor in the general rise of domestic gasoline prices, proximate cause could not have been shown without more **[**56]** specific evidence. Plaintiff was not maintaining and could not maintain, this action on behalf of the general public or the average American consumer. Rather the action here is necessarily being brought and maintained by a specific plaintiff (IAM), with the result that proximate cause must be established to connect the alleged prohibited conduct of the OPEC members in raising foreign crude oil prices to the specific injury allegedly suffered by plaintiff, IAM, in paying higher domestic gasoline prices. Here plaintiff did not even attempt to establish that the domestic gasoline it purchased was the product of any of the crude oil purchased from one of the defendant members of OPEC. All this Court could do is engage in nebulous speculation as to whether plaintiff was a purchaser of gasoline manufactured from defendants' product, in any way at all. Once again, proximate cause has not been established by the plaintiff and the Court must deny plaintiff's prayer for injunctive relief.

NO DEFAULT JUDGMENT AND NO WAIVER

HN32[↑] Under *28 U.S.C. § 1608(e)* the Court cannot enter a default judgment automatically upon failure or refusal of a foreign sovereign to appear after being served as required **[**57]** by the Foreign Sovereign Immunities Act. The Court, as previously pointed out in the Order to Show Cause (Appendix A), and in the "Introductory" hereinabove **[*575]** at page 4, must conduct a full and complete hearing to determine if the plaintiff (claimant) has established "his claim or right to relief by evidence satisfactory to the Court." This was one of the reasons the Court consolidated the full trial of the Final Injunction and hearing upon the Preliminary Injunction with this hearing on Default Judgment, and heard all relevant evidence. The Court is convinced that plaintiff did not carry its burden of showing by a preponderance of the evidence that it was entitled to any relief. A fortiori, this Court cannot and will not enter any Default Judgment against any of the defendants.

Since no Default Judgment is entered here against any of the defendants', there is no waiver by defendants of their sovereign immunity, nor do they admit any of plaintiff's allegations concerning such sovereign immunity, each Defendant's sovereignty, or that the defendants' activities with OPEC concerning crude oil prices are in any way "commercial activities."

CONCLUSION

The Court should not conclude **[**58]** this discussion without reaffirming its admiration of plaintiff and its counsel for bringing this action, a commendation already stated by the Court at trial. In this suit, plaintiff has brought public attention in the United States and throughout the World to the frustration and anger all American gasoline consumers must feel about increasing domestic gasoline prices as a large part of the increasing costs of energy, a frustration in great part due undoubtedly to their own inertia and unjustified reliance on Federal and State bureaucracy. The Federal Executive Branch, through its Cost of Living Council and regulations, its Federal Energy Administration and Emergency Petroleum Allocations, its Department of Energy and accompanying maze of enigmatic and incomprehensible regulations, along with inept State interventions, has helped to create the energy crisis, has helped to intensify this crisis, and has utterly failed to resolve it, through inaction and ineffective action, as illustrated by the domestic gasoline price increases and long service station lines. When the Executive Branch so completely falters in its handling of an obvious and major problem, it is extremely tempting for **[**59]** the Court to take the initiative. However, we must recognize that we are a court of limited jurisdiction with the ability to handle problems only within the confines of the law and only within the power granted to this Court by Congress. Through its Order to Show Cause of June 25th, the Court endeavored to give the Executive Branch every opportunity to assist the Court in its handling of this matter. The Executive Branch, however, remained silent, perhaps hoping this storm would blow over.

With the persistent initiative of plaintiff, aided by the outstanding Amicus curiae briefs and through oral argument submitted on behalf of plaintiff by Richard A. Fine, Esq., and S.C. Yuter, Esq., In propria persona, and submitted by Latham and Watkins and Antonin Scalia, Esq., on behalf of Amicus, Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry, and by Holmes and Warden, and Khalid Abdullah Tariq Al Mansour, Esq., and Faisal Bin Fahad Al Talal, Esq., on behalf of Amicus, Concerned Black Americans In Support of Africa and the Middle East, the Court has been able to arrive at a just and legally unassailable position here. While this action must be dismissed, **[**60]** the storm and crisis still exist and will not be resolved through inaction. It is only to be hoped that the Executive Branch as the Federal Governmental leader in the field of Foreign Relations, as well as domestic and international Energy, will now take over and bring appropriate relief to the American consumer in the entire field of Energy, and particularly in foreign as well as domestic crude oil prices and domestic gasoline prices. To do less, or to put the burden back on the Judicial branch again is intolerable.

This Court may only act where Congress has given it power to act. For purposes of asserting jurisdiction over a foreign sovereign, Congress has given this Court power to act only when the sovereign does not have immunity from suit. Here the sovereign does **[*576]** have immunity from suit because the activity of which plaintiff complains is, by its nature, sovereign and governmental. There being no waiver, express or implied, of this immunity by the defendant nations, the Court is powerless to act.

Even if the Court did have jurisdiction to act, the defendant nations could not be held accountable for their activities under American antitrust laws. Foreign nations are **[**61]** not persons who may be sued under the American antitrust laws. While the Supreme Court did recently hold that foreign nations may bring suit for violations of American antitrust laws, this Court will not extend this ruling in the absence of a clear Congressional mandate changing the antitrust laws so as to permit the joining of a sovereign state as a defendant.

Plaintiff also failed on the merits. The requisite proximate cause was not established by evidence satisfactory to the Court. The causal connection between the alleged violation and the alleged injury was not shown Generally, because the evidence revealed that the principal determinants of the price of gasoline were other than the rise of crude oil prices. Neither was this causal connection shown Specifically, because the plaintiff failed to establish through specific evidence that it was a buyer, directly or indirectly, of crude oil which originated from any of the defendant nations.

As a result, this Court has no alternative but to terminate this action in favor of the defendants and against the plaintiff, and the Complaint and First Amended Complaint must be dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX A **[**62]**

ORDER TO SHOW CAUSE Re: Viability of Suit; Issues Therein; and Determination Thereof;

ORDER CONTINUING HEARING ON PRELIMINARY INJUNCTION;

ORDER SETTING CASE FOR TRIAL ON FINAL INJUNCTION, AND EVIDENTIARY HEARING RE DEFAULTS

AND

CONSOLIDATING TRIAL AND EVIDENTIARY HEARING WITH HEARING ON PRELIMINARY INJUNCTION

ORDER FOR SERVICE

TO: PLAINTIFF herein, and its attorneys and counsel of record.

TO: DEFENDANTS herein, and each of their respective attorneys and counsel, whether of record or not.

TO: UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, and ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF STATE and SECRETARY OF STATE OF THE UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY and SECRETARY OF ENERGY OF THE UNITED STATES; and their attorneys and counsel, ATTORNEY GENERAL OF THE UNITED STATES and UNITED STATES ATTORNEY, CENTRAL DISTRICT OF CALIFORNIA.

TO: STATES OF THE UNITED STATES and SECRETARY OF STATE and ATTORNEY GENERAL of each State, and their respective attorneys and counsel.

AND

TO: All persons and entities to whom these presents shall come, concern or appertain, **[**63]** and their respective attorneys and counsel.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that because of the complexities of the within lawsuit, the difficulties in framing the issues therein contained, and the far-reaching effects of judicial determination thereof, the Court has this day and date made and entered the following Orders:

[*577] I. ORDER TO SHOW CAUSE

On MONDAY, AUGUST 20, 1979, at 10:00 o'clock A.M. Pacific Daylight Saving Time, or as soon thereafter as attorneys and counsel can be heard, in Courtroom 1, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, the above entitled United States District Court, Central District of California, the Honorable A. Andrew Hauk, Judge Presiding, will hear: from any and all of the aforesaid parties, persons, entities, organizations, sovereigns, sovereignties; from all departments, agencies and instrumentalities thereof; and from any and all attorneys and counsel thereof: any and all cause, causes, reasons, rationales and theories which they or any of them have and desire to present, express or suggest to the Court with respect to, in support of or in opposition to, in question of or in answer **[**64]** to any or all of the following inquiries:

GENERAL

1. Is the within lawsuit a viable, valid, legal, proper and justiciable controversy validly and legally brought in and pending before this Court?

2. Does the within lawsuit raise any issue or issues that are or can be validly and legally determinable in and by this Court?

3. Are any or all of the issue or issues which the within lawsuit raises validly and legally determinable only by the Legislative and/or Executive branches of the United States Government rather than by the Judicial branch thereof?

4. Are the acts and activities of defendants, as alleged by plaintiff in the within lawsuit "Acts of State" Not within the reach, purview or coverage of the laws of the United States, and therefore not within the jurisdiction of the United States Courts, and more particularly this Court?

SUBJECT MATTER JURISDICTION

5. Does the within lawsuit sufficiently state or set forth any valid and legal claims for relief, or raise any issues under and by virtue of the Foreign Sovereign Immunities Act of 1976, *28 United States Code §§ 1602-1611*, Public Law 94-583, 90 Stat. 2892 (Oct. 21, 1976), so as to invest subject matter jurisdiction in this **[**65]** Court?

6. Does the within lawsuit sufficiently state or set forth any valid and legal claims for relief, or raise any issues under and by virtue of the Sherman Antitrust Act, *Section 1*, *15 United States Code 1*, and the Clayton Act, *Sections 4* and *16*, *15 United States Code 15* and *26*, so as to invest subject matter jurisdiction in this Court?

7. Do any of the acts and activities of the defendants, as alleged by plaintiff in the within lawsuit, constitute "commercial activity (carried on) in the United States (by the foreign state)," *28 U.S.C. 1605(a)(2)* and *1603(d)*; or "commercial activity carried on (elsewhere) and having substantial contact with the United States," *28 U.S.C. 1605(a)(2)* and *1603(e)*; or "an act performed in the United States in connection with a commercial activity (of the foreign state) elsewhere," *28 U.S.C. 1605(a)(2)*; or "an act outside the territory of the United States in connection with a commercial activity (of the foreign state) elsewhere and that act causes a direct effect in the United States," *28 U.S.C. 1605(a)(2)*?

8. Is the within lawsuit "(a case) not otherwise encompassed in paragraph (2) above (*28 U.S.C. 1605(a)(2)*), in which money damages are sought **[**66]** against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment," except "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused" and except "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," *28 U.S.C. 1605(a)(5)*? Note : Legislative History seems to indicate this kind of a case was intended to cover "a traffic accident or other noncommercial tort," 1976 U.S.Code **[*578]** Cong. & Admin.News, Vol. 5, p. 6604 at p. 6620, 94th Cong. 2d Sess., and would appear irrelevant in the context of the within lawsuit.

IN PERSONAM JURISDICTION

9. Have any or all of the defendants been validly and legally served with process, i. e., Summons and Complaint and First Amended Complaint, under and by virtue of the Foreign Sovereign Immunities Act of 1976, *28 U.S.C. 1608*? If so, which defendant or **[**67]** defendants, and in what manner? Does any such service invest in personam jurisdiction in this Court over the defendant or defendants so served?

PLAINTIFF'S RIGHT TO SUE; STANDING

10. Damages Clayton Act, *Section 4*, *15 U.S.C. 15*

Is not plaintiff precluded from bringing the within lawsuit against defendants, in that plaintiff is an indirect purchaser of gasoline sold to plaintiff by and through third parties other than defendants, which gasoline was manufactured and refined by said third parties from oil produced and sold by defendants directly to said third parties; and further in that plaintiff utilizes and relies upon so-called "pass on" and "pass through" theories to support its claim for damages allegedly suffered by paying higher and higher prices from time to time for said gasoline, which gasoline prices plaintiff claims were raised and caused to be raised by reason of the higher and higher oil prices fixed and raised by defendants, which oil price raises were "passed on" or "passed through" to plaintiff by the third party intermediate buyers of oil produced by defendants, which third party intermediate buyers manufactured and refined into the gasoline ultimately purchased **[**68]** by plaintiff? Note : See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, particularly at 728-729, at 735-736, and at 744-748, *97 S. Ct. 2061*, wherein the United States Supreme Court in a 6-3 decision, while not addressing the standing issue, applies the Hanover Shoe (*Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968))* doctrine against defensive use of "pass on" theories by antitrust defendants to Offensive use of such "pass on" theories by antitrust plaintiffs who are indirect purchasers from intermediate third parties other than defendants.

11. Injunctive Relief Clayton Act, *Section 16*, *15 U.S.C. 26*

Although by the ruling of *Illinois Brick, supra*, the Supreme Court effectively bars, or may effectively bar, plaintiff's claim for damages against defendants, does it bar injunctive relief in favor of plaintiff and against defendants? Note : See *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979)* wherein the Court of Appeals for the Third Circuit in a 2-1 decision, holds that indirect purchasers have standing to sue for and obtain injunctive relief under Clayton **[**69]** Act, *Section 16*, *15 U.S.C. 26*, even though barred from damage actions under Clayton Act, *Section 4*, *15 U.S.C. 15*, by the Supreme Court in the Illinois Brick case, Supra.

DEFAULT ENTRY AND DEFAULT JUDGMENT

12. Is plaintiff, by reason of effective, valid and legal service of process, entitled to Default Entry by Clerk when a defendant fails or refuses to file and serve "an answer or other responsive pleading to the complaint within sixty days after service (upon such defendant)," *28 U.S.C. 1608(d)*? If so, as against which defendant or defendants, and why? What is the effect of any such Default Entry by Clerk ?

13. What must the Court do by way of evidentiary hearing before making or entering an effective, valid and legal Default Judgment, in order to comply with the mandatory language of the Foreign Sovereign Immunities Act of 1976, ***HN33***[↑] *28 U.S.C. Section 1608(e)* which provides:

> "(e) No judgment by default shall be entered by a court of the United States . . . against a foreign state, a political **[*579]** subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

[70]**

14. In this connection, "since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity." Legislative History, 1976 U.S.Code Cong. & Admin.News, Vol. 5, p. 6616. In other words, the foreign state must produce prima facie evidence of immunity. What, therefore, is the effect of the foreign state's failure to answer or file a responsive pleading? What is the result of a default judgment against the foreign state? Does this mean that the foreign state by failing to assert the affirmative defense and by defaulting, has explicitly or by implication waived immunity and left itself open by way of default judgment against it for injunctive relief?

ATTACHMENT OR EXECUTION

(Attachment in Aid of Execution)

15. Before Judgment Against A Defendant's Property Used For A Commercial Activity In The United States.

Does the Court have any jurisdiction or power to issue a writ of attachment (garnishment, sequestration, arrest or seizure) Pendente lite against property in the United States belonging to a defendant, Prior to entry of Judgment? If so, is not that jurisdiction and **[**71]** power limited to situations where:

> (a) the defendant has "Explicitly waived" immunity against pre-judgment attachment; and

(b) "the purpose of the attachment is to secure satisfaction of a judgment that has been or ultimately may be entered against the foreign state, and not to obtain jurisdiction." *28 U.S.C. 1610(d)(1)* and *(2)*. (Emphasis ours).

16. After Judgment Against A Defendant's Property Used For A Commercial Activity In The United States.

Does the Court have any jurisdiction or power to issue a writ of execution (or a writ of attachment in aid of execution) against property in the United States belonging to a defendant After entry of Judgment? If so, is not that jurisdiction and power limited to situations where:

(a) "the foreign state has waived its immunity . . ." either Explicitly or by Implication ; Or

(b) "the property is or was used for the commercial activity upon which the claim is based," Or *28 U.S.C. 1610(a)(1)* and *(2)* (Emphasis ours, and other permissive executions After judgment in the Act are not relevant.) Or

(c) The execution or attachment in aid of execution is against property of an "agency or instrumentality of a foreign **[**72]** state," which agency or instrumentality has "waived its immunity . . . either Explicitly or by Implication," or "the judgment relates to a claim" under *28 U.S.C. 1605(a) (2)* or *(5)*, "regardless of whether the property is or was used for the activity upon which the claim is based." *28 U.S.C. 1610(a)(1)* and *(2)* (Emphasis ours).

17. In connection with inquiries 14 and 15 above, what is the proper, valid and legal meaning of the word "explicitly" when applied to waiver of immunity? And what is the meaning of the words "explicitly or by implication" when applied to waiver of immunity in *28 U.S.C. 1610*?

PROPRIETY OF PRELIMINARY INJUNCTION

18. Has plaintiff met the conditions necessarily prerequisite to obtaining a preliminary injunction? Has it demonstrated or can it demonstrate to the satisfaction of the Court that:

1. It is probable and there is a clear likelihood that plaintiff will, after trial on the merits, prevail and be **[*580]** awarded judgment against defendants, either for damages or for final injunctive relief?

2. Is the injury, damage and hardship to defendants that would be caused by the Court in granting the preliminary injunction be outweighed by the **[**73]** injury, damage and hardship to plaintiff that would be caused by the Court in not granting the preliminary injunction?

3. Is any injury or damage suffered or allegedly anticipated to be suffered by plaintiff irreparable and certain to occur?

4. Is it in the public interest to grant the preliminary injunction to plaintiff?

II. ORDER CONTINUING HEARING ON PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED THAT the hearing of plaintiff's Motion For a Preliminary Injunction be and the same is hereby continued for further hearing to the date of MONDAY, August 20, 1979, in Courtroom 1, United States Courthouse, Los Angeles, California 90012, the Honorable A. Andrew Hauk, Judge Presiding.

III. ORDER SETTING CASE FOR TRIAL ON FINAL INJUNCTION AND EVIDENTIARY HEARING RE DEFAULTS AND CONSOLIDATING TRIAL AND EVIDENTIARY HEARING WITH HEARING ON PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED that, pursuant to *Rule 65(a)(2), F.R.Civ.P.*, the trial on the merits of the Final Injunction sought in the within lawsuit, and pursuant to *28 U.S.C. 1608(e)* the evidentiary hearing re defaults, be and the same hereby are consolidated with the further hearing on plaintiff's Motion for a Preliminary **[**74]** Injunction, and the said trial on the merits of the Final Injunction, the said evidentiary hearing re defaults, and the further hearing on

Preliminary Injunction be and the same are hereby set for MONDAY, AUGUST 20, 1979, in Courtroom 1, United States Courthouse, Los Angeles, California 90012, the Honorable A. Andrew Hauk, Judge Presiding.

IV. ORDER FOR SERVICE

IT IS FURTHER ORDERED that attorneys and counsel for plaintiff shall serve a copy of this Order to Show Cause upon the plaintiff and all persons who have appeared in the within lawsuit by serving it or its, or them or their, respective attorneys and counsel of record, by registered mail, return receipt requested; upon all defendants who have not appeared herein, and their attorney and counsel by serving said defendants by registered mail, return receipt requested, and by following the procedure of service through the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services, as provided in the Foreign Sovereign Immunities Act, *28 U.S.C. 1608(a)(4)*; upon the United States of America, and its Department of Justice and Attorney General, its Department of State and Secretary **[**75]** of State, its Department of Treasury and Secretary of Treasury, its Department of Energy and Secretary of Energy by registered mail, return receipt requested, addressed to the Attorney General of the United States, United States Department of Justice, Washington, D.C. and to the United States Attorney, Central District of California, United States Courthouse, Los Angeles, California 90012; upon each and all States of the United States and each respective Governor, Secretary of State and Attorney General, by registered mail, return receipt requested, addressed to the Honorable Attorney General of each State of the United States, at the State Capitol Building of each such State; and upon all other persons to whom this Order shall come, concern, or appertain, by making copies hereof available to all news media and to any such persons requesting a copy. Such copy and service thereof shall be effected and effective if made and done, including service of a copy of the First Amended Complaint and Summons upon those not as yet served therewith, all in the **[*581]** English language. And all pleadings, motions, answers, points and authorities, and papers of every kind desired to be filed **[**76]** by any of the persons served shall be filed in the within Court and with its Clerk of Court on or before Wednesday, August 1, 1979, and served upon attorneys and counsel for plaintiff, Law Offices of Richard I. Fine, 10100 Santa Monica Boulevard, Los Angeles, California 90067 on or before the same date.

Dated: Monday, June 25, 1979

/s/ A. Andrew Hauk

UNITED STATES DISTRICT

JUDGE

CENTRAL DISTRICT OF

CALIFORNIA

JUDGMENT FOR DEFENDANTS AND AGAINST PLAINTIFF

The Court having made and entered its Memorandum of Decision and Order of Judgment For Defendants, which constitutes its findings of fact and conclusions of law pursuant to *Rule 52(a) F.R.Civ.P.*, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That judgment is rendered in favor of defendants and against plaintiff, and the Complaint and First Amended Complaint herein, and each and every cause of action alleged or attempted to be alleged therein, be and the same are dismissed with prejudice, for lack of jurisdiction.

2. That judgment is rendered in favor of defendants and against plaintiff, and the Complaint and First Amended Complaint herein, and each and every cause of action alleged or attempted **[**77]** to be alleged therein, be and the same are dismissed with prejudice, because each and all defendants are sovereignties which cannot be made defendants in an Antitrust action under either the Sherman Act, *Section 1*, *15 U.S.C. 1*, or the Clayton Act, *Section*

16, *15 U.S.C. 26*, and no claim for relief under the said Antitrust laws can legally or properly be made, stated or shown by plaintiff against defendants.

3. That plaintiff take nothing of or from defendants, or any of them, and defendants have judgment against plaintiff on the merits.

4. That the Complaint and First Amended Complaint herein, and each and every cause of action alleged or attempted to be alleged therein against defendants or any of them, be and the same are dismissed on the merits.

5. That plaintiff pay its own costs of suit incurred herein.

Photovest Corp. v. Fotomat Corp.

United States Court of Appeals for the Seventh Circuit

January 22, 1979, Argued ; September 24, 1979, Decided

Nos. 77-1741, 77-1742

Reporter

606 F.2d 704 *; 1979 U.S. App. LEXIS 11655 **; 1979-2 Trade Cas. (CCH) P62,869; 28 Fed. R. Serv. 2d (Callaghan) 1; 28 Fed. R. Serv. 2d (Callaghan) 1; 56 A.L.R. Fed. 365

PHOTOVEST CORPORATION, an Indiana Corporation, Plaintiff-Appellee and Cross-Appellant, v. FOTOMAT CORPORATION, a Delaware Corporation, Defendant-Appellant and Cross-Appellee.

Subsequent History: [1]** Rehearing and Rehearing En Banc Denied October 25, 1979.

Prior History: Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No IP 74-705-C -- Cale J. Holder, Judge.

Core Terms

processing, franchise, district court, processor, trial brief, Labs, kiosks, franchisees, submarket, prices, drive-thru, lease, tying arrangement, argues, franchise agreement, discounts, present case, customers, retail, damages, film, tie, monopolize, cases, sales, new store, Sherman Act, conspiracy, overlapped, print

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

A definition of the relevant market is essential in a claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, because without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition.

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

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Market Definition**

The relevant factors for defining the market in a *§ 2* Sherman Act case are similar to those used to define the market in a § 7 Clayton Act case. In *§ 2* cases under the Sherman Act, as in § 7 cases under the Clayton Act, there may be submarkets that are separate economic entities, and there is no reason to differentiate between "line" of commerce in the context of the Clayton Act and "part'" of commerce for purposes of the Sherman Act.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN3[] **Relevant Market, Product Market Definition**

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN4[] **Regulated Practices, Market Definition**

High cross-elasticity between two products suggests that they are in the same market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Regulated Practices, Market Definition**

The law does not require an exclusive class of customers for each relevant submarket.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

HN6[] **Monopolies & Monopolization, Attempts to Monopolize**

While the completed offense of monopolization under *15 U.S.C.S. § 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 a mere attempt charged.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product. Tying arrangements are unreasonable in and of themselves whenever 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

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A franchise license itself can be a tying product.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Governments > Courts > Authority to Adjudicate

Trademark Law > Conveyances > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Trademark Law > ... > Licenses > Licensable Subject Matter > Tying Arrangements

HN9[] **Conveyances, Franchises**

A franchise license constitutes a separate and distinct marketable item. The weight of judicial authority supports the proposition that if prospective franchisees are compelled to purchase equipment or other tied products in order to obtain the franchise and trademark, an illegal tying arrangement exists.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Trademark Law > Conveyances > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A seller's untruthful representation may constitute breach of contract or fraud or other state law violations, but it cannot constitute the missing link in an illegal tying arrangement.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN11[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A corporation can conspire in violation of *15 U.S.C.S. § 1* with its wholly-owned, unincorporated sales division.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN12[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The elements of actionable fraud are: (1) false representation of material fact; (2) knowledge of falsity or lack of reasonable ground for believing the matter asserted to be true; (3) intent to induce reliance thereon; (4) justifiable reliance by the plaintiff; and (5) resulting damage.

Counsel: Edward L. Lascher, Wendy C. Wilner, Ventura, Cal., for defendant-appellant and cross-appellee.

Theodore R. Boehm, Indianapolis, Ind., for plaintiff-appellee and cross-appellant.

Judges: Before PELL, Circuit Judge, MARKEY, Chief Judge, * and WOOD, Circuit Judge.

Opinion by: PELL

Opinion

[*707] The defendant, Fotomat Corporation, is engaged in the retail sale of film processing, film, and camera related products which are sold insofar as the present litigation is concerned from small (9' X 5'), "drive-thru" kiosks located generally in shopping center parking lots. It obtained the rights to this retailing concept in 1967 and opened its first stores in April of that year. It also began selling franchises, and by 1971, 1,035 units were open, 680 company stores and 355 franchised stores. These stores sell mostly to amateur photographers. The customer **[**2]** drives up to the side of the kiosk and gives his exposed film to a "Fotomate" who operates the kiosk. He may also purchase film or other items from the Fotomate. One or two days later the customer returns and receives the processed work. In each metropolitan area in which it operates, Fotomat runs a pickup and delivery service to the kiosks from a central area office which is staffed by an area manager and some assistants. A route driver runs a daily pickup and delivery circuit of all the kiosks in the area, delivering the previous day's developed film and picking up that day's film. At the end of the route, the driver delivers the film to the processor.

The plaintiff, Photovest Corporation, was formed in 1968 by three individuals desiring to invest in Fotomat franchises. Photovest was incorporated for the purpose of operating a block of Fotomat kiosks in the Indianapolis area. On August 26, 1968, Photovest signed a master franchise purchase agreement obligating it to purchase 15 franchises to operate 15 Fotomat stores in Marion County, Indiana. Specific store sites had not been selected, but each store was bound by the standard Fotomat franchise agreement and the standard **[**3]** Fotomat lease agreement, which would be separately signed upon the opening of each store. Photovest agreed to pay $ 21,000 for each franchise for a total of $ 315,000. It also agreed to pay Fotomat royalties and advertising fees based on

* Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

monthly gross sales. Additional details of the franchise agreement as well as other pertinent facts will be set forth throughout this opinion where relevant to the specific argument being discussed.

In December 1974, Photovest filed this action [1] charging Fotomat, Inter alia, with violations of both federal and state antitrust laws, breach of contract, fraud, and tortious breach of contract. After trial in the district court, the judge made extensive findings of fact and conclusions of law and awarded Photovest damages totaling $ 3,017,161.86. Prior to the district court's decision, Fotomat had paid Photovest $ 41,484.53 which reduced the final judgment to $ 2,923,557.

[4]** In this appeal, Fotomat raises numerous arguments regarding the antitrust, breach of contract, and damages aspects of the district court's decision. It also argues that some of the procedures followed by the district court judge violated Fotomat's due process rights. We will address one of these procedural problems first.

[*708] I. EXCHANGE OF BRIEFS PROCEDURE

Fotomat argues that it was prejudiced, and indeed was deprived of due process, by the fact that Photovest submitted an extensive trial brief to the district court judge without at the same time providing Fotomat with a copy. On Friday, December 3, 1976, Fotomat's counsel first discovered that Photovest had earlier filed a 207 page trial brief with the district court judge and that Photovest did not intend to serve a copy on Fotomat. Earlier that day Fotomat had given Photovest a copy of its trial brief. Since the trial was to begin on Monday, December 6, 1976, Fotomat immediately complained to the judge of the In camera filing. The judge found that the pretrial order did not require pretrial exchange of briefs and that there was no record of any agreement to such an exchange. He said he "would leave counsel where **[**5]** they find themselves." At that time, Photovest agreed to return Fotomat's trial brief which Fotomat had earlier served on it. On Monday, December 6, the first day of trial, Fotomat filed a motion to reconsider and the judge granted a hearing. After hearing arguments on the exchange of briefs issue, he ordered Photovest to serve its brief on Fotomat with some modifications. Photovest was allowed to edit and delete certain portions of its brief "to avoid tipping off Fotomat's witnesses." It served the edited brief on Fotomat on December 16, 1976, the ninth day of the trial. Trial was then recessed for two months. The judge advised Fotomat that it could submit a revised trial brief prior to resuming trial and could follow the same procedure as Photovest in submitting its trial brief. That is, Fotomat could submit a complete version to the court and a modified version to Photovest. All briefs were to be exchanged at the conclusion of the trial. In January, 1977, Fotomat served Photovest with its 38-page trial brief filed with the court on December 3, 1976, and on February 11, 1977, Fotomat filed a 290-page supplemental trial brief and served a copy on Photovest. After the recess, **[**6]** trial resumed on February 14 at which time Fotomat again objected to not being served a copy of Photovest's unedited trial brief. Photovest then voluntarily agreed to give Fotomat a copy of the unedited version which it did later that day.

Fotomat contends that it was prejudiced by this procedure and that the procedure violates the Federal Rules of Civil Procedure and the Constitution. Before addressing the propriety of the delayed exchange of trial briefs, we note that there is in this case the additional factor that Fotomat was apparently unaware of the procedure until the first day of trial by which time Photovest had already submitted its unedited brief to the court. The record indicates that this was a result of a bona fide misunderstanding between counsel at the pretrial stages. Nothing in the record suggests any foul play or attempts to secure an unfair advantage by either party. Accordingly, the only issues are whether the procedure violates either the Federal Rules of Civil Procedure or the Constitution, or is otherwise undesirable, and if so, whether Fotomat was prejudiced by it. We also note that the delayed exchange of trial briefs is not an unusual procedure in **[**7]** the Southern District of Indiana. Local Rule 19(k) of the District Court for the Southern District of Indiana [2] does not appear to require pretrial exchange of trial briefs and the practice in that district is not to exchange until the conclusion of trial.

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[1] Photovest amended its complaint on several occasions throughout the litigation. Our discussion proceeds on the basis of the final amended complaint.

[2] The rule provides:

(k) Subsequent to Pretrial Conferences. At such time as directed by the court, each party shall submit the following to the trial judge, unless notified to the contrary:

[*709] [8]** Fotomat contends that the procedure violates *Rule 5(a), Fed.R.Civ.P.*, which requires service on all the parties of

> Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, And similar paper . . . .

(Emphasis added.) Fotomat argues that a trial brief is a "similar paper" under *Rule 5(a)* and thus that the procedure employed in this case is inconsistent with *Rule 5(a)*. [3] However, neither Fotomat nor Photovest has provided any federal case involving the application of the rule to trial briefs, and our independent research has been equally unsuccessful. Indeed, "the language of *Rule 5* has given rise to little controversy." 4 Wright & Miller, Federal Practice and Procedure: Civil § 1141 at 570 (1969). As a result, we are left to write on a clean slate.

[9]** The inclusion of the words "and similar paper" in *Rule 5(a)* indicates that the drafters did not intend the preceding list of documents to be exhaustive. Wright and Miller state that the words suggest an expansive application of the rule. Id., § 1143 at 577. Even an expansive application of the rule does not, in our opinion, clearly mandate pretrial exchange of trial briefs. *Rule 5(a)* provides an extensive list of documents before concluding with the phrase "and similar paper." Given the prominence and significance of the trial brief in the litigation process, its glaring absence from the list of documents specifically mentioned in the rule supports the inference that the drafters did not intend *Rule 5(a)* to apply to trial briefs. This inference is buttressed by the existence of local rules like the one before us, none of which, as far as we have been able to determine, have been successfully challenged as inconsistent with *Rule 5(a)*. [4]

[10]** We also note that the rule does not address the timing of the service. The procedure in the present case clearly provided for service on all parties since it always contemplated exchange at the close of trial. The only unusual aspect was that service on the court occurred well before service on the opposing party. Therefore, arguably the rule does not have any application to the issue before us.

Fotomat also argues that the delayed exchange procedure violates the *Due Process Clause of the Fifth Amendment*. Again we note the absence of any cases involving a due process challenge to a delayed exchange of trial briefs procedure. None of the cases cited by Fotomat involves a closely analogous situation, and instead, Fotomat relies on broad language from due process decisions all of which are clearly distinguishable. For example, Fotomat cites *Haller v. Robbins, 409 F.2d 857, 859 (1st Cir. 1969)*, for the proposition that a party's constitutional

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(1) A trial brief, the nature, and extent of which will be directed by the judge. Copies of all foreign statutes involved, with reference, to their source, shall also be submitted.

(2) In non-jury cases, proposed findings of fact and conclusions of law, including citations for each conclusion of law if available.

(3) In jury cases, requested charges to the jury covering issues to be litigated shall be filed in duplicate with the clerk. Each charge shall cite appropriate authority.

A copy of requested charges also shall be served on opposing counsel.

[3] *Rule 83, Fed.R.Civ.P.*, grants district courts the authority to adopt local rules to regulate their practice "in any manner not inconsistent with these rules."

[4] See, e. g., Rule 20(c) of the District of Kansas which provides:

Any party in an action or proceeding before this court may submit a trial brief to the judge in advance of trial, provided prior notice of intention to submit such trial brief is given to all opposing counsel of record at least three days prior to such submission. . . . Two copies of such trial brief shall be delivered to the judge, but such trial brief need not be served upon opposing counsel. After the trial, all briefs shall be filed with the clerk.

See also E.D.Mich.Rules XV and XVI; S.D.Miss.*Rule 5*; E.D. and W.D.Ark.Rule 13.

rights are infringed if counsel for the opposing party is allowed "to convey information or to discuss any matter relating to the merits of the case" with the trial judge in the absence of opposing counsel. Haller was a habeas corpus case **[**11]** in which the petitioner raised a due process challenge to ex parte communications by the county attorney. The petitioner entered a guilty plea to a kidnapping charge in the state court; but sometime between his arraignment and his **[*710]** sentencing, the county attorney, in the absence of petitioner and his attorney, informed the presiding judge of a statement made by the petitioner's victim of an episode of sordid behavior by petitioner while the victim was in his custody. The judge sentenced petitioner without the petitioner knowing of the ex parte communication. The court of appeals held this to be a violation of due process. The present case differs in many respects, but a critical distinction is that the trial briefs were to be exchanged after trial giving both parties an opportunity to respond to any inaccuracies or misleading information before the court rendered judgment. This fact also distinguishes and renders unpersuasive Fotomat's reliance on *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974)*; *Home Box Office, Inc. v. F.C.C., 185 U.S.App.D.C. 142, 189, 567 F.2d 9, 56 (D.C.Cir.1977)*; and *United **[**12]** States v. Miller, 495 F.2d 362, 364-65 (7th Cir. 1974)*.

Fotomat contends that exchange after trial is too late and that this timing transgressed the due process requirement that notice and opportunity to be heard "be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972)*. However, we are of the opinion that exchange of trial briefs at the conclusion of trial is a sufficiently meaningful time for purposes of due process analysis. None of Fotomat's authority on this issue suggests otherwise. See, e. g., *Edelberg v. Illinois Racing Board, 540 F.2d 279, 285 n.9 (7th Cir. 1976)*, and cases cited therein.

That the delayed exchange of trial briefs procedure is not inconsistent with *Rule 5(a), Fed.R.Civ.P.*, and is not per se violative of due process protections does not mean that we approve of it without reservation. Indeed, we are of the opinion that exchange of trial briefs at the time they are filed with the court is sounder procedure, being one more consistent with the elimination of gamesmanship aspects of litigation and, indeed, with the quest for truth, presumably the ultimate aim of adversarial **[**13]** litigation. Any benefits that a delayed exchange may provide are outweighed by the increased potential for prejudice and by the added difficulties resulting from postponing until after trial the curing of any real prejudice caused by the trial briefs. The district court judge, particularly in the case of a long and complex trial, who has entertained incorrect concepts about some aspects of the case during the course of the trial because of an ex parte brief, is placed in the difficult position of returning to a status quo ante position prior to engaging in the decisional process.

The district court judge in the present case explained his reasons for the procedure on the first day of trial:

> I have to go back and give you the basis for my position in the District for not exchanging briefs. 99 percent of our cases are not cases of this nature, that are well prepared by both sides, and I grew up in that period when we had a lot of counter-punchers practicing law, and they were educated by the opposing party and did little or no work, but they were very adept at using the work of counsel on the other side. That was basically the background of the rule that I have followed on exchange **[**14]** of briefs.

Although we are somewhat sympathetic to the problem for which the delayed exchange procedure was designed, that problem can be mitigated to some degree by merely requiring the parties to submit their briefs for exchange simultaneously. Moreover, we are more concerned with assuring that a party at all times is as well advised of his opponent's arguments as is the trial judge than we are with the problems of the "counterpuncher."

For these reasons under our supervisory power we hereby direct any district court of this circuit which now follows the practice of delayed exchange of trial briefs to require in all future cases each party to serve his trial brief on all other parties at some reasonably short time before or after **[*711]** he files the brief with the court or provides a copy to the judge. [5]

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[5] Our authority to direct procedures in the district court derives from our supervisory powers over the district court. In *LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 77 S. Ct. 309, 315, 1 L. Ed. 2d 290 (1957)*, the United States Supreme Court stated that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the

[15]** We find no reason to reverse the district court in the present case on this issue because although we deem more desirable the procedure just announced, the district court's procedure in this case had not been demonstrated to have prejudiced the defendant. The delayed exchange procedure was abandoned early in the trial. Photovest gave Fotomat an edited version of its trial brief on the ninth day of trial, and after a two month recess in the trial, gave it the full, unedited version on the tenth day of trial. As to the first nine days of trial, Fotomat was given the right to call any Photovest witness who had testified during that portion of the trial. [6] During the remaining 21 days of trial, Fotomat did not cite any prejudice from the delay in service. Indeed, in all of its briefs and arguments in this appeal, Fotomat has failed to demonstrate any specific instance of prejudice resulting from the trial brief procedure.

[16]** II. ATTEMPT TO MONOPOLIZE

The district court held that Fotomat violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and the Indiana statutory counterpart, *Ind.Code 24-1-2-2*. [7] *Section 2* of the Sherman Act prohibits attempts to monopolize. Generally, a plaintiff claiming that the defendant violated this section must prove specific intent and conduct manifesting that intent to monopolize and a dangerous probability of success in a relevant market. [8] See generally L. Sullivan, Handbook of the Law of Antitrust §§ 50-52 (1977) (hereinafter Sullivan), and cases cited therein. Before discussing the specific intent and dangerous probability of success elements, we will first address the relevant market issue, one which the parties have vigorously contested.

[17]** A. Relevant Market

HN1[] A definition of the relevant market is essential because "without a definition of that market there is no way to measure (the defendant's) ability to lessen or destroy competition." *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 350, 15 L. Ed. 2d 247 (1965)*. There is some authority for the proposition that in an attempt to monopolize case, as distinguished from a monopolization case, a definition of the relevant market is not necessary. In *Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-75 (9th Cir. 1964)*, Cert. denied, *377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046*, the court stated that "(w)hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is "not in issue.' " [9] The great weight of authority, **[*712]** however, requires a definition of the relevant market. See, e. g., *United States v. Empire Gas Corp., 537 F.2d 296, 298-99 (8th Cir. 1976)*, Cert. denied, *429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572*; *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 919 (8th Cir. 1976)*; *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348* ***[**18]*** *(3d Cir. 1975)*; *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550 (1st Cir. 1974)*, Cert. denied, *421 U.S. 1004, 95 S. Ct. 2407, 44 L. Ed. 2d 673*; *Bendix Corp.*

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federal system." This pronouncement has been reaffirmed by every court of appeals that has confronted the issue including our own. See ***Burton v. United States, 483 F.2d 1182, 1187-88 (9th Cir. 1973)***, and cases cited therein. See also *United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976)*.

[6] At oral argument in this court, Fotomat argued that some of Photovest's witnesses during the first nine days of trial were adverse witnesses. Photovest disputed this assertion contending that it called adverse witnesses later in its case. Regardless of the accuracy of Fotomat's assertion, it failed to indicate anything in Photovest's trial brief that would have caused prejudice.

[7] See notes 27 & 31 Infra.

[8] A private plaintiff can sue for damages under *§ 2* if he has been "injured in his business or property." *15 U.S.C. § 15*. He can sue for injunctive relief against threatened loss or damage from a *§ 2* violation. *15 U.S.C. § 26*.

[9] This follows from the court's rejection of the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. The court rejected this premise on the theory that "specific intent itself is the only evidence of dangerous probability the statute requires perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *327 F.2d at 474*. See *Knutson v. Daily Review, Inc., 548 F.2d 795, 813-14 (9th Cir. 1976)*, Cert. denied, ***433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094***. See also Turner, Antitrust Policy and the Cellophane Case, 70 Harv.L.Rev. 281, 305 (1956).

v. Balax, Inc., 471 F.2d 149, 161-64 (7th Cir. 1972), Cert. denied, *414 U.S. 819, 94 S. Ct. 43, 38 L. Ed. 2d 51 (1973)*; Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich.L.Rev. 373, 385 & n.37 (1974). Indeed, one commentator has concluded that the Lessig approach "reeks of overkill." Hibner, Attempts to Monopolize: A Concept in Search of Analysis, 34 A.B.A. Antitrust L.J. 165, 171 (1967). We are similarly unpersuaded by Lessig and thus shall proceed to analyze the relevant market in the present case.

[19]** The district court concluded that Fotomat attempted to monopolize "the drive-thru retail photo processing submarket in the Indianapolis metropolitan area." Fotomat argues that the district court erred in defining the submarket and that a proper definition of the relevant submarket is much broader and would include photo processing services offered in drugstores, supermarkets, etc. [10] Under its broader market definition, it argues that its share of the market was insufficient as a matter of law to give rise to any probability that it could succeed in monopolizing that market.

HN2[] The relevant factors for defining the market in a *§ 2* Sherman Act case are similar to those used to define the market in a § 7 Clayton Act case. In *United States v. **[**20]** Grinnell Corp., 384 U.S. 563, 572-73, 86 S. Ct. 1698, 1704-05, 16 L. Ed. 2d 778 (1966)*, the Court stated that "in *§ 2* cases under the Sherman Act, as in § 7 cases under the Clayton Act (*Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510*) there may be submarkets that are separate economic entities," and that "we see no reason to differentiate between "line' of commerce in the context of the Clayton Act and "part' of commerce for purposes of the Sherman Act." See *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270-71 (9th Cir. 1975)*; *L. G. Balfour Co. v. F.T.C., 442 F.2d 1, 11 (7th Cir. 1971)*. Accordingly, the Brown Shoe Opinion is instructive even though it is a Clayton Act § 7 case involving a product market rather than a service market. [11] The Court stated:

[21]**

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325, 82 S. Ct. at 1523-24 (footnotes omitted).

[*713] The market definition problem in the present case is whether Drive-thru photo processing is, as found by the district court, a relevant submarket. One of the most important indicia suggested in Brown Shoe is whether drive-thru photo processing is offered at prices distinct from other methods of photo processing. This is in essence asking whether there is a low level of cross-elasticity of demand between drive-thru and other methods. The **[**22]** concept of cross-elasticity, defined and explained in the margin, [12] first appeared in the case law in *Times-Picayune*

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[10] We note here that although delineating the scope of the relevant market entails analysis of both geographic market and product market, our analysis will address only the latter because the parties do not dispute the geographic delineation used by the district court.

[11] For purposes of market definition, we shall use product market and service market interchangeably unless indicated otherwise. In most circumstances the same antitrust analysis applies to both. See, e. g., *United States v. Connecticut National Bank, 418 U.S. 656, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974)*; *United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *International Boxing Club of New York v. United States, 358 U.S. 242, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959)*.

HN3[] -

Publishing Co. v. United States, 345 U.S. 594, 612 n. 31, 73 S. Ct. 872, 97 L. Ed. 1277 (1953), where the Court used it to support its conclusion that advertising in other media was not a close enough substitute for newspaper advertising to be included in the same market. ***HN4***[] High cross-elasticity between two products suggests that they are in the same market. [13]

[23]** The district court found that:

> Retail processing delivered to the amateur photographic consuming public by the drive-thru method has a very low or no significant price cross-elasticity with other methods of retailing processing.

Fotomat contends that this finding is largely unsupported in the record. We cannot agree. The record indicates that Fotomat's prices for photo processing were approximately 20% Or more above conventional forms of retailing. Fotomat's Vice-President of Marketing Services testified that Fotomat's print processing prices were over 50% Higher than those of most drug store or discount store services. Yet Fotomat was able to grow despite its significantly higher prices. Similar price differentials were found to be very significant in defining the submarket in *Avnet, Inc. v. F.T.C., 511 F.2d 70 (7th Cir. 1975)*, Cert. denied, *423 U.S. 833, 96 S. Ct. 56, 46 L. Ed. 2d 51*. One of the issues in Avnet was whether rebuilt or reconditioned used components (auto electrical units such as generators, alternators, etc.) should be included in the same market as comparable new components. This court upheld the F.T.C.'s decision to exclude the used components: **[**24]**

> The Commission found that prices for rebuilt or reconditioned used components varied from 25% To 50% Below the prices of comparable new items. Moreover, it noted the absence of any substantial interaction in price between the two lines. These factors are sufficient to support the finding that they should be placed in different submarkets.

Id. at 77. See also *Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc., 516 F.2d 1092, 1100 (7th Cir. 1975)*, Cert. denied, *423 U.S. 986, 96 S. Ct. 394, 46 L. Ed. 2d 303*. Although Fotomat argues that the record establishes substantial similarity and interaction in prices between drive-thru and other retailers of processing, it has failed to provide any citation to the record in support of this argument, and in our independent review of the record we have not discovered any. Therefore, Fotomat's ability to charge distinctive prices, albeit not determinative of a submarket, [14] is an important factor suggesting that the district court's delineation of a submarket was correct.

[25] [*714]** Because a primary aspect of the service at issue, photo processing, is nearly identical whether done by drive-thru kiosks or conventional retailing methods, we might have been inclined to afford the price differential less weight than in other situations where the products appear to be less similar. Our inclination derives from the possibility that the reason for the price differential may be price-insensitive consumers. Cf. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 28 & n. 22 (3d Cir. 1978)*, Cert. denied, *439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978)*. However, since there is no conclusive evidence that

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[12] Products that are similar to each other, that are substitutes for each other, display positive cross-elasticity. That is, if the price of A remains constant, an increase in the price of B will generate more sales of A as buyers switch to it. High cross-elasticity means that if the price of A remains constant, an X % Increase in the price of B will generate a greater than X % Increase in the sales of A. See *United States v. DuPont & Co., 351 U.S. 377, 400, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

[13] This is not always the case. As Professors Areeda and Turner explained:

Notwithstanding high cross-elasticity between two products at given prices, the producer . . . of one product has market power if he has a significant cost advantage that would persist as he expanded output. (But) since producers with such an advantage will be motivated to cut price and expand their sales, the case will often be taken into account, at least partially, by adjusting market shares to reflect clear trends.

II P. Areeda & D. Turner, ***Antitrust Law*** at 371 n. 1 (1978); See also Sullivan at 56.

[14] See *United States v. Continental Can Co., 378 U.S. 441, 455, 84 S. Ct. 1738, 12 L. Ed. 2d 953 (1964)*; *Beatrice Foods Co. v. F. T. C., 540 F.2d 303, 310 (7th Cir. 1976)*.

consumers in this market are price insensitive, we must afford the price differential its due weight. Moreover, a closer analysis of the products show that although the end product of the drive-thru and the conventional method is nearly identical, the total service is quite different.

The differences in the total service provided by drive-thru as compared to conventional retailing are reflected by industry perception of the drive-thru submarket as a separate economic entity, another Brown Shoe factor suggesting a relevant **[**26]** submarket. The district court found that "the drive-thru retail photographic processing business has achieved recognition within the photographic industry as a separate method of doing business and a separate market." More important than industry perception is consumer perception. Expert testimony indicated that consumers do treat drive-thru as a separate submarket. The convenience and service of drive-thru kiosks apparently segregate them from other forms of retailing. Consumers are willing to pay a premium for the convenience of drive-thru service. And the Fotomate, with whom a customer deals, is more of a specialist than salespersons in many drug stores or discount stores that offer photo processing.

Another Brown Shoe factor, "specialized vendors," also supports the district court's finding of a drive-thru submarket. It is quite clear that kiosks are a specialized method of retailing distinct from other conventional methods.

Fotomat is disturbed by the district court's finding of a drive-thru submarket in view of the fact that the district court found that a given customer might purchase photo processing from both drive-thru and conventional retailers depending on which **[**27]** is more convenient under the circumstances. Fotomat suggests that this precludes the existence of a submarket. We cannot agree. ***HN5***[] The law does not require an exclusive class of customers for each relevant submarket. See, e. g., *United States v. Aluminum Company of America, 377 U.S. 271, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)* (the Court recognized a distinction between markets for insulated aluminum and insulated copper wire despite the fact that the same customers bought each for similar purposes). Moreover, in the present case it is significant that at a given time a customer who finds a kiosk convenient will use it regardless of its higher prices.

Recognizing that in defining the relevant submarket the legal "guidelines offer no precise formula for judgment and (that) they necessitate, rather than avoid, careful consideration based on the entire record," [15] we conclude that the district court properly defined the relevant submarket.

[28]** B. Specific Intent & Conduct

Having affirmed the district court's delineation of the drive-thru submarket we **[*715]** turn now to the issue of whether Fotomat intended to monopolize the market. Although the case law contains some confusing dicta regarding the need to prove specific intent in an attempt to monopolize case, the Supreme Court has stated that:

> ***HN6***[] 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.

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[15] *United States v. Continental Can Co., 378 U.S. 441, 449, 84 S. Ct. 1738, 1743, 12 L. Ed. 2d 953 (1964)*. We note also that although in Brown Shoe and DuPont relatively expansive markets were found to be appropriate, subsequent Supreme Court opinions have recognized narrower markets. Thus, in *International Boxing Club, Inc. v. United States, 358 U.S. 242, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959)*, the Court held the relevant market to be the promotion of championship boxing contests in contrast to all professional boxing events, despite the claimed physical identity of the products involved. See also *United States v. Connecticut National Bank, 418 U.S. 656, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974)*; *United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc., 516 F.2d at 1094*.

Times-Picayune Publishing Co. v. United States, 345 U.S. at 626, 73 S. Ct. at 890. Accord, *United States v. Griffith, 334 U.S. 100, 105, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*. Although the specific intent requirement has been criticized, See, e. g., Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich.L.Rev. at 398-400 (1974); III P. Areeda & D. Turner, ***Antitrust Law*** P 822 (1978), and the requisite proof to establish it is not well-settled, the district court found, and the **[**29]** record supports its finding of, the requisite intent, and Fotomat has not argued error in this regard.

Fotomat directs its argument to the district court's finding of predatory conduct and contends that either the finding is not supported by the record or that its conduct was not the sort which is proscribed by the antitrust laws. Photovest's theory, accepted by the district court, was that when Fotomat determined that owning the kiosks was more profitable then franchising them, Fotomat, among other things, saturated the market with company-owned kiosks to reduce severely the profitability of Photovest's kiosks and thereby attempted to reduce substantially the value of Photovest's kiosks so that Fotomat could buy them at a low price. Saturating the market was not the only method that Fotomat used, according to the district court, to reduce the profitability of Photovest's kiosks. It found that Fotomat engaged in the following conduct in an intentional attempt to do so:

> concealment of discounts available from processors, retention of discounts from processors, the markup of film, the placement of company stores in such a manner as to siphon business from plaintiff, attempts **[**30]** to coerce plaintiff into remaining with Carhart, refusal to relocate losing stores, insistence on escalating rents and a number of miscellaneous found facts. Each of these was designed to reduce plaintiff's profits for purposes of reacquiring plaintiff's stores at the lowest possible price. [16]

Although we will discuss only the primary components of Fotomat's attempt to monopolize, an analysis of these components requires a thorough review of the factual context in which they occurred. [17]

From its **[**31]** inception in 1967, Fotomat intended to "blitz the industry," that is, to preempt the desirable sites for drive-thru kiosks nationally. Because it did not have a vast capital supply with which to do this, it established a franchising arrangement to provide capital and operating management for its rapidly expanding network and to permit simultaneous development of many metropolitan areas. During its initial years of operation, the bulk of Fotomat's revenue was derived from the sale of franchises, not from operations.

By about June 1969, Fotomat concluded that the profits it derived from company-owned kiosks were significantly greater than those it derived from franchised stores. After 1969, no significant franchise sales were made except to fulfill commitments to "block" franchisees who had rights to purchase additional stores. In 1971, a new franchise relations director was employed **[*716]** by Fotomat with instructions to "work himself out of a job."

The franchise arrangement with Photovest began in 1968. The investors who ultimately formed Photovest responded to an advertisement in the Wall Street Journal in which Fotomat solicited the purchase of franchises in several states **[**32]** including Indiana. The Photovest principals made two trips to Fotomat's headquarters in La Jolla, California, where they were given an extensive sales talk. Fotomat represented that each store had a "market area" consisting of the geographic area from which the store drew its customers and that as a general rule no store would be constructed within two miles of any existing store so as not to infringe on the market area of the existing store. It represented that it would select sites for the franchisees based on sophisticated demographic studies which it and others had conducted. It also represented that two stores would not overlap each other's market areas because Fotomat's royalties applied only to receipts of stores in excess of $ 2,500 per month and thus Fotomat could not afford to have overlapping in market areas. It described a store sales level of $ 60,000 per year as "modest," $ 90,000 per year as "satisfactory," $ 120,000 per year as "above average," and $ 150,000 per year as "high." Fotomat estimated that the Marion County (Indianapolis) area would support fifteen stores which it

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[16] Beginning in May 1968, Fotomat's franchise agreements contained a buy-back option by which Fotomat was entitled to repurchase the franchise after three years at a price equal to the greater of $ 50,000 or 5 times the total net profit for the 12 month period preceding exercise of the option.

[17] Although this factual discussion is taken primarily from the district court's opinion, we have found that the record supports it.

identified as the "saturation" level of the area. [18] It told the investors that it would **[**33]** provide the franchisee with essential support services, including daily pickup and delivery of film, customer service, administrative support, kiosk maintenance and complete merchandising support.

On August 26, 1968, Photovest signed a master franchise purchase agreement obligating it to purchase fifteen franchises to operate fifteen Fotomat stores in Marion County, Indiana. Each store was made subject to the standard Fotomat franchise agreement and the standard Fotomat lease agreement which **[**34]** would be separately signed when each store was opened. Photovest agreed to pay $ 21,000 for each franchise. The price was payment for use of Fotomat's trademark name, a small amount of equipment, original inventory, and miscellaneous items of a value less than $ 1,000. Photovest also agreed to pay Fotomat as a royalty and continuing franchise fee 12% Of the franchisee's gross sales in excess of $ 2,500 per month. The franchisee was required to pay Fotomat an additional 3% Of all gross sales to be "expended by Fotomat for the purpose of advertising, public relations, and the promotion of the total franchise operation."

The agreement expressly required that the franchisee "purchase all merchandise, photo-processing services and other services from Fotomat or from such other sources as have been approved in writing by Fotomat." But Fotomat agreed to sell "all film and film processing" to the franchisee "at Fotomat's cost without any markup whatsoever." If Fotomat itself entered the photo processing business, it could charge the franchisee for its photo processing services, but only at such rates as "shall be comparable to or less than those prevailing in the industry in operator's **[**35]** general market area."

The agreement required Photovest to lease the store from Fotomat at a rent of $ 375 per month with a cost-of-living escalator effective after five years. Expiration or termination of the lease would terminate the franchise. Fotomat agreed to perform "general services including frequent pickup and delivery of film, frequent delivery of inventory, maintenance of inventories, and regular merchandising services." The term of the franchise was ten years with renewal options for three additional five year periods upon payment of $ 7,000 per period. Photovest had a right of first refusal which **[*717]** could be exercised on any additional stores Fotomat offered for sale in Marion County.

1. Saturating the Market

In 1971, Fotomat's executives in charge of site selection believed that Fotomat had an obligation to the franchisees "to not intentionally pull customers from (the franchisee's) operating stores to ours (company stores) and to act in good faith in the performance of our positioning of the units relative to franchised stores." These beliefs and the understanding or informal policy against "overlaps" of franchised stores were based on Fotomat's knowledge **[**36]** of the basis on which the franchises were sold. As of June 16, 1971, there were eighteen Fotomat stores in the Indianapolis vicinity; fifteen were Photovest's franchised stores, all located in Marion County, and three were company stores located in adjoining counties.

In about 1972, Fotomat began to modify its previous procedures and began to overlap franchised stores on a systematic basis. In 1973, Fotomat devised a "four point program" in response to a Kansas City franchisee's objection to Fotomat's placement of stores in proximity to a franchised store. The program provided that if a store were opened within two miles of a franchised store, the franchisee could either (1) buy a franchise for the store for $ 21,000 and take a lease at $ 375.00 per month, (2) choose either unit within six months of the opening of the new unit, (3) sell the franchised unit back to Fotomat "at a negotiated price" (Fotomat represented that the franchisee could choose a unit if, after a sufficient time, it is determined to close one of the units), or (4) do nothing. This four point policy was not disclosed to Photovest until June 1974, when a store was placed in Indianapolis within one and one half **[**37]** miles of one of Photovest's best stores with an annual sales volume of $ 88,471. Photovest did exercise the option to buy, and that store became its sixteenth store. It believed at the time that the location was

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[18] In October 1968, after Photovest purchased the fifteen franchises in Marion County, Fotomat placed an advertisement in the Wall Street Journal soliciting the purchase of franchises in certain midwestern cities. The ad stated that Fotomat was "one of the fastest growing franchise systems in the nation" and that "only a few key franchise areas are still available." The ad prominently displayed the names of various midwestern cities, including Indianapolis, with a line drawn through the name and the notation "sold out."

not good, but hoped to deter Fotomat from placing additional overlapping stores in Marion County and purchased to "set a precedent."

In 1974, two other stores were installed within two miles of a Photovest store. Neither was offered to Photovest under the four point program, and when such omission was called to Fotomat's attention, its response was to ignore Photovest's requests. Beginning on October 17, 1974, and up to the date of trial of this case, Fotomat opened ten more stores in and around Marion County. In March 1975, in its next four option offer, Fotomat announced that the price for a franchise store was now $ 30,000 and the required monthly rental would be $ 500 per month. It was not economically feasible for Photovest to accept new stores on those terms, a fact which was known to Fotomat. Since March 1974, Fotomat has opened fourteen new stores in the Indianapolis metropolitan area. Twelve of these represent new sites, while two of them are relocations. Over **[**38]** one-half of the new stores since 1973 have physically overlapped existing stores in Marion County, Indiana.

Prior to the effect of the overlaps, three Photovest stores had attained all-time sales highs in excess of $ 90,000 per year, and two others exceeded $ 80,000. Although all were growing, by trial Photovest's best store was at $ 70,576, and like most other stores, was dropping sharply. Photovest's annual sales reached $ 1,071,670 in the year the overlaps started, and the most recent data available at trial showed its annual sales at approximately $ 900,000, even with a sixteenth store. As of January 1977, ten of Photovest's stores were below Photovest's overall break-even point, and five were below the incremental break-even point of $ 50,000. [19] **[**39]** By trial, Photovest was incurring substantial losses. It was valued by professional **[*718]** business appraisers as worthless and the district court agreed. [20] The district court found that the new company stores were the principal cause of the decline in Photovest's sales. The record supports this finding.

Thus the critical issue in this regard is whether this conduct, albeit destructive of Photovest's profit levels, is proscribed by *§ 2* of the Sherman Act. Fotomat poses the issue as whether the antitrust laws are violated by locating a store close to a competitor in the hopes of taking some customers from the competitor. It argues that the law does not proscribe such behavior because the antitrust laws specifically encourage competitive store locations and condemn competitors **[**40]** who allocate territories among themselves. It attempts to draw support for its arguments primarily from three cases, none of which we find provides persuasive support. *National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *United States v. Topco Associates, Inc., 405 U.S. 596, 611, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*.

Topco Associates was a cooperative association of regional supermarket chains. Its basic function was to serve as a purchasing agent for its members and to obtain for them high quality merchandise under private labels to make them competitive with larger national and regional chains. The Government sued Topco under *§ 1* alleging that it combined and conspired with its members to enforce territorial allocation of markets. The territorial allocations effectively insulated members from competition in Topco-brand goods. The Court found the arrangement to be a per se violation of *§ 1* and was not persuaded to the contrary by the district court's determination that the agreements among members allowed **[**41]** them to compete more effectively with the large supermarket chains. The district court had found for Topco in part because "by limiting the freedom of its individual members to compete

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[19] Photovest's break-even point is $ 55,000 exclusive of general overhead and $ 65,000 after all expenses. The incremental break-even point (i. e. the point at which sales exceed the direct costs of the particular store and begin to contribute to general overhead) is $ 50,000 for a franchised store. Because a franchised store must pay royalties, advertising fees and rents, which company stores do not pay, the break-even point of a company store is significantly lower. For example the incremental break-even point for a company store is $ 21,000 to $ 25,000.

[20] Fotomat argues that the district court's finding that Photovest's franchises were worthless is inconsistent with its finding that sales dropped "a mere 15%" from 1975 to 1977. These findings are not inconsistent since Photovest had relatively high fixed costs and relatively slim profit margins per store. Thus a 15% Drop in sales could mark the difference between a profitable enterprise and a bankrupt enterprise. This is also supported by the fact that franchisees would buy blocks of franchises so that a minor drop in the sales at one or two stores could be temporarily absorbed by the other stores in the block.

with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains." *405 U.S. at 610, 92 S. Ct. at 1135*.

Fotomat argues that the Supreme Court's rejection of this reasoning suggests that the antitrust laws could not proscribe its adding stores in Indianapolis which overlapped the market areas of Photovest franchises. [21] This quantum leap in legal reasoning ignores an important aspect of antitrust analysis. Fotomat's reasoning ignores the whole concept of predatory practices which was not an issue in Topco. Many predatory practices promote competition in the short run, but if they are used to effect a monopoly by eliminating competition, they are illegal under the Sherman Act. The enforcement of *§ 2* of the Sherman Act will often result in a sacrifice of the most competitive conduct in the short run if the ultimate goal of that conduct is the establishment of monopoly power.

[42]**

[*719] In *Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 119, 68 S. Ct. 947, 952, 92 L. Ed. 1245 (1948)*, the Court sustained district court findings that the defendant "made threats to build theaters or to open closed ones in order to force sales of theaters in various towns or to prevent entry by an independent operator." The Court stated that the district court was justified in drawing the inference of unlawful purpose from this conduct. Id.

More recently, the Third Circuit found that there was sufficient evidence from which the jury could have found a *§ 2* violation, part of that evidence being the defendant's intentional location of a competing factory in the immediate vicinity of the plaintiff's plant. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 31 (3d Cir. 1978)*. Each defendant's conduct in Schine and Columbia Metal may have promoted competition in the short run, but that did not foreclose the possibility of antitrust liability. Fotomat's citation of Brunswick [22] and National Society of Professional Engineers is unpersuasive for the same reasons.

[43]**

Fotomat also contends that the evidence of record does not support the findings that it expanded in the Indianapolis market for anticompetitive purposes. It relies in great part on the fact that the franchise agreement did not contain a provision prohibiting it from opening new stores which overlapped Photovest's franchised stores. But a party's right to sue for antitrust violations is not dependent on the existence of a contract provision prohibiting the alleged anticompetitive behavior. Moreover, the record in this case clearly supports the district court's findings regarding Fotomat's purpose in locating new stores in Indianapolis. One example of support for this finding is Fotomat's location decisions for its new stores in Indianapolis. It opened new stores in close proximity to Photovest's best stores. One of Photovest's best stores was devastated by Fotomat's opening of three new stores in its immediate market area. One of these new store's sales never exceeded Fotomat's incremental break-even point and by trial were well below it. Notwithstanding Fotomat's operations personnel recommendations to remove it, Fotomat did not close it, apparently willing to lose money in **[**44]** the short run hoping to reduce the profitability of Photovest's store for future buy-back. Indeed, after being bracketed by these three new stores, Photovest's store's annual sales of $ 88,000 dropped 40%. A Fotomat internal memorandum written by an area manager establishes that Fotomat "anticipated" that the new store would "siphon" volume from Photovest's store. [23] Also, it should be remembered

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[21] Fotomat seems to suggest that if it respected the market areas and did not open overlapping stores, it might be subject to antitrust prohibitions against territorial allocations. But in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57 n.26, 97 S. Ct. 2549, 2561 n.26, 53 L. Ed. 2d 568 (1977)*, the Court, in rejecting the inherent illegality of territorial allocations, stated:

We also note that Per se rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a Per se rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen.

[22] See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 831-32 & n.14 (7th Cir. 1978)*, Cert. denied, ***440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486***.

that Fotomat's conduct regarding new store locations must be viewed along with its other behavior which in total was found to support a § 2 violation. Otherwise, lawful practices may become unlawful if they are part of an illegal scheme. See *Schine Chain Theatres v. United States, 334 U.S. at 119, 68 S. Ct. 947, 92 L. Ed. 1245* .
[45]**

2. Processing Discounts and Film Markups

Another part of the scheme by Fotomat to reduce the profitability of Photovest's stores so that they would eventually be less expensive to buy back was Fotomat's concealment of and retention of discounts it obtained on processing and its markup of Fotomat brand film.

The franchise agreement obliged Fotomat to sell all film and processing to Photovest "at Fotomat's cost without any markup whatsoever." The arrangement between Fotomat and its processors involved processing prices stated in tiers of discounts from the retail price. For example, if the **[*720]** retail price was $ 1.00 and Fotomat was given a discount of 47% Plus 10%, its wholesale price would be $ 0.477 ($ 1.00 47% = $ 0.53; $ 0.53 10% = $ 0.477). Over the years, the second tier discount increased. Fotomat passed on the first tier discount to Photovest but retained the second tier discount. Since the discount terms granted to Fotomat by its processors were highly confidential, Photovest was unaware of Fotomat's retention of the second tier discounts. These discounts ultimately rose to 12% For print and 21.6% For chrome and were secretly retained by Fotomat, as the district **[**46]** court found, both in violation of the contract, and for the purpose of reducing Photovest's profitability.

Similarly, Fotomat introduced private label Fotomat brand film which Fuji and GAF manufactured and sold to Fotomat. Fotomat then sold it to Photovest at prices 7% To 26% Above its cost, in violation of the franchise agreement and as part of its scheme to reduce Photovest's profitability.

3. The Processing Tie

The master franchise agreement gave Photovest the option to purchase processing from Fotomat or "such other sources as have been approved in writing by Fotomat." But twelve of the individual franchise agreements signed on the opening of new stores from December 30, 1968, through 1971 deleted all reference to "approved sources" and required processing to be purchased from Fotomat. In June 1971, Fotomat informed all franchisees that they could use any processor they wished despite the contract provision.

In the summer of 1974, Photovest began looking for another print processor because of quality problems with Carhart (Fotomat's processor). In September, Photovest informed Fotomat that it intended to switch its print processing to Colorcraft. Fotomat demanded that Photovest **[**47]** also change its chrome processor and perform its own pickup and delivery and customer service, despite the fact that Fotomat was contractually required to provide both pickup and delivery and customer service in return for royalty payments from Photovest. Although Fotomat's refusal to perform pursuant to the contract exerted pressure on Photovest to stay with Carhart, Photovest persisted and ultimately signed a contract with Colorcraft.

The pressure Fotomat exerted on Photovest to stay with Carhart put Photovest in a no-win situation. Either it stayed with Carhart and lost the discounts that Fotomat wrongly retained and suffered the loss in sales resulting from inferior quality processing, or it switched processors and lost the customer service and pickup and delivery services which Fotomat threatened to terminate. [24] **[**48]** Either choice subjected Photovest to an economic loss which contributed to Fotomat's plan to reduce Photovest's profits. [25]

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[23] Other indications of Fotomat's purpose in adding numerous stores in Indianapolis include the fact that Fotomat was well aware that "the more profitable the franchise is, the more expensive and difficult it is to reacquire it," and that the franchise relations director was hired "to work himself out of a job."

[24] The yearly cost of pickup and delivery in Indianapolis was about $ 23,000 during 1974, approximately 50% Of Photovest's annual profit in 1974. The cost of customer service was $ 7,000 per year.

C. Dangerous Probability of Success

Having agreed with the district court's delineation of the relevant submarket, it is quite clear that there was a dangerous probability that Fotomat would succeed in monopolizing the market. [26] The only related issue worthy of discussion is whether Fotomat's control of the market via buy-back **[*721]** of the Photovest franchises would change the competitive dynamics of the market. Fotomat argues that since **[**49]** Photovest always followed Fotomat's recommended pricing, the buy-back would have no effect on the pricing of the goods or services in the relevant market. It argues that the same amount of photo processing would be done whether Photovest or Fotomat owned the Indianapolis drive-thru kiosks, and that the number of sites preempted by Fotomat stores would remain constant.

We are unpersuaded by this argument because it proceeds on the assumption that Fotomat's pricing behavior is not influenced by the existence of Photovest franchises and thus that if Fotomat succeeded in buying back all the Photovest franchises and obtaining a monopoly, it would not change its pricing policies. Antitrust analysis does not recognize as a defense the possibility that if a defendant obtains **[**50]** a monopoly, he might nevertheless not abuse his monopoly power to extract monopoly profits. The recognition of such a defense in an attempt to monopolize case would devastate the impact of *§ 2*.

The fact that Photovest has always followed Fotomat's suggested prices does not suggest, as Fotomat implies, that the same prices would be charged if Fotomat succeeded in buying back all Photovest stores. The forces of competition may well be restraining Fotomat's recommended prices to its franchisees. The franchisees are not bound to follow these Recommended prices. Without the restraints of competition, a monopolist often will find that it can maximize profits by selling a lower volume at higher prices than would prevail in a more competitive market. We cannot reverse the district court's finding of a *§ 2* violation on the ground that Fotomat may not, if given the opportunity, follow the path of many monopolists. Accordingly, we affirm the district court's conclusion that Fotomat violated *§ 2* of the Sherman Act.

III. THE TYING ARRANGEMENTS

The district court found that Fotomat engaged in illegal tying arrangements involving both photo processing and leasing of kiosks. The photo **[**51]** processing tie was held to be in violation of *§ 1* of the Sherman Act and its state law counterpart, *Ind. Code § 24-1-2-1*. The lease tie was held to be in violation of only this state statute apparently because of lack of sufficient effect on interstate commerce. [27]

A. The Photo Processing Tie

The district court held that:

> Defendant's securing of plaintiff's agreement to purchase print processing from defendant, by means of the franchise agreements, defendant's concealment of its discounts from processors, and its policies with respect

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[25] The district court found that one of the contributing factors to Fotomat's attempt to monopolize was its refusal to settle this litigation. It stated: "In sum, this litigation itself has been utilized by defendant as an instrument to drain plaintiff for purposes of ultimately buying plaintiff out at an inadequate price."

We are of the opinion that the district court erred in considering this as a factor. See our discussion of this issue in section V.A., Infra. Consequently, on remand the district court must reconsider the damage award for the *§ 2* violation. The award must be reduced by $ 72,267 (the $ 24,089 litigation expenses trebled.).

[26] Fotomat and Photovest together had 30 of the 39 drive-thru outlets at the conclusion of the trial. Fotomat's regional director estimated Fotomat's and Photovest's aggregate share of sales in 1975 at 95% Of the Indianapolis drive-thru market.

[27] *Ind. Code § 24-1-2-1* is patterned after *§ 1* of the Sherman Act and Indiana courts have looked to decisional law under *§ 1* to interpret *§ 24-1-2-1*. See *Orion's Belt, Inc. v. Kayser-Roth Corp., 433 F. Supp. 301, 302-03 (S.D.Ind.1977)*; *Citizens National Bank of Grant County v. First National Bank in Marion, 165 Ind. App. 116, 331 N.E.2d 471, 478 n.5 (1975)*.

> to plaintiff's use of independent processors, constitutes an unlawful restraint of trade in violation of *Section [**52] 1* (and *Ind. Code § 24-1-2-1*).

Initially, the tying arrangement was part of the franchise agreement. From 1968 to 1971, twelve of the Photovest franchises included a contractual clause prohibiting Photovest from buying processing from anyone other than Fotomat. [28] Then in June 1971, Fotomat wrote to its franchisees, apparently with knowledge of the then recent opinion in *Siegel v. Chicken Delight, Inc., 311 F. Supp. 847 (N.D.Cal.1970)*, Aff'd in part, *448 F.2d 43 (9th Cir. 1971)*, Cert. denied, *405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972)*, advising them that they could use any processor they wished despite the provision in their agreements to the contrary. This letter, however, also assured the franchisees that Fotomat was selling processing at its cost without any markup **[*722]** whatsoever. Fotomat then adopted a policy that any franchisee who did switch print processors would have to supply its own pickup and delivery and would have to switch chrome processors. When Photovest decided to switch processors in September 1974, Fotomat responded, consistently with this policy, by demanding that Photovest change its chrome processor and do its own pickup and delivery **[**53]** and customer service.

The district court apparently concluded that an illegal tying arrangement existed from the inception. Although the district court did not analyze the alleged tying conduct in temporal segments, we find it instructive to view the conduct in three segments: (1) prior to the June 1971 Chicken Delight letter; (2) from June 1971 to September 1974; and (3) after September 1974.

In period one, prior to the June 1971 letter, the tying arrangement is clear, at least as to twelve of the sixteen Photovest franchises. These franchise agreements required Photovest to purchase its processing from Fotomat. Thus Fotomat tied the sale of processing to the franchise itself. ***HN7***[] A tying arrangement is defined as:

> an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or **[**54]** tied) product, ... They (tying arrangements) are unreasonable in and of themselves whenever 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 Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958). ***HN8***[] The law is well-settled that a franchise license itself can be the tying product. In *Northern v. McGraw-Edison Co., 542 F.2d 1336, 1345 (8th Cir. 1976)*, Cert. denied, *429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544 (1977)*, the court stated:

> ***HN9***[] A franchise license constitutes a separate and distinct marketable item. The weight of judicial authority supports the proposition that if prospective franchisees are compelled to purchase equipment or other tied products in order to obtain the franchise and trademark, an illegal tying arrangement exists.

Accord, *Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971)*; *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)*.

In the present case, Fotomat's considerable economic power in the tying **[**55]** product, the trademark/franchise, was used to restrain competition in the processing market. Competing processors were effectively blocked from competing for Photovest's processing needs, a not insignificant amount of processing.

As to the four Photovest franchises which were permitted to purchase processing from Fotomat-approved sources, the tying arrangement was not established sufficiently. Photovest did not show that Fotomat unreasonably withheld approval. Indeed, it appears that Photovest never submitted a processor to Fotomat for approval during this time period. Photovest contends that the tie was nevertheless sufficiently established because Fotomat did not provide a list of approved processors. This does not in our opinion establish the requisite condition for illegal tying. Given the contractual language, which at least provides for the possibility of purchasing processing from non-Fotomat

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[28] The other four Photovest franchises were subject to clauses which prohibited Photovest from purchasing its processing from anyone else without written approval of Fotomat.

sources, we are reluctant to find a tying arrangement without some evidence that Fotomat applied the contract language so restrictively as to constitute a de facto tying clause. "The presence of the illegal condition may be inferred from an extrinsic course of conduct supplementing **[**56]** the written contract," *Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 64 (4th Cir. 1969)*, Cert. denied, *397 U.S. 920, 90 S. Ct. 928, 25 L. Ed. 2d 101 (1970)*, but in the present case Photovest has failed to provide evidence of any conduct from which to infer the tie. Accordingly, we are of the opinion that the district court erred in including these four franchises in the tying arrangement for the period before June 1971.

In period two, from June 1971 to September 1974, we are again unable to agree with **[*723]** the district court's finding of a tying arrangement. Photovest's theory, which persuaded the district court, was that notwithstanding the "Chicken Delight" letter of June 1971, Fotomat's fraudulent representation to Photovest that it was offering processing at its cost without markup, induced Photovest to continue to purchase its processing from Fotomat's processor (Carhart). When Fotomat informed its franchisees that they could purchase processing from whomever they wished, it also assured them that it was offering them processing at its cost. Photovest argues that it had no reason to look elsewhere for processing since it assumed it was receiving **[**57]** its processing at Fotomat's cost and that Fotomat had substantial buying power. From this premise, Photovest concludes that Fotomat tied its processing to its trademark/franchise. It is at this step in the reasoning that Photovest's argument fails.

In essence, using Photovest's reasoning, we would find an illegal tying arrangement whenever a franchiser tells a franchisee, "You can buy your supplies from whomever you desire, but my prices are lower" (knowing that its prices are not lower). This cannot constitute an illegal tie because a tying arrangement requires that the defendant use his economic power in the tying product to coerce the plaintiff to purchase the tied product on terms the plaintiff would not otherwise accept but for his desire to obtain the tying product. See, e. g., *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 377 (5th Cir. 1977)*; *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1326-31 (5th Cir. 1976)*. Photovest did not purchase processing from Fotomat because of Fotomat's power over the trademark/franchise. Rather it purchased from Fotomat because of Fotomat's untruthful representation that Fotomat was selling **[**58]** at cost. ***HN10***[] Fotomat's untruthful representation may constitute breach of contract or fraud or other state law violations, but it cannot constitute the missing link in an illegal tying arrangement.

Photovest cites *Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969)*, Cert. denied *397 U.S. 920, 90 S. Ct. 928, 25 L. Ed. 2d 101 (1970)*, in support of its tying theory which appears to be a tying by lying theory. SCM manufactured and sold office copying machines and the paper and other supplies used with the machines. The plaintiff was a distributor of paper and supplies for copying machines, but distributed a different brand of paper and supplies. The court held that SCM tied its paper and supplies to its service contracts. Its service contract stated, "Because SCM photocopy machines are designed to give excellent performance with SCM photocopy supplies, . . . SCM reserves the right to suspend this agreement as to any machines in which other suppliers' paper or other supplies have been used. . . . (and) (t)his agreement shall not apply to any repairs made necessary by the use . . . (of) supplies made by other than SCM and not approved by SCM for use in SCM **[**59]** equipment." *Id. at 65*. SCM never approved any competitive paper for use in its machines even though it knew that the plaintiff's paper was safe and as effective as SCM paper for such use. Moreover, SCM representatives deliberately misrepresented to customers that use of plaintiff's supplies "would cause service calls and interrupt the continuous operation of their machines," and threatened cancellation of rental agreements with customers who used non-SCM supplies in their SCM machines. The court held that both the restrictive contract language and the conduct designed to enforce the illegal restrictions violated the Sherman Act. *Id. at 66*.

From this holding, Photovest tries to distill a rule that fraudulent inducements to purchase made by a defendant with market power in one product will entail an illegal tie. This goes too far. SCM Corp. is distinguishable from the present case because SCM threatened, both by contract and by conduct, to terminate its customers' access to the tying product (either the service and maintenance of SCM copiers or the rental or lease of the copiers themselves) if the customers failed to use the tied product **[*724]** (SCM paper and supplies). The **[**60]** fraudulent misrepresentations were used merely to justify to its customers its enforcement of the tie. In the present case, however, the fraudulent misrepresentations stood alone; they were unaccompanied by either contract language or conduct which was invoked to enforce a tie. Fotomat did not threaten to terminate the franchise if Photovest refused to use Fotomat's processor. It merely misrepresented the value to Photovest of using that processor. Indeed, the fraud was not linked in any significant way with the tying product.

The principal evils of tying arrangements are the foreclosure of competitors in the tied product market and the denial to buyers of the advantages of marketplace shopping. See *Northern Pacific Ry. Co. v. United States, 356 U.S. at 6, 78 S. Ct. 514, 2 L. Ed. 2d 545* . These evils do not arise in the present case because competitors in the processing market were free to lure Photovest's business by offering their services at lower prices than Carhart, and Photovest was free to solicit such bids. That these parties failed to do so may be attributable to poor business judgments or to torpid competitors in the processing market, or even to Fotomat's fraudulent **[**61]** misrepresentations, but not to Photovest's fear of losing the tying product (the franchise or whatever else might be characterized as the tying product). Accordingly, we are of the opinion that the district court erred in finding an illegal tying arrangement during this period.

In period three, after September 1974, we agree with the district court that Fotomat engaged in an illegal tying arrangement. It was during this period that Photovest informed Fotomat that it was switching print processors. Fotomat's response, including its demand that Photovest switch chrome processors and that it perform its own pickup and delivery and customer service, constituted the illegal tie. [29] It tied its print processing to its contractual duties to perform specific and costly services. Since Photovest could not obtain the tied services elsewhere (free of charge) Fotomat had appreciable economic power in the tying product. We also note that Fotomat's pressures to induce Photovest to purchase processing only from its processor were not grounded on quality control considerations. See *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d at 376*.
[62]**

The damages computed by the district court on these tying claims under counts I and III must be recomputed on remand consistent with foregoing portion of this opinion.

B. The Lease Tie

The district court held that the contractual requirement that Photovest lease its kiosks from Fotomat constituted an illegal tying arrangement. The franchise agreements stated: "As an express condition of this agreement, Operator must continue as a lessee of a Fotomat Merchandising Island. Operator hereby agrees that the lease executed between Fotomat and Operator contemporaneously with this Agreement is pertinent to this Agreement and expiration or termination of the lease, in accordance with its terms, shall have the effect of terminating this Franchise Agreement." Photovest paid $ 375 per month for each kiosk and land until 1973 when the contractual rental escalator permitted Fotomat to raise the rent to $ 500 per month which it did. The district court found that there was no operational reason why Photovest **[*725]** could not have either constructed its own kiosks or purchased them outright from Fotomat. It found that Photovest was capable of locating suitable sites and negotiating ground **[**63]** leases had it been permitted to do so under the franchise agreements. It also found that Photovest incurred no damages from the leasing requirement until Fotomat raised the rent to $ 500.

The tying arrangement here is quite clear. The express language in the franchise agreement setting forth the condition constitutes a prima facie case. See, e. g., *Schuler v. Better Equipment Launder Center, Inc., 74 F.R.D. 85*

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[29] Photovest contends that Fotomat's conduct in response to Photovest's desire to switch processors was a consistent policy that Fotomat had developed since June 1971. However, Photovest was unaware of this alleged policy until period three. Thus this policy cannot be used to extend the tying violation into period two.

Even if there were sufficient evidence that during period two Fotomat would have responded to Photovest's attempt to change processors in the same manner as Fotomat responded after September 1974, we would not extend the tying violation to include period two because Photovest could not have proved that it was coerced to stay with Carhart because of its desire to receive the tying product (the pickup and delivery services, etc.) since it was totally unaware that the tying product was conditioned on staying with Carhart.

(D.Mass.1977). A tie involving real estate is just as unlawful as any other tie. See *Carpa v. Ward Foods, Inc., 536 F.2d 39, 50-51 (5th Cir. 1976)*; *Milsen Co. v. Southland Corp., 454 F.2d 363, 365 (7th Cir. 1971)*.

Fotomat argues that the lease tie was rebutted by the facts that Photovest desired to purchase a "turn-key operation," a complete package including land and kiosks, and that Photovest never sought to lease land on its own. These facts, however, do not rebut the proposition that Photovest was coerced by Fotomat's appreciable market power in the franchise to accept the leasing provision. That Photovest desired a complete package does not alter the proposition that were it not for its desire to obtain and retain the franchise it would not have agreed to the leasing **[**64]** provision. Indeed, Fotomat could have offered a "complete package" without conditioning the franchise on the leasing arrangement. It could have made the leasing arrangement optional. The fact that Photovest never sought to lease land on its own is rather obviously the result of the restrictive contract and the fact that Photovest valued the franchise and did not choose to jeopardize the franchise by violating the lease clause. Furthermore, Fotomat offers no evidence to indicate that during the time period for which the district court computed damages Photovest was uncoerced. Fotomat directed its argument only to the time at which the parties entered the franchise agreement.

Fotomat's final argument regarding the tying arrangements deserves little attention. It argues that it lacked any appreciable economic power in the tying product, the trademark/franchise, to permit it to effect an illegal tie. [30] The record shows that in 1968 Fotomat was the only national franchiser of drive-thru photo processing. Its national advertising and the "billboard" effect of its forecasted 5000 stores were substantial advantages. This, in our opinion, shows the requisite economic power in the **[**65]** trademark/franchise. We, accordingly, affirm the judgment as to this issue.

IV. COMBINATION AND CONSPIRACY TO RESTRAIN TRADE

The district court concluded that since March 1972, Fotomat has engaged "in an unlawful combination and conspiracy with its wholly owned subsidiary, Fotomat Labs, Inc., designed to eliminate plaintiff as a retail competitor of defendant and as an independent purchaser of photo processing in violation of *Section 1* of the Sherman Act. . . ." [31]

[66]**

[*726] Fotomat Labs, Inc. (Labs) was incorporated in 1971 as a wholly owned subsidiary of Fotomat. In March 1972, Labs acquired 50% Of a joint venture with a subsidiary of Carhart (the independent Indianapolis processor based in New York from which Fotomat purchased print processing) to operate the Indianapolis plant. This joint venture lasted until May 1974 when Carhart again owned the plant independently. By 1974 Labs' wholly owned plants were doing much of Fotomat's print processing throughout the country.

Carhart performed Fotomat's Indianapolis processing from 1968 to February 1972. From February 1972 to May 1974, the joint venture performed the processing. Then from May 1974 to May 1976, Fotomat again used Carhart. It then switched to the Labs plant in St. Louis. In 1974, Photovest switched its processing to Colorcraft, an independent print processor in Louisville.

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[30] The Supreme Court has explained that for purposes of tying arrangements, "appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them . . . ." *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503-04, 89 S. Ct. 1252, 1258, 22 L. Ed. 2d 495 (1969)*.

[31] The district court also held this same conduct violative of *Ind. Code § 24-1-2-1*. It further held that Fotomat violated *§ 24-1-2-1* since June 1971, before Labs was on the scene, by engaging in an unlawful scheme and design having the same purpose. The district court apparently was of the opinion that two actors, as required by *§ 1* of the Sherman Act, were not necessary under *§ 24-1-2-1*. Subsequent to the district court's opinion in this case, the Chief Judge of that district issued an opinion, with which we agree, that states that the Indiana statute does not extend beyond the bounds of federal ***antitrust law***. *Orion's Belt, Inc. v. Kayser-Roth Corp., 433 F. Supp. 301, 302-03 (S.D.Ind.1977)*. Accordingly, the district court in the present case erred in finding a violation of *§ 24-1-2-1* before March 1972.

The object of the Fotomat-Labs conspiracy, as described by Photovest, was as follows:

> Fotomat receives roughly twice the profits from a retail outlet that uses Labs rather than an outside processor. . . . (O)ne of the reasons both Fotomat and Labs sought first to deceive and then to coerce Photovest **[**67]** into remaining with Carhart was keep Photovest "within the Fotomat system" . . . so it could be converted to Labs as soon Fotomat's contractual commitment to Carhart expired. . . . Fotomat's objective was ultimately to acquire Photovest and thereby obtain for Labs Photovest's volume as a consumer of wholesale processing.

A scheme to force independent dealers out of business pursuant to a plan of vertical integration, if effected through combination or conspiracy, is a *§ 1* violation. See *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1347 (3d Cir. 1975)*. Photovest argues that the Fotomat-Labs plan was just that.

Fotomat attacks this *§ 1* violation on several fronts. First, it contends that Labs was not separate, distinct, or independent from Fotomat and thus a conspiracy could not have existed with only one member. The problem of intra-enterprise conspiracy often presents difficult issues in defining an economic unit. The Supreme Court has held that two separately incorporated subsidiaries within the same corporate family can conspire. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 71 S. Ct. 259, 261, 95 L. Ed. 219 (1951)* ("common ownership **[**68]** and control does not liberate (them) from the impact of the antitrust laws."). Accord *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 141-42, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*; *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*. Separate incorporation, however, albeit an important factor, is not conclusive proof of the requisite two actors for a *§ 1* conspiracy. *Knutson v. Daily Review, Inc., 548 F.2d 795, 801-02 (9th Cir. 1976)*, Cert. denied, *433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094*. Thus we must decide each case on its particular facts. Some relevant factors to consider include "the extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms." Sullivan At 328.

The evidence in the present case shows that Labs was separately **[**69]** incorporated to minimize potential for labor relations friction which might arise from the disparity in benefits between employees of photo processing labs and existing Fotomat personnel. The executive management of Fotomat overlapped that of Labs. Moreover, Labs did not maintain separate corporate offices. Profit-related compensation for Labs personnel was calculated solely in terms of the profitability of Fotomat rather than in terms of an appraisal of Labs' independent net income. For all external purposes, financial statements and tax return **[*727]** data were consolidated. In publicly circulated financial statements, all subsidiaries of Fotomat were lumped together with the parent and referred to simply as "the Company." Historically, Labs was formed to integrate photo processing services into Fotomat owned processing facilities and never existed for the independent purpose of establishing a processing business to service non-Fotomat customers. It acted merely as the processing arm of the enterprise.

In response to this substantial evidence that Fotomat and Labs were not separate entities for antitrust purposes, Photovest offers only two statements, one by Fotomat's **[**70]** in-house counsel in which he said that Labs has independent personnel, laboratories, machinery, equipment, and costs and that it bills Fotomat just as independent processors do, and another by Fotomat's president in which he said that Labs "was a separate business and we elected to treat it as such." The fact that Labs billed Fotomat for processing and had separate costs, machinery, equipment, etc., is not very significant other than as evidence that separate accounting made for internal accounting clarity. And the isolated statement by Fotomat's president cannot be given great weight.

We would be more comfortable in deciding this issue if we had a more thorough record in this regard. It is rather curious that the record is extremely thorough, in fact overwhelming, in almost every other aspect of this case. Nevertheless, on the basis of the record before us, we are of the opinion that for antitrust purposes, Fotomat and Labs were really one entity and thus could not have conspired in violation of *§ 1*. The fact that Labs was separately incorporated and the statements of Fotomat's president and in-house counsel are not sufficient to overcome the more substantial evidence indicating **[**71]** that Labs was merely a service arm of Fotomat, more like a corporate division than a separate corporate entity. ***HN11***[] To find the two actors necessary for a *§ 1* conspiracy in this case would not be significantly different from holding, contrary to good authority, that a corporation can conspire in violation of *§ 1* with its wholly-owned, unincorporated sales division, See *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978)*, and we do not intend in the present case to lead a movement toward a single-firm conspiracy doctrine. [32] **[**72]** Accordingly, we reverse the district court's finding of a *§ 1* conspiracy to restrain trade on the ground that Fotomat and Labs were not two separate economic entities for purposes of *§ 1* conspiracy analysis. [33] Likewise, for the reasons stated in note 31, we reverse the judgment on this issue as raised under state law.

V. STATE LAW CONTRACT CLAIMS

The district court held that Fotomat breached several provisions of the franchise agreements, but the significant issues on appeal involve the district court's holding that Fotomat breached an implied covenant of good faith and fair dealing; that Fotomat's multiple breaches of contract constituted "an oppressive, intentional, tortious wrong" requiring punitive damages; and that Fotomat's representations to Photovest since May 1970 concerning the nature and amount of its processor discounts constituted fraud for which punitive damages were appropriate.

A. Implied Covenant of Good Faith

Applying California law, the district court concluded that Fotomat breached an implied covenant of good faith and fair dealing by:

> **[*728]** (a) its saturation of the Marion County market with company-owned **[**73]** stores, including the placement of numerous company stores in the market areas of franchised stores as found; (b) its refusal to relocate losing plaintiff's stores and its imposition of onerous terms upon relocations; (c) its reduction in services to plaintiff, and its efforts to transfer expenses to the franchisees as found; (d) its efforts to prevent plaintiff from changing print processors and thereby obtain better processing at lower cost as found; (e) forcing plaintiff to bring this action to obtain rights it clearly has as found; and (f) its efforts through all of the above to destroy plaintiff's business and to recover the franchise for itself as found.

The covenant of good faith and fair dealing, according to the district court, is implied by California law in every contract and imposes a duty on each party to do nothing to destroy the right of the other party to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose. Under the district court's interpretation of California law, the implied covenant prohibited actions by Fotomat that would preclude profitable operation of the franchise or coerce franchise **[**74]** owners to terminate their agreements on terms favorable to Fotomat. Fotomat argues that the covenant of good faith doctrine is essentially a rationalization for imposing otherwise unfamiliar duties on insurers, and that in a non-insurance context, the doctrine must be applied only in very narrow circumstances not present here. It is quite clear that California courts have not restricted the doctrine to insurance cases. See, e. g., *Schoolcraft v. Ross, 81 Cal.App.3d 75, 146 Cal.Rptr. 57, 59 (1978)* (deed of trust); *Osborne v. Cal-Am Financial Corp., 80 Cal.App.3d 259, 145 Cal.Rptr. 584, 589 (1978)* (real estate contract); *Ohashi v. Verit Industries, 536 F.2d 849, 853 (9th Cir. 1976)*, Cert. denied, *429 U.S. 1004, 97 S. Ct. 538, 50 L. Ed. 2d 616* (stock transfer agreement). Indeed, the doctrine has been applied to franchise agreements. *Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 Cal.App.3d 1, 124 Cal.Rptr. 678, 683 (1975)*. Thus Fotomat's suggestion as to the limited scope of application of the doctrine is not persuasive.

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[32] Commentators have not called for the expansion of the intra-enterprise conspiracy doctrine. One respected commentator has referred to the doctrine as "one of the weirdest concepts ever to rear its head in antitrust jurisprudence." Handler, Some Misadventures in Antitrust Policymaking Nineteenth Annual Review, 76 Yale L.J. 92, 119 (1966).

[33] Since we have decided that Fotomat and Labs were not two economic entities for *§ 1* purposes, we need not reach the issue of whether their conduct was sufficient to establish an agreement or conspiracy. However, we note that the evidence in this regard is very thin.

As to its suggestion that in a non-insurance context, the doctrine must be applied only in very narrow circumstances not present here, it cites *Hinckley* ***[**75]*** *v. Bechtel Corp., 41 Cal.App.3d 206, 116 Cal.Rptr. 33 (1974)*, as its only authority. In that case, an employee of the defendant was covered by a group life insurance program under which he had a right to convert it into an individual policy without evidence of insurability within thirty days after termination of employment. He failed to exercise that option after he retired, and when he died over a year later, his administratrix sued the defendant for breach of employment contract for the value of the group life policy. Because the language of the policy clearly prohibited recovery, the court explored but rejected the possibility of implying a term or covenant in the employment contract to allow recovery. It would have had to imply a term which would have required the employer to give special notice to its employees of the conversion right under the policy. In refusing to imply such a term the court stated that "It must be especially emphasized that appellant does not allege that it was clearly within the contemplation of the parties that Bechtel (employer) should give special notice to its employees of the conversion right . . . ." *116 Cal.Rptr. at 36*.

In contrast, in the present **[**76]** case, Photovest argued specifically that Fotomat's actions violated representations it made that were clearly within the contemplation of the parties. Moreover, Fotomat's reliance on Bechtel is unpersuasive because Bechtel addressed a request to imply a specific provision rather than a general covenant of good faith and fair dealing which is what the district court in the present case did.

Although we affirm generally the district court's holding regarding the breach of covenant of good faith and fair dealing, we disagree with one aspect of that holding. One of the means by which Fotomat was **[*729]** held to have breached that covenant was by "forcing plaintiff to bring this action to obtain rights it clearly has. . . ." In other words, Fotomat's refusal to settle and its concomitant decision to defend in this litigation contributed to Fotomat's breach of the covenant. Photovest has not provided nor have we found any authority to support the district court in this regard. The only cases offered in support by Photovest are cases which involve antitrust or other injury resulting from instituting a pattern of baseless litigation. Nothing in the case law suggests that liability **[**77]** may stem from the Defense of a lawsuit or from the decision to defend rather than settle. Such a rule would infringe basic rights in our system of jurisprudence.

> Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant in causing the plaintiff to sue him or in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent.

Ritter v. Ritter, 381 Ill. 549, 46 N.E.2d 41, 44 (1943). We, therefore, reverse the district court's award of $ 24,089 damages for litigation expenses as part of its damage award for breach of implied covenant of good faith and fair dealing. [34]

Fotomat has also argued, albeit briefly, that the record **[**78]** does not support the findings on which the district court based its conclusion that Fotomat breached an implied covenant of good faith and fair dealing. We have reviewed the record in this regard and must flatly disagree.

B. Tortious Breach of Contract

The district court held that Fotomat's "multiple breaches of its contract with Photovest constitute under Indiana law an oppressive, intentional, tortious wrong for which punitive damages are appropriate. [35] The court would reach the

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[34] For the same reasons, we reverse the litigation expenses damage component awarded under other counts.

[35] Although this statement might be interpreted to mean that the tort liability arose from the numerosity of breaches rather than from the substance of the breaches, it is clear from the context and from the allegations in the count which the court was addressing that the number of breaches alone was not the basis for the tort liability.

same conclusion under California law." [36] It also concluded that the awarding of punitive damages was in the public interest.

[79]**

Fotomat argues that neither Indiana nor California law recognizes tort liability for oppressive breach of contract. The seminal case in *Indiana is Vernon Fire & Casualty Insurance Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976)*. In that case the Indiana Supreme Court, after first acknowledging the general rule that punitive damages are not appropriate for breach of contract, discussed exceptions to that rule. It explained that punitive damages may be awarded if the conduct of the breaching party "not only amounts to a breach of the contract, but also Independently establishes the elements of a common-law tort such as fraud." *Id. at 180*. It also explained that punitive damages could be awarded in the absence of an independent tort if "it appears from the evidence as a whole that a serious wrong, tortious in nature, has been committed, but the wrong does not conveniently fit the confines of a pre-determined tort . . . (and) That the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer and parties similarly situated." Id. (emphasis in original).

It is, therefore, clear under Indiana law that in the proper circumstances **[**80]** punitive damages may be awarded on a tort theory in a breach of contract case. Although **[*730]** Fotomat has contested the propriety of mixing tort liability into a breach of contract setting a practice which we ourselves view as questionable, we are compelled to follow the state law as articulated by the Indiana Supreme Court in Vernon Fire & Casualty Insurance Co. In doing so, we note that Fotomat has offered no persuasive reasons why its conduct did not satisfy the requirements set forth in that case. Thus, we affirm the district court's decision that punitive damages are Appropriate. [37]

[81]**

We cannot, however, affirm the district court's award of an equal amount of actual damages for tortious breach of contract. [38] Vernon Fire & Casualty Insurance Co. does not permit the tortious breach of contract theory to be used as a means to recover actual damages. It very clearly articulated this theory as a justification only for awarding punitive damages. See *Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845, 847 (Ind.1977)*. We, therefore, reverse the district court's award of Actual damages for tortious breach of contract. [39]

C. Fraud

The district court held that Fotomat's representations **[**82]** to Photovest since May 1970 concerning the nature and amount of its processor discounts constituted fraud under both Indiana and California law. ***HN12***[] The elements of actionable fraud are: (1) false representation of material fact; (2) knowledge of falsity or lack of

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[36] Although the court and the parties agreed that California law applied for contract breach purposes, the court apparently applied Indiana law regarding tortious breach of contract because the tort occurred in Indiana. The parties have not contested this.

[37] Although the district court held that punitive damages were appropriate, it concluded that: "Because the court holds that defendant has violated *Indiana Code 24-1-2-1* and *24-1-2-2*, which are Indiana criminal statutes, plaintiff may not under Indiana law recover the punitive damages to which it would otherwise be entitled for activity by defendant which violates those criminal statutes."

Because the conduct which supported the punitive damages was in essence the same conduct which contributed to the antitrust treble damage liability, it would be inappropriate under Indiana law to award punitive damages in addition to the punitive aspects of the treble damage award. See *Taber v. Hutson, 5 Ind. 322, 325 (1854)*; *Glissman v. Rutt, 175 Ind. App. 493, 372 N.E.2d 1188, 1190 (1978)*.

[38] The district court stated that Fotomat's tortious breaches of contract constituted a basis for actual damages of $ 894,046.76 and for an equal amount of punitive damages.

[39] To eliminate any confusion, our holding does not disturb the district court's award of compensatory damages for normal, as distinct from tortious, breaches of contract regarding film markups, processing discounts, etc.

reasonable ground for believing the matter asserted to be true; (3) intent to induce reliance thereon; (4) justifiable reliance by the plaintiff; and (5) resulting damage. *Auto Owners (Mutual) Insurance Co. v. Stanley, 262 F. Supp. 1, 4 (N.D.Ind.1967)*; *Vasquez v. Superior Court, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964, 970 (1971)*. Fotomat's only significant argument is that Photovest did not satisfy the fourth element because its reliance on Fotomat's misrepresentations were not justifiable. It argues that the record proves that Photovest had knowledge of the fraud since March 1970 and thus it could not have justifiably relied on the misrepresentations. Our review of the record, however, indicates that the few amorphous bits of information that Photovest may have been aware of were insufficient to provide grounds for it reasonably to be able to construct even a rough idea of the full scope and substance of the fraud. **[**83]** [40] Accordingly, its reliance on Fotomat's fraudulent misrepresentations were justifiable. We, therefore, affirm the district court's decision regarding fraud.

VI. DAMAGES

Calculation of Photovest's damages in this case was a very complicated task for the district court, because the case involved several different legal theories with overlapping damages and variations in the statutory periods of limitation. Our disposition of the numerous issues in this appeal has **[*731]** included reversals of some aspects of the district court's decision. On remand, this will require the district court to recalculate damages, but the total damages awarded will not be drastically altered because the bulk of the damages awarded for attempt to monopolize have been affirmed; and **[**84]** damages awarded under theories that have now been reversed were for the most part duplicated in the attempt to monopolize award.

We direct the district court on remand to reassess and recalculate damages consistent with this opinion and, for greater clarity, to list the damage awards under the various counts and indicate what portion of each is duplicative of damages under another count so that the total damages may be computed by adding the non-duplicative amount of each count. We do not suggest that this procedure is required in all similar cases, but when a complex damage award, as in this case, is involved, this procedure will facilitate any subsequent review that may occur. We also do not suggest that the district court did not provide an adequate basis for the damage award. See *Allen v. W.H.O. Alfalfa Milling Co., 272 F.2d 98, 100 (10th Cir. 1959)*. The district court entered damage findings as to each count and made subsidiary findings stating the amount of the components of each award. Moreover, Fotomat's contention that the damage findings are replete with internal conflicts has not been persuasively supported.

VII. FACT FINDINGS

Fotomat argues that the district court's **[**85]** findings were adopted almost verbatim from findings submitted by Photovest, and thus that we should scrutinize those findings more critically. This court has criticized the practice of adopting the prevailing party's findings without change and has admonished the district courts to "exercise an astucious editorial pen on counsel-submitted findings." *FS Services, Inc. v. Custom Farm Services, Inc., 471 F.2d 671, 676 (7th Cir. 1972)*. We are of the opinion that findings which have been adopted wholesale from those submitted by the prevailing party should be examined more critically to determine whether they are clearly erroneous.

The present case is not an egregious example of undeviating adoption of the prevailing party's findings. The district court rejected all or most of 86 of Photovest's numerous proposed findings, reorganized findings it did accept, and edited others of them. Because it did adopt with little change the bulk of Photovest's findings, however, we have critically reviewed the contested findings and examined the record to insure that it contained the requisite support. As a result, we conclude that except where we have stated otherwise, the findings are not clearly **[**86]** erroneous.

For the reasons stated throughout this opinion, the judgment of the district court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. As we have noted, despite some reversals, the total

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[40] We do not suggest that a plaintiff with knowledge of the fraud may nevertheless claim justifiable reliance just because it does not know the exact dollar amount involved or every intricate detail of the fraud. But that is not the case here.

damages awarded will not be drastically altered. Accordingly, costs in the judgment of this court will be assessed against the defendant. [41]

[41] Pursuant to Circuit Rule 16(e), that part of the foregoing opinion captioned "I. EXCHANGE OF BRIEFS PROCEDURE" has been circulated among all judges of this court in regular active service. No judge favored a rehearing En banc on the question presented by the direction that any district court of this circuit now following the practice of delayed exchange of trial briefs should require in all future cases each party to serve his trial brief on all other parties at some reasonably short time before or after he files the brief with the court or provides a copy to the judge.

[Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.]

United States District Court, Central District of Illinois

September 26, 1979

No. 76-2-167

Reporter
479 F. Supp. 281 *; 1979 U.S. Dist. LEXIS 9546 **; 1980-2 Trade Cas. (CCH) P63,423

CHAMPAIGN-URBANA NEWS AGENCY, INC., a corporation, Plaintiff, vs. J. L. CUMMINS NEWS COMPANY, INC., a corporation, Defendant, MARTIN R. HOFFMAN, Secretary of the United States Army, and JOHN L. McLUCAS, Secretary of the United States Air Force, Defendants.

Core Terms

Robinson-Patman Act, purchases, anti trust law, immunity, antitrust, exempt, seller, regulation, exchanges, sovereign immunity, arm, military, buyer, instrumentality, nonappropriated, purposes, funds, sales, institutions, sovereign, coverage, enjoys, prices, waived

LexisNexis® Headnotes

Governments > Federal Government > Claims By & Against

HN1[] **Federal Government, Claims By & Against**

As a general rule, the United States may not be sued without its consent.

Governments > Federal Government > Claims By & Against

Governments > Federal Government > Employees & Officials

HN2[] **Federal Government, Claims By & Against**

The Army and Air Force Exchange Service is an arm of the Department of Defense and is government.

Governments > Federal Government > Claims By & Against

HN3[] **Federal Government, Claims By & Against**

A governmental officer acting within the scope of his authority in the discharge of the duties of his office enjoys the same personal immunity from suit as does the government.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN4[] **Price Discrimination, Buyer Liability**

Section 2(a) and (f) of the Robinson-Patman Act states that it shall be unlawful for any person engaged in commerce to discriminate in price between different purchasers where the effect of such discrimination may be substantially to lessen competition. It shall be unlawful for any person engaged in commerce knowingly to induce or receive a discrimination in price which is prohibited by this section.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Governments > Local Governments > Libraries

HN5[] **Robinson-Patman Act, Claims**

By its own terms, the Robinson-Patman Act does not prohibit all price discrimination. It expressly exempts purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit. *15 U.S.C.S. § 13c*.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

Statutes which in general terms divest pre-existing rights or privileges will not (be applied) to the sovereign without express words to that effect.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN7[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act does not apply to government purchases.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN8[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act is special-interest legislation that protects small businesses from the rigors of more efficient, large scale, integrated chains.

Counsel: **[**1]** James L. Capel, Jr., Meyer, Capel, Hirschfeld, Muncy, Jahn & Aldeen, Champaign, Ill., Alan E. Popkin and Pat L. Simons, St. Louis, Mo., for plaintiff.

Ralph J. Swanson, Sebat, Swanson, Banks, Lessen & Garman, Danville, Ill., for defendant Cummins.

V. Rock Grundman, Jr., and Charles G. Symmonds, Terry Horn, Peoria, Ill., for defendants Hoffman and McLucas.

Opinion by: BAKER

Opinion

[*282] MEMORANDUM AND ORDER

This is an action for damages under the Robinson-Patman Act. The plaintiff seeks to impose liability upon the individual defendants, who are governmental officials, and upon the private corporate defendant which dealt with them. The defendants have moved to dismiss or for summary judgment.

The plaintiff, Champaign-Urbana News Agency, Inc., is a Delaware corporation with its principal office and place of business in Champaign County, Illinois. Plaintiff is engaged in the business of wholesale distribution of paperback books, magazines and comic books in the States of Illinois and Indiana.

[*283] The defendant, J. L. Cummins News Company (Cummins), is an Illinois corporation with its principal place of business in Bloomington, Indiana. It is engaged in the same business **[**2]** as plaintiff and conducts a portion of that business within the Central District of Illinois.

The defendants, Martin R. Hoffman and John L. McLucas, are, respectively, Secretary of the United States Army and Secretary of the United States Air Force. In those capacities they are responsible for the administration and operation of the Army and Air Force Exchange Service (AAFES). AAFES is a nonappropriated fund instrumentality of the United States Government which operates post exchanges or commissaries located on Army and Air Force bases. The post exchanges sell a wide variety of merchandise, including paperback books, magazines and comic books, to members and employees of the United States Armed Forces and their families.

The plaintiff has filed its first amended complaint in three counts, seeking damages and injunctive relief. In Count I, plaintiff alleges that the defendant Cummins violated the Robinson-Patman Act, § 2(a), *15 U.S.C. § 13(a) (1976)*, by discriminating in the price of its goods between different purchasers and by affording a five percent discount to the Chanute Air Force Base Exchange in Rantoul, Illinois. As a result of Cummins' illegal price discrimination, the **[**3]** plaintiff claims that it has been injured and that it failed to receive the contract for sale of paperback books, magazines and comic books to the Chanute Air Force Base Exchange for the year 1976-1977. The plaintiff prays for damages against Cummins in the sum of $ 90,000 and for an injunction against the alleged illegal discriminatory sale practices.

In Count II, the plaintiff seeks a declaratory judgment against the defendants, Hoffman and McLucas, declaring that sales to the AAFES are subject to the provisions of the Robinson-Patman Act.

In Count III, the plaintiff alleges that the defendants, Hoffman and McLucas, in their capacities as Secretary of the Army and Air Force, respectively, combined and colluded with the defendant Cummins to procure a price discrimination in violation of § 2(f) of the Robinson-Patman Act to the plaintiff's injury. The plaintiff prays for damages of $ 90,000 from AAFES and that AAFES be enjoined from the practice of procuring a discrimination in price on purchases of paperback books, magazines and comic books.

The defendant, Cummins, and the defendants, Hoffman and McLucas, have separately moved to dismiss the first amended complaint with prejudice **[**4]** or for summary judgment on the grounds that the allegations show a lack of jurisdiction by the court over the subject matter and a lack of jurisdiction over the persons of the defendants, Hoffman and McLucas, and that the complaint fails to state a claim upon which relief can be granted.

The pleadings present the following issues for determination:

I. Is AAFES, as an arm of the United States government, immune from liability under the Robinson-Patman Act?

II. If so, does this sovereign immunity extend to the defendant federal officials, Hoffman and McLucas?

III. If the federal buyers AAFES, Hoffman and McLucas cannot be liable for inducing a Robinson-Patman Act violation, does the private seller thereby escape liability?

I. Is AAFES, as an arm of the United States government, immune from liability under the Robinson-Patman Act?

A. ***HN1***[] As a general rule, the United States may not be sued without its consent. 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3654, at 156 (1976). This doctrine of sovereign immunity has been imported to the United States from English law. National Ass'n of Attorneys General, Sovereign Immunity: The Liability of Government and its **[**5]** Officials (1975).

> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial **[*284]** power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514, 60 S. Ct. 653, 657, 84 L. Ed. 894 (1940).

The plaintiff claims *Penn Dairies, Inc. v. Milk Control Comm'n of Pennsylvania, 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943)*, and *Paul v. United States, 371 U.S. 245, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963)*, support its claim that AAFES purchases are subject to the Robinson-Patman Act without express consent. The cited decisions do not support that proposition because they involve federal subjection to state regulation, which concerns conflicting sovereign rights and may in turn depend on land ownership.

In *Penn Dairies, supra*, the Supreme Court, recognizing that sales on government reservations were not subject to state regulation, held that Pennsylvania **[**6]** had a right to regulate the sale of milk at an Army camp established by the United States on land belonging to the Commonwealth of Pennsylvania. Only on an exclusively federal enclave would the Commonwealth of Pennsylvania have been prohibited from exercising control over the sale of milk.

Again, on the question of the ability of a state to regulate sales at military installations, the Supreme Court in Paul held that sales for government consumption could not be regulated irrespective of whether the consumption took place on a federal enclave or on state-controlled land. Whether a state could regulate the sale of goods which were not to be consumed by the federal government raised a different problem:

> What we have said would dispose of the entire case but for the fact that some of the milk was purchased out of nonappropriated funds for use in military clubs and for resale at post exchanges. This brings us to the question whether Congress has power to exercise "exclusive legislation" over these enclaves within the meaning of *Art. I. § 8, cl. 17, of the Constitution* . . . .

371 U.S. at 263, 83 S. Ct. at 437. Whether the state had the right to regulate sales in the military **[**7]** clubs and post exchanges thus appeared to turn on the factual question of which sovereign owned the land on which the post was situated.

B. The weight of authority clearly indicates that AAFES is a branch of the Department of Defense and that its activities are protected by the doctrine of governmental immunity except in those specific instances where Congress has waived that immunity.

In *Standard Oil Co. v. Johnson, 316 U.S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942)*, the Supreme Court was called upon to decide whether post exchanges, established under regulations promulgated by the Secretary of War under the authority of Congressional enactments, are arms of the government deemed by it essential for the performance of governmental function. The Court held that post exchanges are indeed arms of the government and that sales made in the post exchanges are exempt from state regulation.

> Congressional recognition that the activities of post exchanges are governmental has been frequent. Since 1903, Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for **[**8]** post exchanges.
>
> . . . The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The Government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not **[*285]** go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

Id. at 484-485, 62 S. Ct. at 1170.

The conclusion in *Standard Oil Co. v. Johnson, supra*, that post exchanges and similar facilities are instrumentalities of the United States, is reiterated in *United States v. Mississippi Tax Comm'n, 421 U.S. 599, 606, 95 S. Ct. 1872, 44 L. Ed. 2d 404 (1975)*. That case, too, dealt with the ability of a state to tax a transaction on a post exchange and the Court recognized post exchanges as arms of **[**9]** the Department of Defense.

In *United States v. Hopkins, 427 U.S. 123, 96 S. Ct. 2508, 49 L. Ed. 2d 361 (1976)*, the status of military post exchanges as arms of the Government was raised as a defense to an AAFES employee's suit for breach of employment contract. While the case turns on an interpretation of the Tucker Act, *28 U.S.C. § 1491 (1976)*, and the jurisdiction of the Court of Claims, the basic premise that AAFES is an arm of the Government remains unchanged.

It is noteworthy that Congress in defining government employees excluded AAFES personnel paid from nonappropriated funds but went on to say, "this subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities." *5 U.S.C. § 2105(c) (1976)*.

A series of lower court decisions have dealt with the status of AAFES as an arm of the government and the immunity which is attendant upon that status.

In *Ellsworth Bottling Co. v. United States, 408 F. Supp. 280 (W.D.Okl.1975)*, a soft drink concessionaire claimed that AAFES had engaged in unlawful bidding procedure in awarding a contract to the plaintiff's competitor. The district court ruled that plaintiff had a remedy under the Administrative **[**10]** Procedure Act. In discussing AAFES status, the court said:

> The AAFES is a joint major command of the U.S. Army and the U.S. Air Force under the jurisdiction of the Chief of Staff, U.S. Army and Chief of Staff, U.S. Air Force. AAFES is the entity embracing the activities, personnel, property and nonappropriated funds through which exchange service is provided within the Army and Air Force. AR 60-10/AFR 147-7 §§ 1-5. The Secretary of Defense has vested in the Secretary of the Army and the Secretary of the Air Force all functions, powers and duties relating to exchange service activities within their respective departments. AR 60-10/AFR 147-7 §§ 1-3. Thus, it is clear that the AAFES is a part of the Department of Army and Air Force and, hence part of the Department of Defense. As AAFES is part of the Executive department, the Department of Defense, it cannot be an independent establishment within the meaning of *5 U.S.C. § 104*. *Moreover, in Standard Oil Company of California v. Johnson, supra*, the Court found a post exchange, the predecessor to the modern AAFES, to be an integral part of the War Department, one of the predecessors to the Department of Defense, sharing in the duties **[**11]** intrusted to it and partaking of whatever immunities it may have under the Constitution and federal statutes.

Id. at 284 (footnote omitted).

Ellsworth also distinguishes *W. B. Fishburn Cleaners, Inc. v. Army & Air Force Exchange Service, 374 F. Supp. 162 (N.D.Tex.1974)*, a case on which plaintiff relies. Fishburn found the AAFES to be an independent establishment within the definition of *5 U.S.C. § 104*. Ellsworth points out, however, that Fishburn did not consider the effect of joint Army/Air Force regulations:

> In light of these regulations it is clear that the AAFES is a dependent part of the Departments of Army and Air Force. The AAFES is entirely under the control of these Departments. There is nothing independent about its operations under the pertinent regulations.
>
> It is possible that the Fishburn court did consider the regulations but considered, in the construction of *5 U.S.C. § 104*, that the words "or part thereof" **[*286]** were intended to modify only "Government corporation" and not "Executive department, military department." This Court would reject such a construction. Reason dictates that if an Executive or military department is excluded from **[**12]** the section's coverage, an integral part thereof would also be excluded.

408 F. Supp. at 284 n.3.

See also *Bramblett v. Desobry, 490 F.2d 405 (6th Cir. 1974)*, Cert. denied *419 U.S. 872, 95 S. Ct. 133, 42 L. Ed. 2d 111 (1974)*, which held the discharge of an AAFES employee by a base commanding officer was a governmental act granting immunity from suit; *Young v. United States, 498 F.2d 1211 (5th Cir. 1974)*, where the plaintiff was barred from bringing suit in either the Court of Claims or the District Court and was required to seek relief under the Administrative Procedure Act; *Fraley v. United States, 232 F. Supp. 491 (D.Mass.1964)*, holding that AAFES was an instrumentality of the United States and not subject to suit for personal injuries arising from a collision with an automobile owned by AAFES; *Bailey v. United States, 201 F. Supp. 604 (D.Alaska 1962)*, dismissing a suit brought on a post exchange contract because the United States had not waived sovereign immunity.

C. The examples cited by the plaintiff in its brief to illustrate the lack of governmental immunity for AAFES, E. g. federal legislation allowing imposition of state gasoline taxes, exempting AAFES from Civil **[**13]** Service control, the Tucker Act, and requiring liability insurance coverage for AAFES automobiles, tend rather to show a recognition by Congress of the governmental nature of AAFES functions. Each example is really an illustration of Congress saying, "In this particular instance we will waive the United States' immunity."

The rationale followed by the Court of Appeals for the District of Columbia in *Hecht v. Pro-Football, Inc., 144 U.S.App.D.C. 56, 444 F.2d 931 (D.C.Cir. 1971)*, in subjecting the District of Columbia Armory Board to suit under the antitrust laws, seems inapplicable to AAFES as an arm of the Department of Defense.

The Hecht decision leans heavily on cases interpreting the preemptive effect of government regulation on the application of antitrust laws to regulated industries. Thus, the Securities Exchange Commission in *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*, could not use its powers to bring about a business combination which would violate the antitrust laws. Similarly, the Comptroller of the Currency in his regulation of banks could not authorize a merger which violated the *Clayton Act. United States v. Philadelphia **[**14]** National Bank, 374 U.S. 321, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*. Regulation by the Civil Aeronautics Board will not exempt airlines from application of the antitrust laws. *Pan American World Airways v. United States, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963)*. Regulation by the Federal Communications Commission does not exempt broadcasters from the antitrust laws. *United States v. Radio Corporation of America, 358 U.S. 334, 79 S. Ct. 457, 3 L.E.2d 354 (1959)*. Shipping subject to regulation by the Federal Maritime Commission, on the other hand, is exempt by statute. 46 U.S.C. § 814 (1976).

However, it does seem that AAFES is not analogous to any of the regulated industries subject to federal regulatory commissions which Hecht relied upon as being comparable to the District of Columbia Armory Board. As observed above, AAFES is an arm of the Defense Department and is government in the sense that it enjoys and partakes of the immunity which that department unquestionably enjoys.

Neither can it be said that Hecht's Observations about state-created instrumentalities which are subject to antitrust legislation are persuasive that AAFES is a similar instrumentality. AAFES is **[**15]** not a federal agency with a status equivalent to the District of Columbia Armory Board. Rather, AAFES enjoys a higher and more protected status for purposes of sovereign immunity than does any District of Columbia agency. AAFES is truly a federal agency, while for purposes of sovereign immunity **[*287]** the District of Columbia Armory Board is more like a state agency or instrumentality. [1.] The antitrust laws are an exercise of Congress's commerce power and are thus supreme over any state law, including doctrines of state sovereign immunity. Although Congress may decide to exempt various activities of state government from coverage under the antitrust laws, nothing prevents Congress if it so desires from subjecting states to antitrust liability without their consent. *Georgia v. Evans, 316 U.S. 159, 162, 62 S. Ct. 972, 86 L. Ed. 1346 (1942)*. The relevant question is not the power of Congress to create state or District of Columbia antitrust liability without the consent of those governments, but whether Congress in a particular case intended to do so. *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*; See *Kurek v. Pleasure Driveway and Park District of Peoria, **[**16]** 557 F.2d 580 (7th Cir. 1977)*, Vacated and remanded, *435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81 (1978)*, for consideration in light of *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*.

The plaintiff argues that the nature of AAFES as a business enterprise requires that it be denied antitrust immunity. The plaintiff points out that AAFES operates on nonappropriated funds and engages in merchandising not unlike that **[**17]** of a chain of huge, private, supermarkets or department stores. In reality, plaintiff says, AAFES is not carrying out a governmental function but is engaged in a proprietary activity and should be subject to antitrust liability like the defendants in *Kurek, supra.* This argument mistakenly equates the status of AAFES immunity with state immunity. The "private business" test for determining whether state activity is within the coverage of the antitrust laws has relevance only in deciding whether Congress has intended the antitrust laws to override state sovereign immunity. As has been shown, however, AAFES enjoys federal, not state, sovereign immunity and cases like Kurek are inapposite.

While the plaintiff's argument that AAFES in reality is a business enterprise is a very appealing one philosophically, this court cannot ignore the reiterated holdings of the Supreme Court that ***HN2***[] AAFES is an arm of the Department of Defense and is government.

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1. The activities of the AAFES find their genesis in an exercise of enumerated federal powers under the Constitution; namely, the war and military powers of Art. I, § 7, clauses 11-14, together with the Necessary and Proper Clause. With regard to the District of Columbia, however, Congress is not limited to enumerated powers. It has, instead, the general police powers of a state government. U.S. Const. art. I, § 7, cl. 17; *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc., 337 U.S. 582, 69 S. Ct. 1173, 93 L. Ed. 1556 (1949)*.

II. Does the sovereign immunity of AAFES extend to the defendant federal officials, Hoffman and McLucas?

HN3[] A governmental officer acting within the scope of his authority in the discharge of the duties of his office enjoys the same personal immunity **[**18]** from suit as does the government.

In *Union Carbide and Carbon Corporation v. Nisley, 300 F.2d 561, 576-77 (10th Cir. 1961)* Cert. denied *371 U.S. 801, 83 S. Ct. 13, 9 L. Ed. 2d 46 (1962)*, the United States entered into a contract with one of the litigants for production of vanadium ore, which contract was claimed to violate the antitrust laws. The question of immunity of the government agent was raised:

> The trial court was requested to instruct the jury in substance that the government itself could not violate the antitrust laws; that an agent for the government, acting within the scope of his authority, was likewise immune, and that if the authorized activities of the agent were validly conferred, the fact that the agent may have had illegal private motives in the performance of his authorized duty was irrelevant. It is true, as appellants suggest, that the antitrust laws are inapplicable to government activities. And, it may also be taken as equally true that since the government acts only through its agents, such agents are likewise immune from liability under the statute **[*288]** while acting within the scope of his authority in the furtherance of a declared governmental **[**19]** policy or legislative scheme. *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315*; *Asheville Tobacco Board of Trade v. F. T. C., 4 Cir., 263 F.2d 502*, Cf. *Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transportation Ass'n, 102 U.S.App.D.C. 355, 253 F.2d 877*. But there is nothing in this agency contract to justify the inference that the government intended to transgress the antitrust laws. The contract does not purport to authorize USV to fix prices, restrain trade or achieve a monopoly in the vanadium industry, and we will not lightly infer an intention to do so. Cf. *Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880*; *United States v. Radio Corp. of America, 358 U.S. 334, 79 S. Ct. 457, 3 L. Ed. 2d 354*; *United States v. Borden Co., 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181*.

If the AAFES activities are government functions and the Secretaries are in charge of those activities, it becomes apparent that the Secretaries are immune.

The argument that the Secretaries have waived governmental immunity is untenable. The executive arms of the government, through which the United States does business, have no power to waive **[**20]** the sovereign's immunity, or create a right of suit that Congress has not sanctioned. *American Foreign Steamship Corp. v. United States, 291 F.2d 598 (2d Cir. 1961)* Cert. denied, *368 U.S. 895, 82 S. Ct. 171, 7 L. Ed. 2d 92 (1961)*. See also *Reid v. United States, 211 U.S. 529, 29 S. Ct. 171, 53 L. Ed. 313 (1909)*.

III. If the federal buyers AAFES, Hoffman and McLucas cannot be liable for inducing a Robinson-Patman violation, can the private seller, Cummins, thereby escape liability?

HN4[] Section 2(a) and (f) of the Robinson-Patman Act states that:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition . . . .
> . . . It shall be unlawful for any person engaged in commerce . . . knowingly to induce or receive a discrimination in price which is prohibited by this section.

On the face of the statute it is apparent that the seller and the buyer who engage in outlawed pricing activities are each subject to penalty and that the prohibitions of the statute can be applied individually as well as jointly. There is no necessity for concert **[**21]** of action by the seller and buyer to justify proceeding against the seller, although the statute does require the buyer to be witting before an action will lie against him. The different sections of the statute are independent of each other and may be separately enforced. *Federal Trade Comm'n. v. Henry Broch & Co., 363 U.S. 166, 170-71, 80 S. Ct. 1158, 4 L. Ed. 2d 1124 (1960)*. [2.]

Cummins, the seller, argues it cannot be guilty of discrimination because its buyer cannot be guilty of inducement. It presents a theory of what might be characterized as "vicarious sovereign immunity." Taking the statute at face value, Cummins' claim would fail. **[**22]** If Congress intended to prohibit All price discrimination through the Robinson-Patman Act, then a seller should not find shelter behind the sovereign immunity of a buyer and frustrate the Congressional intent. To reach that conclusion, however, it would be necessary to find that Congress intended the Robinson-Patman Act to apply to all transactions, including those of the United States.

To resolve the question of Cummins' liability, therefore, it becomes necessary to go **[*289]** beyond the initial inquiry of sovereign immunity and to probe the reasons for Congress' enactment of the Robinson-Patman Act. Did Congress intend that the Robinson-Patman Act should apply to purchases by the United States? Put another way, can the United States be a "purchaser" within the meaning of § 2(a) of the Robinson-Patman Act, Supra.

HN5[] By its own terms, the Act does not prohibit all price discrimination. It expressly exempts "purchases of their 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 (1976)*. The purpose of this exemption is to allow the named institutions to make their **[**23]** purchases at the lowest possible price. *Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212 (9th Cir. 1967)*. The exemption runs to both sellers and purchasers.

> For every purchase . . . there must be both a purchaser and a seller. It follows that if a particular purchase is exempt from the Act, both the seller and the purchaser involved in that transaction are exempt. Moreover, the benefits in the form of lower prices which are expected to accrue to non-profit institutions by reason of this statute would be illusory if only the purchasing institution, but not the sellers thereto, were exempted. No seller would be able to give a non-profit institution the benefit of a lower price which was discriminatory under the Act, if such a seller was not exempt from the sanctions of the Act in making the sale.

Id. at 215-16.

Why then was the government not exempted, the plaintiff argues, if the Act was not to apply to government purchases? The answer is straightforward and simple. The government was never included and therefore did not need to be exempted. It is an "old and well known rule that ***HN6***[] statutes which in general terms divest pre-existing rights or privileges will not (be applied) **[**24]** to the sovereign without express words to that effect." *United States v. United Mine Workers of America, 330 U.S. 258, 272, 67 S. Ct. 677, 686, 91 L. Ed. 884 (1947)*.

See *Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 22 L. Ed. 80 (1874)* where it was stated:

> It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts.

Id. at 239. [3.]

[2.] It seems apparent from the statutory language that a buyer cannot be guilty of inducing if the seller cannot be guilty of discriminating, and the Supreme Court has so held. *Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Comm'n, 440 U.S. 69, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*. A&P, However, says nothing about the reverse case which is the situation here.

[3.] The doctrine that the sovereign retains immunity from suit unless expressly waived and the rule of construction that restrictive statutes do not apply to the sovereign unless expressly named obviously overlap to a great extent. The distinctions emerge where, as here, the action somehow depends on the legal rights of the United States, and the amenability of the sovereign to suit is not at issue.

[25]** **[*290]** The United States Attorney General, shortly after passage of the Robinson-Patman Act, relied on this principle and construed the ***HN7***[] Act as not applying to government purchases. *38 Op. Att'y Gen. 539 (1936)*.

A district court following the Attorney General held the Act inapplicable to government purchases. In *General Shale Products Corp. v. Struck Construction Co., 37 F. Supp. 598 (W.D.Ky.1941)*, Aff'd on other grounds, *132 F.2d 425 (6th Cir. 1942)*, the district court noted that Congress must have been fully aware of the Attorney General's construction of the Act when it debated and enacted the *§ 13c* exemption provisions, yet it chose specifically not to include government purchases in the Act. No less an authority than U.S. Representative Wright Patman, a sponsor of the Act, seems to have acquiesced in the Attorney General's opinion:

> Question : If a manufacturer sells to government, municipal or public institutions at a lower price than he sells to his wholesale customers, is he in violation of the law if he does not make the same price for the same quantity available to the wholesaler to whom he sells?
>
> Opinion : The Attorney General of the United States has **[**26]** ruled that the Act does not apply to the government . . . . It may be presumed that the Attorney General's reasons may also be applied to municipal and public institutions.

W. Patman, The Robinson-Patman Act: What You Can and Cannot Do Under This Law 168 (1939). For a more recent statement by Mr. Patman to the same effect, see, W. Patman, Complete Guide to the Robinson-Patman Act 30 (1963). Similar sentiments are expressed in E. Kintner, A Robinson-Patman Primer 202-03 (1970).

On at least three occasions unsuccessful bills designed to amend the Robinson-Patman Act by bringing government purchases within its coverage have been introduced into the Congress. A bill introduced by Representative Patman in 1951 would have amended the Act by adding a new subsection (g), reading, "That for purposes of this section the term "purchaser' includes the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951). Two bills directly on point in this dispute, introduced by Representative Keogh, would have added the following new paragraph at the end of § 2(a) of the Act:

> For the purposes of this subsection, when any officer or agency of the **[**27]** United States (including those operating on nonappropriated funds) purchases commodities for resale, such officer or agency shall be deemed to be a purchaser of commodities to which this subsection refers, and such purchases shall be deemed to be in commerce.

H.R. 155, 86th Cong., 1st Sess. (1959); H.R. 430, 87th Cong., 1st Sess. (1961). The fact that Congress refused to pass them is persuasive evidence that Congress did not intend the Robinson-Patman Act to cover government purchases and specifically not AAFES purchases.

For example, in the United Mine Workers case, the validity of a federal court injunction against a labor strike depended on whether the Norris-LaGuardia Act covered the labor dispute. If it did, the anti-injunction provisions of that Act would have deprived the court of jurisdiction to issue the injunction. The strike occurred while the federal government had taken over operation of the mines pursuant to a Presidential declaration of national emergency. The Supreme Court recognized that the Norris-LaGuardia Act, with its anti-injunction provision, would apply if the operation of the mines had remained in private hands. But because the Act covered only "employees" and "employers" generally, the Court held that the government was not an "employer" for purposes of the Act, and the Act did not apply.

The United States Supreme Court has applied the presumption in other cases to allow the United States to pursue a common-law collection remedy prohibited by statute to other creditors, *Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 238-39, 22 L. Ed. 80 (1869)*; to allow the United States to collect a debt that would have been discharged in bankruptcy had it been owed to a private party, *United States v. Herron, 87 U.S. (20 Wall.) 251, 263, 22 L. Ed. 275 (1873)*; to allow the United States to collect a partnership debt against a bankrupt out of the bankrupt's individual estate, even though the United States had not proved its claim in bankruptcy and even though private creditors would have been limited to the partnership estate, *Lewis v. United States, 92 U.S. 618, 622, 23 L. Ed. 513 (1875)*; and to allow the United States to bring a criminal indictment under a statute prohibiting the importation of alien labor, when the statute spoke of enforcement only by forfeiture and penalty, *United States v. Stevenson, 215 U.S. 190, 197, 30 S. Ct. 35, 54 L. Ed. 153 (1909)*.

Any construction of the Robinson-Patman Act must take into account the fundamental difference between this Act and other antitrust statutes. Although classified as an ***antitrust law***, the Robinson-Patman Act often works at cross purposes with other antitrust laws, particularly with the Sherman Act.

The Sherman Act prohibits monopolization and its economic equivalent, concerted activity by ostensible competitors. These **[*291]** practices allow individuals or collusive groups to insulate themselves from market forces and thereby to maximize profits by artificially lowering output and raising prices. E. Gellhorn, ***Antitrust Law*** and Economics in a Nutshell 87-98, **[**28]** 160-67 (1976). The Sherman Act protects competition, the theoretical heart of the free enterprise system. The Robinson-Patman Act, on the other hand, does not embody such a fundamental and generalized ideal to nearly the same extent. Congress passed the Act in 1936 "in response to the problem perceived in the increased market power and coercive practices of chain stores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Comm'n, 440 U.S. 69, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*. See also *Federal Trade Comm. v. Henry Broch & Co., 363 U.S. 166, 80 S. Ct. 1158, 4 L. Ed. 2d 1124 (1960)*. To a great extent, the ***HN8***[] Robinson-Patman Act constitutes special-interest legislation designed to protect small businesses "from the rigors of more efficient, large scale, integrated chains." L. Sullivan, Antitrust 678 (1977). The Act, in many respects, is an antitrust aberration. [4.]

[29]** Courts must be sensitive to the unique nature of the Robinson-Patman Act and attempt to construe it consistently, when possible, with "broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Comm'n, supra*, at n.13. This directive by the Supreme Court is supported by commentators:

> To the extent that Robinson-Patman separates out for attack competitively harmful discrimination, it can be a positive instrument which aids antitrust enforcement; to the extent it may reach competitively neutral discriminations, its impingement on market freedom cannot be justified on antitrust grounds but only on other social grounds, if at all; furthermore, by limiting competitive choices, it begins to impinge on the interests protected by antitrust. To the extent that Robinson-Patman inhibits discriminations which are actually beneficial to competition, it collides with antitrust policy. As we shall see, the vigorous criticism so often lodged against the law is that it is not effectively integrated with antitrust and probably does more harm than good to competition. Moreover, it is often asserted that it does this harm without discernibly advancing any other **[**30]** comparably important social goal.

L. Sullivan, Antitrust 681-82 (1977).

> In practice the Act has proved to be less than satisfactory. It has been applied primarily against those small sellers who were coerced into granting discounts or into competing against larger sellers, on the one hand, and against firms engaging in vigorous competition, on the other. As a consequence the Robinson-Patman Act has been roundly criticized as being anticompetitive and contrary to the general purposes of the antitrust laws. It has been attacked for discouraging price competition and promoting price uniformity. Consequently its significance in antitrust enforcement has faded in recent years.

E. Gellhorn, supra, at 363-64.

Given the essentially anticompetitive nature of the Robinson-Patman Act, it would appear that the broader policies of antitrust are better served by interpreting the Act narrowly rather than broadly. Cf. *Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Comm'n, supra.*

The Sherman Act and Clayton Act cases plaintiff cites to urge a broad application of the antitrust laws are therefore inapposite here. Congress did not intend the Robinson-Patman Act to apply **[**31]** to government purchases, and a seller who price discriminates in favor of the United States cannot be liable under the Act. The plaintiff cannot employ the Robinson-Patman **[*292]** Act to defeat the United States in its attempts to secure the lowest price possible for goods sold in its military exchanges. Clearly that was not a result intended by the Congress.

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4. The Act has been applied to terminate vigorous competitive activity, even when that activity was succeeding in breaking the probable monopolistic market share of an "injured" plaintiff. *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 (1967)*.

IT IS THEREFORE ORDERED that the motions to dismiss of the defendants, Martin R. Hoffman and John L. McLucas, be, and hereby are, allowed. Counts II and III of the first amended complaint are dismissed with prejudice.

IT IS FURTHER ORDERED that the motion to dismiss (which was denominated motion for summary judgment) of the defendant, J. L. Cummins News Co., Inc., be, and hereby is, allowed. Count I of the first amended complaint is dismissed with prejudice.

Reading Indus. v. Kennecott Copper Corp.

United States District Court for the Southern District of New York

September 26, 1979

No. 71 Civ. 1736

Reporter

477 F. Supp. 1150 *; 1979 U.S. Dist. LEXIS 9569 **; 1979-2 Trade Cas. (CCH) P62,906

READING INDUSTRIES, INC., READI-FIN MANUFACTURING COMPANY, INC., and READING METALS REFINING CORPORATION, Plaintiffs, against KENNECOTT COPPER CORP., CHASE BRASS & COPPER CO., INC., PHELPS DODGE CORP., PHELPS DODGE INDUSTRIES, INC., Successor to PHELPS DODGE COPPER PRODUCTS CORP., THE ANACONDA CO., and ANACONDA AMERICAN BRASS CO., Defendants.

Subsequent History: [1]** As Amended November 26, 1979.

Affirmed by *Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d 10, 1980 U.S. App. LEXIS 13717 (2d Cir. N.Y., 1980)*

Core Terms

copper, prices, scrap, refined, defendants', anti trust law, conspiracy, purchasers, cases, summary judgment, lack standing, domestic, remote, indirect, antitrust violation, fabricators, antitrust, producers, customers, dealers, target, standing to sue, treble damages, Clayton Act, alleges, costs, oil, alleged conspiracy, oil company, circumstances

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Opposing Materials**

If the party moving for summary judgment shows conclusively that the factual allegations of the complaint are not susceptible of any interpretation suggesting that the defendants violated the antitrust laws, the opposing party may not rely on those allegations, but must produce significant probative evidence tending to support the complaint if it is to avoid summary dismissal of the action.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN3[ ] Private Actions, Purchasers

An indirect purchaser cannot maintain an action against a price-fixer to recover overcharges passed on to the indirect purchaser as the price-fixer's product moved through the chain of distribution.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[ ] Private Actions, Standing

Regarding an antitrust violation, 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 > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN5[ ] Clayton Act, Claims

In order to have standing to sue for treble damages under § 4 of the Clayton Act, a person must be within the target area of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly there is a line excluding those who have suffered economic damage by virtue of their relationships with targets or with participants in an alleged antitrust conspiracy, rather than by being targets themselves.

Counsel: Kohn, Milstein & Cohen, Washington, D. C., for plaintiffs; Harold E. Kohn, Jerry S. Cohen, Michael D. Hausfeld, Washington, D. C., of counsel.

Sullivan & Cromwell, New York City, for the Kennecott and Chase defendants.

Debevoise, Plimpton, Lyons & Gates, New York City, for the Phelps Dodge defendants.

Chadbourne, Parke, Whiteside & Wolff, New York City, for the Anaconda defendants.

Opinion by: LASKER

Opinion

[*1152] Reading Industries, Inc., refines copper scrap and manufactures copper tubing. Defendants Kennecott Copper Corporation, Phelps Dodge Corporation, and The Anaconda Company, are large, vertically integrated firms which mine, mill, smelt, and refine copper. Together they produce about sixty percent of the refined copper used each year by the nation's copper fabricators, who transform refined copper into intermediate products such as copper wire, rod, sheet, and tubing. Each of the producing defendants also owns its own fabricating subsidiaries, some of which are named as defendants.

In this suit for treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*, Reading charges that between 1964 and 1970 Kennecott, Phelps **[**2]** Dodge, and Anaconda conspired to fix the price of domestically produced refined copper and to monopolize the market for the sale of domestically produced refined copper, in violation of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. Amended Complaint PP 40-42; [1] Defendants' Brief, Appendix A (letter of May 14, 1979 from plaintiffs' counsel to the court).

[3]** The defendants move on three grounds for summary judgment dismissing the complaint. First, they assert that the action must be dismissed on its merits because, despite extensive discovery over eight years, Reading has failed to produce any "significant probative evidence tending to support the complaint." *First National Bank v. Cities Service Co., 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968)*. Second, they argue that under the rule of **[*1153]** *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, Reading cannot maintain this action. Finally, they contend that Reading lacks standing to sue under section 4 of the Clayton Act "both because (it) was not a "target' of (the alleged) conspiracy and because its claimed injury is too remote and indirect to sustain standing." (Defendants' Brief at 4.)

I. The Copper Market [2] and the Theory of Reading's Case

[4]** There are two sources of copper virgin ore and scrap. Primary production of domestic copper that is, production of copper from domestically mined ore is dominated by the defendants, who control sixty to seventy percent of domestic mine production and have augmented their mining hegemony by forward integration through the various phases of copper production, developing substantial smelting, refining, and fabricating capacity. Secondary copper production the recovery of copper scrap consists of two elements: recirculation of "new" scrap (defective castings, clippings, punchings, turnings, borings, skimmings, drosses, slags, and other scrap generated in the course of manufacturing copper items) and "old" scrap (obsolete, damaged, or discarded articles such as old pipe, spent cartridge casings, automobile radiators, and lithographic plates). Much new scrap is apparently returned by manufacturers directly to the copper fabricator from which the copper sheet, wire, rod, or tubing used in the manufacturing process was originally purchased, and does not pass through the "scrap market." Old scrap, and

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[1] This complex antitrust case was initiated in 1971 but pretrial motions and skirmishes delayed in-depth discovery until about 1977. As a result of that discovery, plaintiffs advised that their theory of the case was radically altered. So different was the plaintiffs' present theory from that articulated in the original complaint that the court ordered the plaintiffs to file with it and defense counsel a "Statement of Contentions." That statement is dated August 29, 1977. After its receipt the court ordered the plaintiffs to propose an amended complaint. That document is dated July 9, 1979. By letter of July 18, 1979 defense counsel objected to certain portions of the amended complaint as inadmissible under the Federal Rules of Civil Procedure. The court invited plaintiffs to respond to the defendants' letter, which the plaintiffs did by a voluminous response dated July 31, 1979. Defense counsel answered the response by detailed letter of August 6, 1979.

In a separate ruling of this date, we have sustained the defendants' objections to (1) inclusion in the amended complaint of material expanding the scope of conspiracy to include co-conspirators not named as defendants and (2) inclusion of material relating to alleged fraudulent concealment of the conspiracy. Moreover, we have specified that allegations increasing damages from $ 18,000,000. to $ 61,000,000. must be particularized. The information contained in this note is given as background. Our ruling dismissing the complaint would not be different if the proposed amended complaint were accepted as tendered.

[2] The discussion of the copper market in this section of the opinion is based primarily on the descriptions in the parties' briefs on this motion and on Y. Levy, Copper: Red Metal in Flux 53-54 & passim (1968) (Federal Reserve Bank of San Francisco Monthly Review Supplement), and A. McMahon, Copper, A Materials Survey 253-55, 259-60 & passim (1964) (U.S. Bureau of Mines Information Circular 8225), which were submitted to the court by the defendants, and the opinion of the court in *United States v. Amax, 402 F. Supp. 956 (D.Conn.1975)*, which is cited by the plaintiffs.

whatever new scrap does enter the market, is collected by several hundred scrap dealers **[**5]** or merchants who accumulate it and sell it to smelters and refiners.

During the period 1964 to 1970 there were three significant pricing systems for copper. The first was that employed by the major domestic producers, including Kennecott, Anaconda, and Phelps Dodge (and, until 1966, by many foreign producers), who quoted a non-negotiated price (known in the industry as the "producers' price") which remained in effect until a new price was quoted. Between 1964 and 1970, all the major domestic producers quoted identical prices, and any price change announced by one producer was, for all practical purposes, immediately matched by the others. The second pricing system was the London Metal Exchange (LME). The LME is primarily a hedgers' or speculators' market, seldom used to secure the actual delivery of copper. Its importance lies in the fact that many smaller producers, (and the major foreign producers after they abandoned the producers' price in 1966), based their prices on the LME quotations. The third pricing system was the scrap market, which consisted of several hundred independent dealers whose prices, according to Reading, were "tied to, tracked and established in the open **[**6]** market relative to the LME price." (Amended Complaint P 31.) Reading alleges that the LME and the scrap market were "open markets," which Reading defines as "competitive pricing mechanisms for copper established by buyers and sellers as a function of supply and demand, including, but not limited to, the LME, the New York Commodity Exchange ("COMEX"), and the dealers market for scrap." Id. P 28.

Reading further alleges that "(during) the period 1964-1970, the U.S. producers' price, the LME price and the scrap price were interrelated, and (that) under competitive conditions, the U.S. producers' price should have approximated the LME price." Id. P 32. In fact, however, between 1964 and 1970 the producers' price was well below the LME price: during this period, refined copper sold by Kennecott, Phelps **[*1154]** Dodge, and Anaconda (at the producers' price) was considerably cheaper than refined copper available from other sources, including independent refiners and scrap dealers. Reading alleges that this was so only because the defendants conspired to keep the producers' price low, and that in furtherance of this conspiracy they chose to ration their available copper among favored **[**7]** customers rather than raise their prices to clear the market. The defendants acknowledge that each of them could have charged higher prices without losing sales in the short run, and that each of them did ration supplies among its customers, but they argue that each acted independently in refraining from raising its prices, in order to protect long term sales. In short, they argue that their conduct, though parallel, was non-collusive. If this is so, they are not accountable under the law for the effects of their actions, no matter how adverse to others. If, on the other hand, as Reading charges, the defendants' pricing behavior reflected a "contract, combination, or conspiracy" to restrain trade, or monopolize a market by fixing prices, they violated the Sherman Act. See *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; L. Sullivan, ***Antitrust Law*** 210-13 (1977).

To prevail in this suit, however, Reading must establish not only that the defendants violated **[**8]** the antitrust laws, but also that Reading was injured "by reason of" their violation. *15 U.S.C. § 15*. Reading does not contend that as a consequence of the defendants' pricing behavior it was injured in its capacity as a copper refiner. Rather, it alleges that it was injured as a purchaser of copper for its fabricating operations. Reading did not purchase copper from the defendants, nor could it allege injury if it had, since the gravamen of its complaint is the claim that the defendants sold copper at artificially low prices. Reading purchased copper primarily from scrap dealers, and the basis for its claim of injury is that because the defendants held down the price for their refined copper, which constituted about sixty percent of the refined copper available in the domestic market, the price for the other forty percent of the available copper, including the price for the copper scrap which Reading purchased, rose to artificially high levels. That is, Reading contends that it was injured because, as a direct result of the alleged conspiracy by the defendants to maintain a low producers' price for copper, it was forced to pay more for the copper scrap it purchased from scrap **[**9]** dealers than it would have had to pay in the absence of the conspiracy.

Despite Reading's voluminous submissions on this motion, it is not entirely clear what Reading considers to be the underlying economic mechanism responsible for the alleged effect of a low producers' price on "open market" copper prices. [3] The Report **[*1155]** of Plaintiff's Economic Expert, submitted as an addendum to Reading's brief in opposition to the present motion, states that:

[10]**

> "The defendants' maintenance of an artificially low price for refined copper had three important consequences for the copper markets: (a) the defendants rationed the supplies of domestic copper that were "available' at the producer price; (b) some semifabricators, who historically had derived a large percentage of their copper from the defendants, experienced a serious shortage; and (c) the demand for copper that could not be satisfied by the defendants spilled over into other markets, causing the prices to rise in those markets." [4]

The critical predicate of Reading's economic argument appears to be the fact, accepted by the defendants (at least for the purposes of this motion), that in order to maintain the low producers' price in the face of excess demand for copper at that price, the defendants rationed their supplies of copper. [5] **[**12]** As a consequence, fabricators who did purchase refined copper from the defendants at the producers' price were not able to **[**11]** purchase as much copper as they might have wished. Reading's argument appears to be that when these fabricators turned to alternate domestic sources, such as the scrap market, to purchase the complement of their needs, they were willing and able to bid up the price of copper available from those alternate sources precisely because they had secured a portion of their requirements at the low producers' price. [6] In short, Reading argues that these fabricators were able to pay, and did in fact pay, a premium price for the copper they purchased from alternate sources, such as scrap dealers, because they had realized savings on their purchases of relatively cheap copper from the defendants, that

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[3] In P 44 of the Amended Complaint, Reading alleges:

"44. The aforesaid combinations and conspiracies in violation of *Sections 1* and *2* of the Sherman Act had the following effects among others:

"a. Created a gap between the U.S. producers' price and the price of copper traded on open markets in which the U.S. producers' price was for the period 1964-70 significantly lower than the price of copper prevailing on the open markets during the same period;

"b. Caused dislocations in the normal supply and demand relationships in the copper market and corresponding hardships for domestic fabricators, including Reading, and resulted in distortions in the domestic copper market;

"c. Resulted in an artificially low U.S. producers' price which in turn caused the price for copper prevailing on open markets, including the dealer market for scrap, to reach artificially high premium levels. This would not have occurred but for the artificially maintained, low U.S. producers' price;

"d. Created an artificial demand for, and shortage of, U.S. producers' price copper and forced domestic fabricators, such as Reading, to purchase their requirements of copper at the artificially high open market prices;

"e. Created a substantial disparity in the raw material costs of copper for domestic fabricators by allocating lower U.S. producers' price copper to preferred and selected customers of the Defendants while forcing the remainder of the domestic fabricators, such as Reading, to purchase their copper requirements at the artificially higher open market prices; and

"f. Had the direct effect of limiting competition by smaller U.S. mine producers by restricting the amount of copper that would have been available but for the artificially low U.S. producers' price."

[4] Addendum to Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, Report of Plaintiffs' Economic Expert at 94.

[5] In P 43 of the Amended Complaint, Reading alleges that

"(in) formulating and effectuating (the alleged conspiracy), Defendants . . .

(i) Allocated the available output of refined copper production to preferred customers;

. . . ."

[6] See Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 393 ("(Certain) United States fabricators, having substantial allocations of lower U.S. producers' priced copper, could afford to and did "bid-up' the price on the open markets.").

as a consequence the price for scrap copper rose to a higher level than it would have had the defendants not held the producers' price low, and that Reading was injured as a result to the defendants' allegedly illegal action.

Although the defendants do not agree with Reading's assertion that "open market" prices for copper, including the price for copper scrap, rose to higher levels than they otherwise would have had the defendants not held their prices for refined copper low, they do not dispute it on this motion. Rather, they take the position that even if Reading's analysis is correct, they are entitled to summary judgment dismissing the complaint. We have discussed Reading's thesis only because any consideration of the second and third branches of the defendants' motion for summary judgment requires an understanding of the purported causal link between the alleged antitrust violation and Reading's alleged injury. For the purposes of this motion, then, we assume that (whatever Reading's precise economic argument may be) Reading and the other firms **[**13]** that did not have access to the defendants' copper did pay more for copper than they would have had the defendants not held their prices at levels which failed to clear the market.

II. Evidence of Combination or Conspiracy

Acceptance of Reading's assumption, however, does not end the matter. To prevail **[*1156]** in this action Reading must prove not only that it was injured because the defendants held the producers' price at an artificially low level, but also that in doing so the defendants violated the antitrust laws. Reading's theory of causation purports to explain only how the market translated a low producers' price into a high scrap price it says nothing as to how the low producers' price came about in the first place. Only if the defendants acted collusively are they liable under the Clayton and Sherman Acts. They argue that they are entitled to summary judgment dismissing the action on the merits because there is no evidence suggesting that they acted in concert or otherwise violated the antitrust laws in connection with their pricing decisions.

It is a legal commonplace that ***HN1***[] "summary procedures should be used sparingly in complex antitrust litigation where motive **[**14]** and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962)* (footnote omitted). This is the paradigm of cases to which the Supreme Court's admonition is addressed. The historical facts here are not in dispute: the defendants do not deny that they quoted identical prices for refined copper, and resisted "market pressures" to raise their prices. The key, indeed the sole, issue, is whether in doing so they acted jointly or independently. Thus, proof that the defendants violated the antitrust laws will not turn on what happened, but rather on why it happened. Nonetheless, the defendants contend that this is a case in which summary judgment dismissing antitrust claims on the merits is warranted.

The rule is that ***HN2***[] if the party moving for summary judgment shows conclusively that the factual allegations of the complaint are not susceptible of any interpretation suggesting that the defendants violated the antitrust laws, the opposing party may not rely on those allegations, but must produce "significant probative **[**15]** evidence tending to support the complaint" if it is to avoid summary dismissal of the action. *First National Bank v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968)*; *United States v. Pent-R-Books, 538 F.2d 519, 529 (2d Cir. 1976)*; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 110-11 (2d Cir. 1975)*; *Weit v. Continental Illinois National Bank and Trust Co., 467 F. Supp. 197, 208 (N.D.Ill.1978)*. The defendants argue that application of this rule requires summary dismissal of this action. However, their argument does not carry the day. Summary judgment is not appropriate here because the defendants have not shown that Reading's factual allegations will not support an inference that the defendants violated *sections 1* and *2* of the Sherman Act. Moreover, as indicated below, Reading has come forward with evidence which does tend to support its contention that the defendants violated the antitrust laws, evidence which would suffice to defeat this branch of the defendants' motion even if the defendants had met their initial burden.

The defendants have concentrated their efforts on demonstrating that each of them had **[**16]** legitimate reasons to hold down the price of copper. While this may be so, the question is not whether the defendants had legitimate reasons for their action, but whether they acted in concert, and here the legitimate business reasons which the defendants suggest motivated their actions do not defeat the possibility that the defendants acted collusively. The defendants have submitted extensive evidence that during the period in question 1964-1970 each of them was concerned that high copper prices would lead their customers to substitute other materials (such as aluminum or plastic) for copper; each was under government pressure (in the form of jawboning) to keep prices down to curb the inflation spawned by the Vietnam war, and each was subject to leverage from large customers who frowned on price increases. This showing, however, does not exclude possible inferences of combination or conspiracy; it simply suggests alternate incentives **[*1157]** to conspire. That each of the defendants had independent motives for holding the price of copper down does not negate the possibility that they acted together to effect them. Despite the volume and quality of the defendants' submissions **[**17]** on this point, they have failed to demonstrate that the undisputed facts are not susceptible to the interpretation that they violated the Sherman Act.

Because of their failure to do so, Reading was under no compulsion to come forward on this motion with evidence in support of its claims. Nonetheless, Reading has identified a number of factors which dictate that summary dismissal of its complaint would be inappropriate even if the defendants had made the conclusive showing required by First National Bank v. Cities Service Co. In particular, Reading points to the undisputed structural characteristics of the copper market and the defendant firms, and argues that inferences of combination and conspiracy sufficient to defeat the defendants' motion for summary judgment can be drawn from these alone. In a highly concentrated, vertically integrated, interdependent industry protected from outside encroachment by enormous startup costs and limited supplies of the basic commodity (copper ore), opportunities for collusion are extensive and the potential benefits to be realized great. When there is in addition evidence, as there is here, of consciously parallel conduct, as well as evidence **[**18]** of common motives for such conduct, strong inferences of collusion are permissible. [7] At trial the jury might or might not find such inferences compelling, but on this motion for summary judgment, Reading is entitled to the benefit of those inferences. [8]

[19]**

In sum, even the defendants' view of the facts does not undercut Reading's allegations of conspiracy, and in addition Reading has adduced evidence "tending to support" them. Accordingly, this branch of the defendants' motion for summary judgment must be denied.

III. The Rule of Illinois Brick Co. v. Illinois.

As an alternate ground, the defendants urge that Reading's suit must be dismissed under the rule of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In addressing the defendants' argument on this point, it is important to distinguish between the Supreme Court's holding in Illinois Brick and the rationale which the Court expressed for its holding. The holding of Illinois Brick was that, with a few exceptions, ***HN3***[] an indirect purchaser cannot maintain an action against a price-fixer to recover overcharges passed on to the indirect purchaser as the price-fixer's product moved through the chain of distribution. To state this holding is to demonstrate that it has no application to the facts of this case, which does not involve overcharges, indirect purchasers, or a vertical chain of distribution linking plaintiff and defendant. To apply the **[**20]** rule of Illinois Brick to the circumstances of this case would be to transmute the decision beyond recognition.

However, although the Rule of Illinois Brick has no application to this case, the Rationale for the rule has direct relevance.

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[7] See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; *American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*; *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*; R. Posner, ***Antitrust Law***: An Economic Perspective (1976); L. Sullivan, ***Antitrust Law*** 354-64 (1977); Turner, Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655 (1962); First, Book Review, 52 N.Y.U.L.Rev. 947 (1977).

[8] "(All) of the evidence . . . does not point in one direction and different inferences might reasonably be drawn from it . . . (It) is the jury which "weighs the contradictory evidence and inferences' and draws "the ultimate conclusion as to the facts.' " *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-01, 82 S. Ct. 1404, 1411, 8 L. Ed. 2d 777 (1962)* (quoting *Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520 (1944))*.

There were two grounds for the Supreme Court's decision articulated in Illinois Brick. **[*1158]** The first was the need to foreclose the possibilities of multiple recovery against defendants that might ensue were indirect purchasers permitted to sue on a "pass on" theory. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, the Court had held that an alleged price-fixer could not interpose as a defense to a treble damages action brought by a direct purchaser the claim that the plaintiff had suffered no injury because it had passed on to its own customers any illegal overcharges it paid. If the rule of Hanover Shoe were to continue unchanged, and indirect purchasers were nonetheless allowed to sue on a pass on theory, defendants would find themselves liable to direct purchasers for the entire amount of any overcharge paid by that purchaser, and also liable to indirect purchasers for that **[**21]** portion of the overcharge that was passed on to them. To avoid such multiple liability, the Court chose to bar suits by indirect purchasers rather than modify or overrule its earlier holding in Hanover Shoe.

In determining whether or not to modify its earlier holding, the Court reexamined the grounds for the Hanover Shoe decision, and concluded that the "principle basis for the decision in Hanover Shoe," the

> "perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damage proceedings"

applied with equal force in the circumstances of Illinois Brick, since it is no easier for a plaintiff to demonstrate how costs filter through a chain of distribution than it is for a defendant. *431 U.S. at 731-32, 97 S. Ct. 2061 at 2068, 52 L. Ed. 2d 707*. This was the second, and more crucial, ground for the Court's decision in Illinois Brick.

The perception that efforts to analyze and explicate the vagaries of the market-place must necessarily create enormous difficulties in the trial and decision of antitrust suits is markedly relevant **[**22]** here, where the core of Reading's case the link between the alleged antitrust violation and the injury Reading claims it suffered because of that violation is an economic theory about the reverbations in one part of the copper market caused by a constraint in another part of that market. Trial of this case would surely involve "the uncertainties and difficulties in analyzing price and out-put decisions "in the real economic world rather than an economist's hypothetical model' and . . . the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom," *431 U.S. at 731-32, 97 S. Ct. at 2068* (footnote and citation omitted) (quoting *Hanover Shoe, 392 U.S. at 493, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*), which it was the Supreme Court's central concern to minimize in Illinois Brick. While this alone is not enough to warrant extension of the narrow holding of Illinois Brick to circumstances radically different from those to which it was addressed, it does counsel special sensitivity to the difficulties and dangers inherent in attempts to trace the causal link between economically remote antitrust violations **[**23]** and injuries. Such sensitivity is crucial to an adequate consideration of the final branch of the defendants' motion, which raises the question whether Reading has standing to sue for treble damages under section 4 of the Clayton Act. See *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 582-87 (3d Cir. 1979)*.

IV. Standing

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 to recover "threefold the damages by him sustained." *15 U.S.C. § 15*. As the Supreme Court has noted, however, the federal "courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n. 4, 92 S. Ct. 885, 881 n. 14, 31 L. Ed. 2d 184 (1972)*. The decision in Illinois Brick, **[*1159]** for example, is one instance in which the Supreme Court has recognized limits to the right to sue for damages based on injuries sustained, at least in part, because of a violation of the antitrust laws. **[**24]** More generally, the lower federal courts have acknowledged such limits in formulating rules limiting plaintiffs' standing to sue for treble damages under section 4.

The reasons for these rules have been thoroughly canvassed. See, e.g., *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971)* Cert. denied, *406 U.S. 930, 92 S. Ct. 1776, 32 L.*

Ed. 2d 132 (1972); Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L.J. 809, 845-58 & passim (1977). By limiting the availability of the treble damage remedy, the courts seek to limit the potential for multiple recoveries, to avoid disproportionate damage awards that threaten to debilitate or ruin defendants (with possible anticompetitive effects), to curb In terrorem suits that encumber the judicial infrastructure, and to minimize the difficulties and speculation encountered at trial in the proof of injury and calculation of damages. In general, the courts have restricted standing to those whose injury is, to a greater or lesser degree, a "direct" consequence of the alleged antitrust violation. The difficulty in each case, of course, lies in discriminating with precision **[**25]** between "direct" and "indirect" injury.

The rule in the Second Circuit is that ***HN4***[] "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." *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970)* Cert. denied, *401 U.S. 923, 91 S. Ct. 877, 27 L. Ed. 2d 826 (1971)*. Though the Second Circuit has sought to elucidate this standard in a number of cases, the line delimiting the "target area" of an antitrust violation has not yet been definitively drawn, and indeed may not be capable of precise definition. [9]

In Billy Baxter, the plaintiff, who franchised independent bottlers of a line of soft drinks, charged various manufacturers of competing soft drinks with violating the **[**26]** antitrust laws in an effort to drive the plaintiff's franchisees out of business. The plaintiff alleged that as a consequence its franchisees' profits had been reduced, and its own revenues had suffered accordingly. The court concluded that the franchisor did not have standing to sue because it was "one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct." *Id. at 188*.

In a subsequent case, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971)* Cert. denied, *406 U.S. 930, 92 S. Ct. 1776, 32 L. Ed. 2d 132 (1972)* the rule was extended. There the plaintiff rented theatres to the defendant, a motion picture exhibitor. The complaint charged the plaintiff's tenant with conspiring with others to restrain the trade of competing motion picture distributors and exhibitors, and asserted that in furtherance of the conspiracy the tenant exhibited less profitable films in the theatres it rented from the plaintiff than it otherwise would have. This indisputably injured the plaintiff because the rent paid was based in part on the tenant's gross receipts. Nonetheless, the court held that **[**27]** the landlord did not have standing:

> "(T)his court has committed itself to the principle that ***HN5***[] in order to have "standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target area' of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with "targets' or with participants in an alleged antitrust conspiracy, rather than by being "targets' themselves."

[*1160] *Id. at 1295*. The court noted that a "line which limits standing to those against whom the antitrust violation is directed . . . establishes a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the floodgate to all, no matter how remote their interest or incidental their relationship," *Id. at 1296* (footnote omitted). Subsequent cases, however, and the present one, demonstrate that the "cut-off" is not always so "easily identifiable" as might be wished.

In *Long Island Lighting Co. v. Standard Oil Company of California, 521 F.2d 1269 (2d **[**28]** Cir. 1975)*, Cert. denied, *423 U.S. 1073, 96 S. Ct. 855, 47 L. Ed. 2d 83 (1976)* (LILCO), Judge Gibbons (siting by designation) noted that "the line between plaintiffs with standing and those who lack it may not in every case seem perfectly plain." *Id. at 1274*. In LILCO, the plaintiffs were two public utilities who sued three oil companies, charging that the oil companies had organized a joint boycott of Libyan oil in an effort to dissuade the Libyan government from nationalizing their oil concessions. Pursuant to the boycott, the oil companies refused to honor contracts requiring

[9] For a recent discussion of the Second Circuit's antitrust standing decisions, see *Laurie Visual Etudes, Inc. v. Chesebrough-Pond's Inc., 473 F. Supp. 951 (S.D.N.Y.1979)* (Weinfeld, J.).

them to deliver Libyan crude oil to the independent refiner who was the plaintiffs' chief source of low sulphur heating oil. The refiner was forced to negotiate new supply contracts directly with the Libyan government, on terms less favorable than its contracts with the defendant oil companies. In addition, the oil companies refused to ship Libyan oil, and as a result the refiner incurred increased transportation costs. The refiner's increased costs were passed on to the plaintiff utilities. It is clear that the utilities' costs were increased sharply as a result of the allegedly illegal boycott of Libyan **[**29]** oil. Judge Gibbons noted that "(it) was foreseeable, certainly, that in the short run this boycott would have some effect, possibly adverse, on the business or property" of the plaintiffs, but concluded that nevertheless they lacked standing to sue in the circumstances.

> "(The utilities) were not the objects of the alleged antitrust violation. Their injuries were the result of their relationship to (the refiner), an intermediate non-target. The cases recognize that suppliers, stockholders, employees, landlords, franchisors, licensors, and consumers are too remote for Clayton Act standing. The instant plaintiffs, customers of a non-target, are at least equally remote."

Id. at 1274 (footnotes omitted).

From the opinions in these cases two factors emerge as tests for the standing of antitrust plaintiffs: First, the plaintiff's status, and second, the plaintiff's proximity or remoteness from the center of the alleged conspiracy. Thus, as to status, in each case the plaintiff which was held to lack standing suffered injury which was "derivative", that is, one suffered not because of the plaintiff's role in the market but because of its status as a "creditor, stockholder, **[**30]** employee, subcontractor, or supplier of goods and services," *Calderone, 454 F.2d at 1295*, or something of the like (franchisor in Billy Baxter, landlord in Calderone, and customer in LILCO). As to proximity or remoteness, the injury of the plaintiff in the cited cases was found to be several steps removed from the immediate impact of the alleged violation.

While each of the cases touches on both of the factors mentioned, none of the opinions suggests that one or the other of the factors is a Sine qua non to the determination that a plaintiff lacks standing. We conclude that the rule of the cases is that a plaintiff lacks standing to sue if he either fails the "status" test or the "proximity-remoteness" test. That is to say, the cases teach that if the plaintiff's status is "derivative" within the meaning of the doctrine Or the plaintiff's position is remote from the center of the alleged conspiracy, the plaintiff lacks standing to sue. The question then is whether Reading passes both tests. We agree that since Reading's alleged injuries, no matter how remote, were suffered "in the market" as a consequence of market interactions and economic adjustments to the defendants' behavior, **[**31]** Reading may well have standing on the basis of the "status" test. Nevertheless, we conclude that whatever Reading's standing under the "status" **[*1161]** test, it does not have standing as defined by the "proximity-remoteness" test. In our view, Reading's claim that its injury was caused by the defendants holding down prices, which in turn is claimed to have raised prices on the LME and in the scrap market, which in turn required Reading to pay prices higher than it otherwise would have is too remote to fall within the "target area" as described by the Second Circuit cases. The causal chain at issue here is at least as involved and tenuous as those in Billy Baxter, Calderone, and LILCO where the plaintiffs were found to lack standing. Accordingly, we conclude that like those plaintiffs, Reading lacks standing to sue.

As was true in another recent case in which antitrust plaintiffs were found to lack standing, our conclusion is strengthened by the Supreme Court's decision in Illinois Brick. See *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979)*. As noted earlier, the Court expressed in Illinois Brick its concern about the difficulties inherent **[**32]** in any attempt to prove the impact of a defendant's activities by tracing the economic adjustments and market interactions caused by those activities, and the danger of duplicative or ruinous recovery that often accompanies such attempts. Both are endemic here. Trial of this action would clearly be complicated by the necessity of pursuing "complex and conjectural economic lines of causation and effect," *Id. at 583*, and the potential for duplicative and ruinous recovery against the defendants is enormous, since if Reading has standing to sue, every other individual or firm who purchased copper during the period 1964-1970 at prices artificially elevated as a consequence of the alleged price-fixing conspiracy must have standing as well. In these circumstances, a decision that Reading has standing to sue could not be lightly taken.

The subject at hand is acknowledgedly complex and the arguments in support of Reading's position are respectable. Nevertheless, we conclude that the thrust of the Second Circuit cases, supplemented by the momentum of Illinois Brick, dictates the conclusion that Reading lacks standing to sue. The complaint is dismissed.

It is so ordered.

[33]**

Encoder Communications, Inc. v. Telegen, Inc.

United States District Court for the Southern District of New York

September 27, 1979

72 Civ. 3576-CSH

Reporter
1979 U.S. Dist. LEXIS 9517 *; 1980-1 Trade Cas. (CCH) P63,119

ENCODER COMMUNICATIONS, INC. and ANTHONY S. LAZZARINO, Plaintiffs, against TELEGEN, INC., GRADUATE EDUCATION NETWORK, (INC.), THEODORE SALATA, RICHARD J. REYNOLDS, JOSEPH ROIZEN, THOMSON-CSF, INC. (a New York Corp.), MICHEL M. BOXBERGER, COMPAGNIE FRANCAISE de TELEVISION, THOMSON-CSF, PARIS and OPTIMEDIA SYSTEMS, INC., Defendants.

Core Terms

patent, license, plaintiffs', antitrust, anti trust law, cause of action, monopoly, amend, concerted, holder, proposed amended complaint, antitrust claim, limitations

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN1[] **Amendment of Pleadings, Leave of Court**

The legal insufficiency of a proposed amendment to a complaint is a ground for denying leave to amend. The question of timeliness of the amendment, in view of the bar of an applicable statute of limitations, gives rise to consideration of the "relation back" provisions of *Fed. R. Civ. P. 15(c)*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

HN2[] **Regulated Practices, Monopolies & Monopolization**

A patent is an exception to the general rule against monopolies and to the right to access to a free and open market.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN3[] **Amendment of Pleadings, Relation Back**

The right to invoke *Fed. R. Civ. P. 15* may be lost if the moving party has been guilty of undue delay, resulting in undue prejudice to the opposing party.

Opinion by: [*1] HAIGHT

Opinion

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

This case is presently before the Court on plaintiffs' motion, pursuant to *Rule 15, F.R.Civ.P.*, to further amend their complaint. Familiarity with the Court's prior opinions is assumed for the sake of this discussion. The most pertinent prior opinions are those of March 21, 1979 and June 29, 1979.

The opinion and order of June 29, 1979 considered the motion of defendants Thomson-CSF, Inc., Thomson-CSF, Paris, and Michel M. Boxberger for summary judgment dismissing the first amended complaint as to them. The opinion granted that motion, but stayed entry of judgment for thirty days, in order to permit plaintiffs to serve and file a motion to amend the complaint against those defendants, in an effort to cure jurisdictional frailities which were discussed in the June 29 opinion, and are not reiterated herein.

Plaintiffs have responded with a motion to amend their complaint as to all defendants. That motion is resisted by counsel for all defendants over whom service has been obtained, and who are still in the litigation.

The amended complaint sets forth five causes of action. The first three causes of action **[*2]** all sound in tort. They allege various theories of conspiracy, fraud, and tortious interference with plaintiffs' licensing agreements, which lie at the heart of the litigation. In the fourth cause of action, the plaintiffs charge the defendants for the first time, in litigation commenced in 1972, with violations of the United States antitrust laws. The fifth cause of action recites irreparable injury arising out of the transgressions referred to in the first four causes of action, and prays for injunctive relief.

If the proposed amended complaint consisted only of the first, second, third and fifth causes of action, it would require no discussion to demonstrate that the amendment could not be allowed.That is because, as pointed out in prior opinions, plaintiffs are New York residents, and defendants Thomson-CSF, Inc. and Boxberger were at the time of commencement of suit New York residents. In consequence, complete diversity of citizenship is not present, and the Court would lack jurisdiction.

Plaintiffs seek to overcome this obstacle by pleading, in the forth cause of action of the proposed amended complaint, a claim against all defendants based upon the antitrust laws. **[*3]** If that claims is viable, then it would establish federal jurisdiction, and this Court could entertain the other claims on principles of pendent jurisdiction.

Defendant resist the proposed amended complaint on the grounds of legal insufficiency and untimeliness. In deciding whether to grant the motion to *amend, I* must consider both these questions. ***HN1***[] The legal insufficiency of a proposed amendment is a ground for denying leave to amend. *Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621 (1950)*; 3 Moore's Federal Practice P15.08[4], at pp. 15-105-109 (2d ed. 1978). The question of timeliness of the amendment, in view of the bar of an applicable statute of limitations, gives rise to consideration of the "relation back" provisions of *Rule 15(c)*. These questions will be considered in turn.

1. Legal Sufficiency of the Antitrust Claim.

The fourth cause of action comprises PP57-68 of the proposed amended complaint. Plaintiffs' litigation posture is that they were given an exclusive "applications" license for North America in respect of the "Secam" television process. In their proposed amended complaint, plaintiffs allege that the patents, licenses and applications of that **[*4]** process "significantly affect interstate commerce." P58. Defendants, "all or some of them," are alleged to possess a monopoly power with respect to the utilization throughout the world of the patents, licenses and applications relating to the "Secam" process. P59. Plaintiffs allege that when they obtained their exclusive applications license, "said monopoly power became threatened." P.60. Defendants are alleged to have combined and conspired, in violation of the antitrust laws, to protect that monopoly power, and to exclude plaintiffs from actual or potential competition in the North American market. Their unlawful interference and unlawful boycotts in respect of plaintiffs' license are alleged. PP61-63. Plaintiffs further allege that the defendants agreed that defendant Compagnie Francaise de Television ("CFT") would be the sole and exclusive holder of a patent relating to the "Secam 60" process despite the alleged fact that defendants Telegen, Inc. and Graduate Education Network, Inc. ("GEN") had developed that process "and therefore had a prior right to apply for any such patent." P64. Finally, plaintiffs allege that even if the defendants held valid patents with respect **[*5]** to the "Secam" and "Secam 60" process, the transactions alleged in the complaint constituted misuse of valid patents, in that the defendants conspired with one another to monopolize trade with respect to the patented processes, suppressing competition therein, and establishing and maintaining a monopoly. PP65-67. Plaintiffs claim treble damages. P68.

Counsel for defendants CFT and Joseph Roizen characterize plaintiffs' antitrust theory as specious, relying upon the observation of the Supreme Court in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 816 (1945)*, that ***HN2***[] "a patent is an exception to the general rule against monopolies and to the right to access to a free and open market." See also *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)*.

It is not sufficient, however, to state that antitrust considerations cannot arise in the face of a valid patent held by one or more defendant. Patent and ***antitrust law*** interact with each other. A leading commentator, who then goes on to discuss the subject over seventy-three pages, commences his analysis with this observation:

"The details of the operative **[*6]** patent system in this nation are determined in part by the particulars of the patent statute and in part by the ways in which antitrust doctrine and patent law are integrated." Sullivan, Handbook of the Law of Antitrust (1977) at § 176, p. 504.

District Judge Newman (as he then was) gives an illuminating discussion in *SCM Corp. v. Xerox Corp., 463 F.Supp. 983, 997-8 (D.Conn. 1978)*, remanded on other grounds, *599 F.2d 32 (2d Cir. 1979)*:

"The cases upholding antitrust violations by holders of valid patents, despite the insulation of the patent laws, have generally done so upon a finding that the patent holder misused the patent to extend his monopoly beyond the statutory grant, e.g., Mercoid Corp. v. Mid-Continent Investment Co., supra (requiring purchase of unpatented product to obtain patented product), or that the patent holder abandoned his freedom to decide unilaterally whether or not to permit use of his patented invention and instead agreed with others not to permit licensing at all or do so only on restricted terms, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc., supra* (concerted refusal to license except on restricted terms). While normally not characterized as **[*7]** such, the concerted refusal to license cases may themselves be viewed as prohibitions against extention of the statutory patent monopoly: the patent laws give the patent owner the power to exclude, but once he makes an agreement with others not to license the patent, the patent monopoly has in a sense been extended because the power to exclude has now been given to those who derived no power from the patent itself."

Analysis of the plaintiffs' amended complaint, particularly when viewed in the light of facts established by prior proceedings in the case, makes it clear that plaintiffs do not allege a viable claim under the antitrust laws. While it is true that plaintiffs allege concerted action on the part of the defendants, it is not the sort of concerted refusal to license with which the cases are concerned. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1968)*, referred to by Judge Newman in SCM Corp., involved a showing that "competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods." *395 U.S. at 118*. The purpose of these business competitors was to exclude concerns **[*8]** from the Canadian market unless they were willing to manufacture there. Such concerted action, the Supreme Court held, implicated the antitrust laws. Nothing resembling concerted action of that nature is alleged in the case at bar. Plaintiffs allege that the defendant CFT was the proprietary patent holder for the "Secam" and "Secam 60" processes. That has always been plaintiffs' allegation. The other defendants held various licenses from CFT. None of the other defendants may be characterized as a competitor of CFT. As I view the authorities, that is an essential element of an antitrust theory, and it is absent here. Nor do plaintiffs allege an agreement between the patent holder and others, even if competitors, not to license the patent. Plaintiffs' complaint, in essence, is that they were granted an exclusive applications license, and that defendants then combined to deny plaintiffs the fruits of that license. Plaintiffs have alleged a combination, but not that sort of combination prohibited by the antitrust laws. Plaintiffs' proposed fourth cause of action is, in essence, their tort theory dressed up in antitrust clothing for jurisdictional purposes. Plaintiffs have failed **[*9]** to submit a memorandum of authorities, calling the Court's attention to cases which might point to a different conclusion. The antitrust claim is insufficient in law, and I deny leave to amend the complaint for the purpose of asserting it.

2. Timeliness of the Proposed Amendment.

Assuming contrary to the foregoing conclusion that the amended complaint states a legally sufficient claim under the antitrust laws, the question of the claim's timeliness arises. An defendants point out, the claim is barred by the four-year statute of limitations governing federal antitrust claims. *15 U.S.C. § 15(b)*. It is of course true that *Rule 15(c)* provides that "the amendment relates back to the date of the original pleading." Thus, if plaintiffs could properly invoke *Rule 15*, the statute of limitations would be overcome. But ***HN3***[] the right to invoke *Rule 15* may itself be lost if the moving party has been quilty of undue delay, resulting in undue prejudice to the opposing party. *Foman v. Davis, 371 U.S. 178, 182 (1962)*. In the case at bar, plaintiffs have never once asserted in their pleadings an antitrust theory. Almost all of the discovery in the case has been completed, with no regard **[*10]** having been given to antitrust theories of liability. Even where an individual plaintiff has appeared entirely pro se, with a consequent liberal construction of his pleadings, there is authority for the denial of a motion to amend the complaint so as to assert an antitrust claim after the state of limitations has run. *Material Handling Industries, Inc. v. Eaton Corp., 391 F.Supp. 977, 980-981 (E.D.Va. 1975)*. In the case at bar, plaintiffs have for most of the litigation been represented by counsel. I am not persuaded by plaintiffs' contention that only recently discovered facts made them aware of a potential antitrust claim. Accordingly, even if plaintiffs alleged a viable antitrust theory, I would not permit them, by resort to *Rule 15(c)*, to deprive defendants of the defense of the statute of limitations.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion to amend their complaint is denied.

In consequence, summary judgment will be entered in favor of defendants Thomson-CSF, Inc. and Boxberger. While the Court's opinion of June 29, 1979 purported to embrace defendant Thomson-CSF Paris as well, plaintiffs' counsel correctly point out that the Court's opinion of **[*11]** March 21, 1979 (at p. 12) held the motion for summary judgment on behalf of that defendant in abeyance until the deposition of M. Dubial had been accomplished. That deposition has not taken place, and so no determination is made at this time of the summary judgment motion made on behalf of that defendant. Since Thomson-CSF (Paris) is a foreign corporation, the diversity of citizenship problems presented by the other two defendants under discussion do not arise.

Finally, I have decided to certify the judgment dismissing the complaint, as against Thomson-CSF (New York) and Boxberger, as a final judgment under *Rule 54(b)*. This will make possible an appeal, at this time, of the Court's ruling that plaintiffs do not state a viable claim under the antitrust laws. In exercising my discretion to issue a *Rule 54(b)* certification, I may consider "the relationship of the adjudicated claims to the unadjudicated claims," *Cold Metal Process Co. v. United Engineering and Foundary Co., 351 U.S. 445, 452 (1956)*. On plaintiffs' theory, defendants are liable to them on an antitrust basis which exists separately and apart from the other theories of recovery. While as stated ante I do not accept **[*12]** plaintiffs' antitrust theory, it is in my judgment appropriate that plaintiffs' right to invoke the antitrust laws in this case be made the subject of a certification under the Rule.

Accordingly, the Court having determined that there is no just reason for delay, the Clerk of the Court is hereby directed, pursuant to *Rule 54(b), F.R.Civ.P.*, to enter judgment in favor of defendants Thomson-CSF, Inc. (a New York corporation) and Michel M. Boxberger, dismissing plaintiffs' complaint against them with prejudice.

It is So Ordered.

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Aladdin Oil Co. v. Texaco, Inc.

United States Court of Appeals for the Fifth Circuit

September 28, 1979

No. 77-2554

Reporter
603 F.2d 1107 *; 1979 U.S. App. LEXIS 11525 **; 1979-2 Trade Cas. (CCH) P62,890

ALADDIN OIL COMPANY, Plaintiff-Appellant, v. TEXACO, INC. and Poweram Oil Co., Inc., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Texas.

Core Terms

summary judgment, distributor, seller, distributorship, cases, purchase option, resale price, customer, antitrust, retail, anti trust law, antitrust case, intrabrand, gasoline, wholesale, retail price, announced, decisions, concerted activity, contingent, products, genuine, reasons, assign, prices

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Antitrust cases are not necessarily ill-suited for summary procedures; those antitrust cases and any other types of cases which raise genuine issues of motive intent and credibility, however, are suited for a full hearing.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Governments > Courts > Judicial Precedent > Dicta

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Simply because a suit is brought under the antitrust laws does not foreclose a summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] Entitlement as Matter of Law, Appropriateness

Fed. R. Civ. P. 56 contemplates an orderly procedure within which to determine whether summary judgment is proper. Once the movant carries its burden of showing that no genuine issue of material fact exists, the nonmovant must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

Section 1 of the Sherman Act makes illegal every contract, combination or conspiracy, in restraint of trade. 15 U.S.C.S. § 1. Although the statute speaks in terms of every concerted restraint, the courts have long interpreted this language to prohibit concerted activity which unreasonably restrains trade. Only when concerted activity is manifestly anti-competitive are per se rules of illegality applicable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN5[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A seller has a unilateral right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN6[] Monopolies & Monopolization, Attempts to Monopolize

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 and 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN7[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A refusal to deal becomes unlawful when it produces an unreasonable restraint on trade, i.e., if there is an anticompetitive purpose or effect in selecting those with whom one will deal. A refusal to deal may not be used as a device to achieve some anticompetitive goal such as to acquire a monopoly, or to fix prices, or to establish market dominance and drive out existing competitors, or to aid the enforcement of unlawful resale price restrictions and territorial allocations, or to increase the seller's own market dominance, or to enforce a boycott, or to promote the predatory practices of the seller. This requirement of illegitimate purpose or effect marks the distinction between concerted activity which is an innocent aspect of business and concerted activity which is inimical to competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN8[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A reduction in intra-brand competition is not pernicious as long as there exists inter-brand competition, which acts as a significant check on the exploitation of intra-brand market power because of the ability of consumers to substitute a different brand of the same product. The law is clear that merely changing from one exclusive distributor to another is permitted. A fortiori, it must be permissible for one distributor going out of business to be purchased by an existing distributor rather than by a new and different distributor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN9[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric coercion, but it must involve making a meaningful event depend on compliance or non-compliance with the suggested or stated price.

Counsel: David E. Cherry, Erwin A. Elias, Waco, Tex., for plaintiff-appellant.

Lyndon L. Olson, Waco, Tex., for Poweram Oil Co., Inc.

Cullen Smith, Waco, Tex., M. C. Bradford, Jr., Denver, Colo., Jack D. Childers, Houston, Tex., Lawrence R. Jerz, White Plains, N. Y., for Texaco, Inc.

Judges: Before RONEY, TJOFLAT and HILL, Circuit Judges.

Opinion by: HILL

Opinion

[*1109] This appeal from the grant of a summary judgment concerns the Colgate [1.] doctrine of ***antitrust law***. As we are convinced that plaintiff-appellant Aladdin Oil Company made an insufficient showing to withstand the motion for summary judgment of defendants-appellees Texaco, Inc. and Poweram Oil Company, Inc., we affirm.

I.

This case involves the distribution of Texaco gasoline products in the Waco, McLennan County, Texas **[**2]** area. Plaintiff Aladdin Oil Company is one of a group of related corporations with basically common ownership engaged generally in distributing Mobil and Arco gasoline and other automotive products at the wholesale and retail levels in the Waco area. [2.] Defendant Texaco, Inc. is a corporation engaged in the production of gasoline and automotive products on a nationwide basis which operates on the wholesale and retail levels in the Waco area. Texaco is the owner of approximately 12 retail gasoline stations in the Waco area in addition to its wholesale distribution operations. Defendant Poweram Oil Company is a corporation engaged in the distribution of Texaco gasoline and automotive products on the wholesale and retail levels in the Waco area.

[3]** The events which precipitated this litigation may be simply stated for our purposes.

Early in 1975, a long-time Texaco distributor in the Waco area, Service Oil Company, [3.] decided to sell its assets and go out of the petroleum business. As a wholesale and retail distributor of competing products, Aladdin Oil pursued the opportunity to acquire a Texaco distributorship and entered into negotiations to purchase Service Oil. Aladdin Oil through a corporation which was to be formed to operate the distributorship, was able to reach an agreement with Service Oil for the sale of its business. The sale was subject to two contingencies. First, under the distributorship agreement between Texaco and Service Oil, any sale of the distributorship was subject to the express approval of Texaco, who the parties to this appeal agree could have (1) approved the sale; (2) disapproved the sale; (3) exercised its option to purchase the distributorship at the purchase price agreed on between Service Oil and Aladdin Oil; (4) assigned the purchase option. In addition to the contingency that Texaco approve the sale, the Aladdin Oil-Service Oil agreement provided that the sale was contingent upon Texaco's **[**4]** entering into a full one-year distributorship contract with Aladdin Oil. Soon after reaching this agreement to purchase Service Oil, Aladdin Oil contacted Texaco and requested that Texaco approve the sale and enter into a one-year distributorship agreement. The reactions of Texaco and Poweram Oil serve as the basis of this antitrust suit.

Texaco's local District Marketing Representative in Waco learned of the agreement of purchase between Aladdin Oil and Service Oil near the end of February 1975 when he obtained a copy of the agreement. Through him, representatives of Aladdin Oil arranged to meet with Texaco's District Sales Manager in an effort to obtain Texaco's agreement to waive its purchase option and to accept a new distributor in place of Service Oil. At the scheduled

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[1.] The doctrine takes its name from the seminal case of *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*.

[2.] We need not detail the complex interrelations among the various entities here loosely referred to as "Aladdin Oil." Since we affirm the summary judgment, we need not decide whether Aladdin Oil has standing to bring this suit as an assignee of the corporate and individual interests who sought to purchase Service Oil and become a Texaco distributor. *15 U.S.C.A. § 15*. We assume, without deciding, that Aladdin Oil has standing. We affirm the summary judgment on the merits. Since there is no antitrust cause of action, we need not concern ourselves further with identifying the proper plaintiff.

[3.] "Service Oil" will be used here to refer collectively to not only that company but also other affiliates and other trade names.

meeting, the Aladdin Oil representatives related the **[*1110]** plans for the formation of a new corporation **[**5]** which would become the Texaco distributor.

Following this meeting, the Texaco District Sales Manager wrote to Texaco's Regional Manager in Houston, advising him of the proposed transaction and outlining the alternatives. He set out his various concerns about the proposal and, after outlining what he deemed were Texaco's alternatives, recommended that Texaco exercise its purchase option, collapse the distributorship, and absorb the Service Oil facilities into its own operations. The handling of the matter was referred to Texaco's Assistant Regional Manager who went to Waco in early March of 1975. He met with the same representatives of Aladdin Oil who had met with the Waco District Marketing Representative. The Assistant Regional Manager reacted negatively to the proposal and he was the first to suggest that Texaco consider assigning its rights under the purchase option to Poweram Oil. To this end, a meeting was arranged with the president of Poweram Oil. At that meeting, the two Texaco officials showed the president of Poweram Oil the Service Oil-Aladdin Oil agreement. They then asked him whether his company would be interested in purchasing Service Oil, if Texaco would assign **[**6]** its option to Poweram Oil. He replied affirmatively.

Upon his return to Houston, the Texaco Assistant Regional Manager briefed his direct supervisor, the Texaco Regional Manager, on developments. He opined that Texaco did not need two distributors in Waco for several reasons which need not concern us. He did not favor, however, the recommendation of the Texaco District Sales Manager that Texaco exercise its purchase option, collapse the distributorship, and absorb the Service Oil facilities into its own operations.

Eventually, the Texaco Regional Manager and the Texaco Assistant Regional Manager concluded that Texaco should assign its purchase option to Poweram Oil. Around the middle of March 1975, such a formal written recommendation was submitted to the New York headquarters of Texaco's Sales Department which detailed several reasons. During the first part of April 1975 the recommendation was approved by the New York office. Service Oil and Poweram Oil were both notified and the purchase option was formally assigned by Texaco to Poweram Oil. Thereafter, Poweram Oil exercised the option and purchased the various assets and properties of Service Oil. Alladin Oil then filed **[**7]** this suit.

Before the District Court, plaintiff alleged Inter alia [4.] that the defendants had conspired to exclude Aladdin Oil to accomplish suppression of intrabrand competition and retail price maintenance. The District Court, after initially denying summary judgment, reversed course and upon reconsideration granted the summary judgment motions of the defendants.

[8]** II.

As a starting point we briefly note the procedural posture in which we find this case: this is a summary judgment entered in an antitrust case.

The facile notion pressed upon us that antitrust cases are typically unsuited for summary procedures can be traced to Obiter dictum in *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. The five member majority expressed the following belief:

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4. Plaintiff's complaint and the District Court's ruling involved alleged violations of *Sections 1* and *2* of the Sherman Act. *15 U.S.C.A. §§ 1*, *2*. Upon defendants prevailing on the federal antitrust claims, the District Court dismissed plaintiff's remaining state law claims. Here, plaintiff has abandoned the Section two claim. Any horizontal implications of the distribution arrangement under *Section 1* of the Sherman Act were not part of Aladdin Oil's theory of the case and will not be considered here. The theory of the complaint and the Summary Judgment proceeding was strictly vertical. But see *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979)*.

> We believe that summary (judgment) procedures should be used sparingly in complex antitrust litigation where motive **[*1111]** 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 so long has been the hallmark of "even handed justice.'

Id. at 473, 82 S. Ct. at 491 (footnote omitted). The four dissenters responded:

> Further, the Rule (56) does not indicate that it is to be used any more "sparingly' in antitrust litigation (Ante, (368 U.S.) **[**9]** p. 473 (*82 S. Ct. 486*, p. 491, *7 L. Ed. 2d 458*)) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others. On the contrary, without reflecting in any way upon the good faith of this particular lawsuit, having regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the summary judgment rule its full legitimate sweep in this field.

Id. at 478, 82 S. Ct. at 493 (Harlan, J., dissenting). Of course, on the face of *Rule 56* the dissenters were inherently correct. There is nothing in *Rule 56* itself or in the other Rules or in the Advisory Committee Notes to suggest that *Rule 56* does not apply equally to all actions. See Federal Practice and Procedure PP 56.17(1), .17(5), Wright and Miller, Federal Practice and Procedure §§ 2730, 2732. That the Summary Judgment Rule applies to antitrust cases is readily evident from the Supreme Court's later treatment of *First National Bank of Arizona v. Cities Service, 391 U.S. 253,* ***[**10]*** *88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)* in which a writ of Certiorari was granted to determine whether the summary judgment entered was consistent with the standards announced in Poller. *Id. at 259, 88 S. Ct. 1575*. On receiving a record which took 11 years to create, the Supreme Court concluded that the defendant had properly supported its motion for summary judgment, and plaintiff, in effect, had merely rested on the allegations of conspiracy contained in the complaint. Over a dissent joined in by three justices, the majority explained that *Rule 56* does indeed apply to antitrust suits:

> (N)either precedent nor logic supports petitioner's contention that the evidence to which he points is significantly probative of conspiracy and, therefore, we hold that on the facts as shown summary judgment was correctly awarded to respondent.
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> To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that *Rule 56(e)* should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those **[**11]** allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. at 288-90, 88 S. Ct. at 1593.

This Court has paid careful attention to these and other Supreme Court pronouncements concerning *Rule 56* in antitrust actions. However, simply because a case is based upon the antitrust laws does not suspend the application of *Rule 56*. The reason summary judgments may seem less common in antitrust cases is because such cases are ripe with issues of motive, intent and credibility which often must be inferred from the total circumstances. ***HN1***[] Antitrust cases are not necessarily ill-suited for summary procedures; those antitrust cases and any other types of cases which raise genuine issues of motive intent and credibility, however, are suited for a full hearing. See **[*1112]** generally Moore's Federal Practice and Procedure PP 56.17(1), **[**12]** .17(5) And cases cited; Wright & Miller, Federal Practice and Procedure §§ 2730, 2732 And cases cited. This Court has implicitly recognized these principles in decisions in which the opinions express a general concern over misuse of *Rule 56* in antitrust cases yet affirm the particular summary judgment being reviewed. See, e.g., *American Telephone and Telegraph Company v. Delta Communications Corporations, 579 F.2d 972 (5th Cir. 1978)* Adopting District Court's opinion at *408 F. Supp. 1075, 1086 (S.D.Miss.1976)* ("Although summary judgment is an available judicial tool in the (field of) antitrust area, Poller does warn that it should be cautiously used."), Aff'd on rehearing 590 F.2d 100 (1979); Scranton Construction Company v. Litton Industries Leasing Corporation, 494 F.2d 778, 781 (5th Cir. 1974), Cert. denied, *419 U.S. 1105, 95 S. Ct. 774, 42 L. Ed. 2d 800 (1975)* (footnote omitted) ("Bearing in mind the deservedly high mortality rate of summary dispositions of such litigation as this, and the disfavor with which such disposition are viewed . . . ."); Littlejohn v. Shell Oil Company, 483 F.2d 1140, 1145 (5th Cir.) (En banc), Cert. denied, *414 U.S. 1116, 94 S. Ct. 849, 38 L. Ed.* ***[**13]*** *2d 743 (1973)* ("(This) fatality rate in summarily disposing of litigation in this manner is high indeed, and largely the result of prematurity through inordinate attention to theories of law at a time when the facts have not been fully developed."). Furthermore, this Court has explicitly recognized these principles in Jones v. Borden Company, 430 F.2d 568 (5th Cir. 1970), expressing a cognizance "of decisions in this Circuit rejecting summary judgment in cases "where motive, intent, subjective feelings and reactions, consciousness and conscience (are) to be searched, and examined and cross-examined are necessary instruments in obtaining the truth.' " Id. at 574 (quoting Alabama Great Southern R.R. v. Louisville & Nashville R.R., 224 F.2d 1, 5 (5th Cir. 1955)). See also Southern Concrete Company v. United States Steel Corporation, 535 F.2d 313, 318 (5th Cir. 1976).

Thus, putting aside contrary Caveats found in Obiter dictum, ***HN2***[] we conclude that simply because a suit is brought under the antitrust laws does not foreclose a summary judgment. We agree with Judge Wisdom's borrowed observation: "But the best procedure "for a correct understanding of summary judgment (is to rely) on the text **[**14]** of the rule, rather than on quotable statements made in one or another case.' " Jones v. Borden Company, 430 F.2d at 574 (quoting 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1232.2 at 114 (C. Wright ed. 1958)).

HN3[] Rule 56 "contemplates an orderly (procedure) within which to determine whether summary judgment is proper." Munoz v. International Alliance of the Theatrical Stage Employees and Moving Picture Machine Operators, 563 F.2d 205, 207 n. 1 (5th Cir. 1977). Once the movant carries its burden of showing that no genuine issue of material fact exists, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). E.g., Save Our Cemeteries v. Archdiocese of New Orleans, 568 F.2d 1074, 1077 (5th Cir.), Cert. denied, *439 U.S. 836, 99 S. Ct. 120, 58 L. Ed. 2d 133 (1978)*. It is this shifting burden of going forward which the District Court held Aladdin Oil, the nonmovant here, did not satisfy. [5.]

[15]** III.

Aladdin Oil argues that the District Court erred in holding that this case involved nothing more than a wholly unilateral refusal to deal by a seller, Texaco, and the choice of one replacement distributor, Poweram Oil, instead of another potential replacement distributor, Aladdin Oil, based on legitimate reasons. We agree with the District Court.

[*1113] ***HN4***[] Section 1 of the Sherman Act makes illegal "(e)very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C.A. § 1. Although the statute speaks in terms of Every concerted restraint, the courts have long interpreted this language to prohibit concerted activity which Unreasonably restrains trade. See, e.g., Chicago Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Only when concerted activity is manifestly anti-competitive are Per se rules of illegality applicable. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 2557-58, 53 L. Ed. 2d 568 (1977); Northern Pac. R. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958); E. A. McQuade ***[**16]*** 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)*.

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5. The District Court's terse Order Granting Summary Judgment concludes:

Despite Plaintiff's allegation that Defendants' conduct in this case fell within an exception to this general rule (Colgate doctrine), Plaintiff has failed to come forward with sufficient factual material to show that there is a genuine issue for trial, as required by Fed.R.Civ.P. 56(e). Thus, summary judgment for Defendants is proper.

HN5[] Accordingly, a seller has a unilateral right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. The seminal decision in this area is *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*. The case came to the Supreme Court on a writ of error from a District Court judgment dismissing an indictment under the Sherman Act. The indictment was based solely on the theory that Colgate & Co. had combined with its wholesale and retail dealers to effect resale price maintenance and had procured adherence through refusals to deal. The District Court interpreted the indictment Not to allege any agreement to maintain resale prices between Colgate & Co. and its customers. The Supreme Court held itself bound by this interpretation of the indictment. Affirming the District Court, the Supreme Court held:

> ***HN6***[] 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 **[**17]** by those engaged, or who wish to engage, in trade and 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.

Id. at 307, 39 S. Ct. at 468. This is the now-famous Colgate doctrine. Although formally grounded on the broad premise that a seller who makes no promise is contractually free to alienate its own goods, the Colgate doctrine has evolved into a much narrower concept. Despite critical Supreme Court narrowing [6] **[**19]** and commentator **[*1114]** criticism, [7] the Colgate doctrine remains viable in ***antitrust law***. Its continued viability has been recognized in recent decisions by all our sibling Circuits [8] **[**20]** and in a long line of decisions by this Court. [9] The

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6. The Supreme Court has repeatedly narrowed the Colgate doctrine, but has never overruled the precedent. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 97 S. Ct. 2549, 2567-68, 53 L. Ed. 2d 568 (1977)* (White, J., concurring); *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)*; *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*; *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Simpson v. Union, Oil Co., 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*; *FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 79 S. Ct. 1005, 3 L. Ed. 2d 1079 (1959)*; *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*; *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)*; *Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S. Ct. 618, 84 L. Ed. 852 (1940)*; *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922)*; *Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 41 S. Ct. 451, 65 L. Ed. 892 (1921)*; *United States v. A. Schrader's Son, Inc., 252 U.S. 85, 40 S. Ct. 251, 64 L. Ed. 471 (1920)*. This consistent narrowing once led Judge Moore to observe: "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise." *George W. Warner & Co. v. Black & Decker Manufacturing Co., 277 F.2d 787, 790 (2d Cir. 1960)*.

7. See, e.g., Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847 (1955); Fulda, Individual Refusals to Deal: When Does Single-Firm Conduct become Vertical Restraint? 30 Law & Contemp.Probs. 590 (1965); Isac, Unilateral Refusals to Deal: King Colgate is Dead!, 30 Ohio St.L.J. 537 (1969); Levi, The Parke, Davis Colgate Doctrine: The Ban on Resale Price Maintenance, 1960 Sup.Ct.Rev. 258; Parker, Individual Refusals to Sell in Regulated Industries, 41 Tex.L.Rev. 295 (1962); Pitofsky & Dam, Is the Colgate Doctrine Dead? 37 Antitrust L.J. 772 (1968). See also generally Areeda, Antitrust Analysis PP 524-531 (2d ed. 1974); Sullivan, Antitrust §§ 137-141 (1977); Annotation, Refusals to Deal as Violations of the Federal Antitrust Laws, 41 A.L.R.Fed. 174 (1979) and cases cited; 58 C.J.S. § 49 and cases cited.

8. See, e.g., *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068 (7th Cir. 1978)*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126* (2d Cir.), Cert. denied, ***439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)***; *Fount-Wip Inc. v. Reddi-Wip Inc., 568 F.2d 1296 (9th Cir. 1978)*; *Quality Mercury Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir. 1976)*; *Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309 (3d Cir. 1975)*; *Brandeis Machinery & Supply Corp. v. State Equipment Co., 503 F.2d 503 (7th Cir. 1974)*; *Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974)*, Cert. denied, ***419 U.S. 1105, 95 S. Ct. 775, 42 L. Ed. 2d 801 (1975)***; *Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974)*; *Amplex of Maryland Inc. v. Outboard Marine Co., 380 F.2d 112* (4th Cir.), Cert. denied, ***389 U.S. 1036, 88 S. Ct. 768, 19 L. Ed. 2d 823 (1967)***; *Dart Drug Co. v. Parke, Davis & Co., 120 U.S.App.D.C. 79, 344 F.2d 173 (D.C.Cir. 1965)*.

Colgate doctrine still allows individual sellers to refrain from dealing, even though the condition for dealing would otherwise violate the antitrust **[**18]** laws. However, the unilateral right to select customers is narrowly circumscribed to permit only the "mere announcement of . . . policy and the simple refusal to deal." *United States v. Parke, Davis & Co., 362 U.S. 29, 44, 80 S. Ct. 503, 512, 4 L. Ed. 2d 505 (1960)*.

Before the District Court and on this appeal, Aladdin Oil has urged that the concerted activity necessary for an antitrust violation was established by the scenario of events previously outlined. The District Court artificially isolated Texaco's refusal to grant Aladdin Oil a distributorship from Texaco's assignment of its purchase option **[**21]** to Poweram Oil. Reasoning that Texaco could have refused to grant Aladdin Oil a distributorship without regard to whether a first refusal purchase option even existed, the District Court concluded that Texaco's refusal to make Aladdin Oil one of its distributors should be isolated and separately considered under *Section 1*. Thus, isolated, the refusal to make Aladdin Oil a distributor was viewed by the District Court as a decision protected under the Colgate doctrine. This was too mechanical an approach. What Texaco had the abstract power to do does not control. Our inquiry must examine what Aladdin Oil alleged and sought to prove actually transpired between Texaco and Poweram Oil. Even thus viewed, however, we believe that Aladdin Oil has not established the existence of a genuine issue of material fact. We agree with Aladdin Oil that the conduct of Texaco and Poweram Oil must be considered together.

Aladdin Oil misapprehends the law, however, if it contends that this joint conduct, without more, violates the antitrust laws. The Court of Appeals for the Ninth Circuit best explained how the Colgate doctrine applies to such situations:

> We think it indisputable that a single **[**22]** manufacturer or seller can ordinarily stop doing business with A and transfer his business to B. All of the cases cited **[*1115]** (above) stand for this rule. The rule is also expressly recognized in the cases upon which appellee relies, and which we have discussed. There is language in many of those cases which, taken out of context, plaintiff construes as meaning that, if the seller agrees with a third party a competitor of the seller, for example, or a competitor of A to do the same thing, a Per se violation of *section 1* has occurred. This obviously cannot mean an agreement with B, the new distributor; he could not accept the distributorship without agreeing to do so. And the decisions cited (above) make it clear that the decision of the seller to transfer his business from A to B is valid even though B may have solicited the transfer and even though the seller and B may have agreed before the seller terminates his dealings with A. No case cited to us, and none that we have found, actually goes so far as plaintiff claims.

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, 24* ***[**23]*** *L. Ed. 2d 755 (1970)*. See also *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 (5th Cir. 1977)*; *Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 (8th Cir. 1976)*; *Dreibus v. Wilson, 529 F.2d 170, 173-74 (9th Cir. 1975)*; *Bowen v. New York News, Inc., 522 F.2d 1242, 1245 (2d Cir. 1975)*; *Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1248-49 (5th Cir. 1975)*; *Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972)*; *Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214 (9th Cir. 1970)*.

We believe this analysis controls. Under this analysis, Texaco's assignment of the Service Oil purchase option to Poweram Oil and Texaco's refusal to grant Aladdin Oil a distributorship are unilateral decisions protected by the Colgate doctrine. The role Poweram Oil played does not render the Colgate doctrine inapplicable. We see no significance in the distinction between a seller negotiating with one existing customer to transfer the complete business of another existing customer, thus eliminating a customer, and the situation here. Here a seller negotiated

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9. See, e.g., *Daniels v. All Steel Equipment, Inc., 590 F.2d 111 (5th Cir. 1979)*; *Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978)*; *Southern Distributing Co. v. Southdown, Inc., 574 F.2d 824 (5th Cir. 1978)*; *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30 (5th Cir. 1977)*; *Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245 (5th Cir. 1975)*; *Weather Wise Co. v. Aeroquip Corp., 468 F.2d 716 (5th Cir. 1972)*, Cert. denied, ***410 U.S. 990, 93 S. Ct. 1505, 36 L. Ed. 2d 188 (1973)***; *Guidry v. Continental Oil Co., 350 F.2d 342 (5th Cir. 1965)*; *Associated Beverages Co. v. P. Ballantine & Sons, 287 F.2d 261 (5th Cir. 1961)*; *Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952)*, Cert. denied, ***345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356 (1953)***.

with an existing customer, Poweram Oil, to transfer the complete business of a customer going out **[**24]** of business, Service Oil, while, at the same time, the attempt of a potential customer, Aladdin Oil, to establish a customer relationship was denied.

Still, sellers do not have an antitrust Carte blanche to select those with whom they will deal. *HN7*[] On the contrary, a refusal to deal becomes unlawful when it produces an unreasonable restraint on trade, I.e., if there is an anticompetitive purpose or effect in selecting those with whom one will deal. A refusal to deal may not be used as a device to achieve some anticompetitive goal such as to acquire a monopoly, [10.] **[**25]** or to fix prices, [11.] or to establish market dominance and drive out existing competitors, [12.] or to aid the enforcement of unlawful resale price restrictions and territorial allocations, [13.] **[**26]** or to increase the seller's **[*1116]** own market dominance, [14.] or to enforce a boycott, [15.] or to promote the predatory practices of the seller. [16.] This requirement of illegitimate purpose or effect marks the distinction between concerted activity which is an innocent aspect of business and concerted activity which is inimical to competition. [17.]

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10. See, e.g., *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 (5th Cir. 1977)*; *Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1248 (5th Cir. 1975)*; *National Screen Service Corp. v. The Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962)*.

11. See, e.g., *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307 (1922)*; *Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir. 1978)*; *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 (5th Cir. 1977)*; *Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 946 (5th Cir. 1975)*.

12. See, e.g., *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*; *Northwest Power Products, Inc. v. Omark Industries, 576 F.2d 83, 87 (5th Cir. 1978)*; *Southern Distributing Co. v. Southdown, Inc., 574 F.2d 824, 828 (5th Cir. 1978)*; *Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir. 1978)*; *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 (5th Cir. 1977)*; *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)***.

13. See, e.g., *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)*; *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979)*; *Dougherty v. Continental Oil Co., 579 F.2d 954, 961 n. 3 (5th Cir. 1978)*.

14. See, e.g., *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*; *Dougherty v. Continental Oil Co., 579 F.2d 954, 961 n. 3 (5th Cir. 1978)*.

15. 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)*; *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 (5th Cir. 1977)*.

16. See, e.g., *Dougherty v. Continental Oil Co., 579 F.2d 954, 961 n. 3 (5th Cir. 1978)*; *Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970)*.

17. This distinction was made in Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847 (1955):

When the element of purpose to coerce the trade policy of third parties or to secure their removal from competition is absent, the policy question raised by agreements under which the parties mutually limit their own freedom to deal with outsiders becomes more difficult, and the courts have appropriately outlined wider limits before declaring such agreements illegal.

There are many "normal and usual agreements in aid of trade and commerce,' * * * which involve the acceptance by the parties of limitations on their freedom individually to deal with others * * * . Requirements contracts, exclusive dealing contracts and contracts involving exclusive territories all involve limitations on the freedom of one or more of the parties to do business with others * * * .

Because all of these situations involve an agreement between two or more persons under which one or more of them agree not to deal with third persons and for that reason foreclose a part of the market to such third persons, they are all subject to scrutiny under the antitrust laws. But in the ordinary case these do not involve combining for the primary purpose of coercing or excluding; rather they involve combinations of two or more persons to further directly the business of the parties to the agreement, and the effect on third parties and on competition is indirect. The issue in these cases is not the existence or nonexistence of concerted refusal to deal, but rather whether the purpose and effect of the operation of the contract, association, exchange or joint sales agency was such as to unreasonably to exclude outsiders from participation in the trade in question. The

[27]** Aladdin Oil has sought to attribute such an anticompetitive Animus to Texaco and Poweram Oil by alleging that Texaco's disapproval of Aladdin Oil as a distributor and the assignment of the Service Oil first refusal purchase option to Poweram Oil were designed to lessen intrabrand competition and further a system of retail price maintenance. [18.]

Aladdin Oil's allegation of suppression of intrabrand competition is nothing more than inartful speculation. As best we can understand this allegation, we can discern no support for it in this record. Here, Texaco did not substitute a new distributor for Service Oil. Instead, Poweram Oil purchased Service Oil. To this extent, intrabrand competition in Texaco gasoline was reduced. However, this distinction from the more usual refusal to deal case does not require the application of any stricter rule. A seller may have just as valid reasons for reducing the number of purchasers as for changing purchasers. See *Oreck Corp. v. Whirlpool Corp.,* ***[**28]*** *579 F.2d 126 (2d Cir. 1978)* Commented on in 92 Harv.L.Rev. 1160 (1979). Precedents establish that abstract lessening of intrabrand competition is not enough. Even a concerted intent to eliminate an exclusive distributor does not necessarily establish a cause of action for violation of the antitrust laws. ***HN8***[] "(A) reduction in intrabrand competition is not pernicious as long as there exists interbrand competition, which acts as a "significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.' " *Daniels v. All Steel Equipment, Inc., 590 F.2d 111, 113 (5th Cir. 1979)* (quoting **[*1117]** *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n. 19, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*. See also *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133* (2d Cir.) (En banc), Cert. denied, *439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)*; *Northwest Power Products, Inc. v. Omark Industries, 576 F.2d 83, 87 (5th Cir. 1978)*; *Dillon Materials Handling Inc. v. Albion Industries, 567 F.2d 1299* (5th Cir.), Cert. denied, *439 U.S. 832, 99 S. Ct. 111, 58 L. Ed. 2d 127 (1978)*; *Universal Brands, Inc. v.* ***[**29]*** *Philip Morris, Inc., 546 F.2d 30, 33 (5th Cir. 1977)*; *Dreibus v. Wilson, 529 F.2d 170 (9th Cir. 1975)*. But cf. *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979)*. The law is clear that merely changing from one exclusive distributor to another is permitted. A fortiori, it must be permissible for one distributor going out of business to be purchased by an existing distributor rather than by a new and different distributor. And, under the precedents discussed above, the prior arrangements Texaco made with Poweram Oil were permitted. Thus, there is no merit in Aladdin Oil's theory of suppression of intrabrand competition.

Just as fanciful is Aladdin Oil's claim that somehow the issue of retail price maintenance is involved in this case. The record demonstrates to the contrary. The District Court held that Aladdin Oil did not bring forth sufficient factual material on the retail price maintenance issue to show there was a genuine issue for trial as required by *Fed.R.Civ.P. 56(e)*. [19.] We agree.

[30]** Of course, Aladdin Oil's allegations of retail price maintenance alone were not sufficient to escape summary judgment. There must be a sufficient quantum of proof to carry an issue of material fact to the jury. Here there is no direct evidence that Texaco and Poweram Oil acted as they did in furtherance of a scheme violative of the antitrust laws. Rarely, if ever, can a plaintiff point to a "smoking gun" in cases such as this. Yet, a plaintiff must convince the court that it is reasonable to infer the existence of the gun from the facts shown. This Aladdin Oil did not do, either in the District Court or in this Court. See *American Telephone and Telegraph Co. v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir. 1979)*.

In *Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974)*, an owner of a retail gasoline station sued his supplier and alleged that the supplier's method of adjusting its wholesale gasoline prices was tantamount to illegal resale price

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principle of the group boycott cases that it is prima facie unreasonable for a dominant group to combine to coerce is not here applicable.

Id. at 876-77, Quoted in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 77 (9th Cir. 1969)*, Cert. denied, ***396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)***.

18. See note 5, Supra.

19. See note 5, Supra.

maintenance. The Court of Appeals for the First Circuit affirmed the summary judgment in favor of the supplier. In its analysis, the First Circuit distilled from the authorities the essence of a resale price maintenance cause **[**31]** of action:

> Resale price maintenance is, in the absence of state fair trade legislation, a Per se violation of the antitrust laws. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*; *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*. But before this doctrine can come into play there must be resale price maintenance. The Supreme Court cases have involved situations in which the attempt to set retail prices was clear. In *Simpson v. Union Oil Co., 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*, upon which (plaintiff) relies, Union Oil had signed an agreement with the retailer containing the latter's promise to resell at the price set by Union Oil. In Kiefer-Stewart a refusal to sell at a fixed price was met by a concerted refusal to deal. In *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* and *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, the retailer was confronted with minimum or maximum prices and harassed by his supplier and others if he stepped out of line. ***HN9***[] Taken together, these cases suggest that **[**32]** a case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness **[*1118]** or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion", but it must involve making a meaningful event depend on compliance or non-compliance with the "suggested' or stated price. The dealers in Parke, Davis and Albrecht were told that the harassment directed against them would end as soon as they acceded to the manufacturer's price desires. The cancellation of the lease in Simpson was a direct consequence of the refusal to charge the manufacturer's desired price. The other cases adhere to the same pattern. Cf. *Lehrman v. Gulf Oil Corp., 464 F.2d 26* (5th Cir.), Cert. denied *409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972)*; *Bowen v. New York News, Inc., 366 F. Supp. 651 (S.D.N.Y.1973)*.

Id. at 436-37 (footnotes omitted). See also *Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965)*. Following this analysis, the First Circuit concluded that there was no resale price maintenance involved. We follow this same analysis to **[**33]** the same result here.

Aladdin Oil has alleged that Texaco and Poweram Oil conspired to maintain resale prices. No announcement of prices has been shown. No "course of action (was) undertaken or threatened contingent on the willingness or unwillingness of (Aladdin Oil) to adopt the price." *496 F.2d at 437*. There was no "meaningful event (dependent) on compliance or non-compliance." Id. Here Texaco refused to deal with Aladdin Oil and arranged with Poweram Oil to take over Service Oil. There was nothing beyond this. There was no resale price maintenance which occurs only "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." *United States v. Parke, Davis & Co., 362 U.S. 29, 43, 80 S. Ct. 503, 511, 4 L. Ed. 2d 505 (1960)*. We reach this conclusion after careful review of the record and Aladdin Oil's allegations. We conclude that summary judgment was proper here. See *Southern Distributing Co. v. Southdown, Inc., 574 F.2d 824 (5th Cir. 1978)*; *Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30 (5th Cir. 1977)*; *Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d **[**34]** 934* (5th Cir.), On rehearing, *509 F.2d 758 (1975)*; *Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974)*; *Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965)*; *Guidry v. Continental Oil Co., 350 F.2d 342 (5th Cir. 1965)*.

Since we find no merit in any of the contentions raised on appeal, the summary judgment is

AFFIRMED.

Bass v. Boston Five Cent Sav. Bank

United States District Court for the District of Massachusetts

September 28, 1979

Civ. A. Nos. 72-2282-C through 72-2889-C

Reporter

478 F. Supp. 741 *; 1979 U.S. Dist. LEXIS 9463 **; 1980-2 Trade Cas. (CCH) P63,383

Henry J. BASS et al. v. BOSTON FIVE CENT SAVINGS BANK.; Laurence CHAIT et al. v. WATERTOWN SAVINGS BANK.; Herbert FEINSTEIN et al. v. WALTHAM FEDERAL SAVINGS AND LOAN ASSOCIATION.; Nathan LISKOV et al. v. CAMBRIDGEPORT SAVINGS BANK.; Henry PLOTNICK et al. v. SUFFOLK FRANKLIN SAVINGS BANK.; Albert ZABIN et al. v. LEXINGTON TRUST CO.; Anna PANDISCIO v. SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF BROCKTON.; Anna PANDISCIO v. HOME OWNERS FEDERAL SAVINGS AND LOAN ASSOCIATION.

Core Terms

mortgage agreement, mortgagee, escrow, plaintiffs', complaints, mortgagors, summary judgment, deposits, cases, motions, banks, escrow account, conspiracy, allegations, mortgage, parties, class action status, class action, reciprocal, Antitrust, funds, extend credit, defendants', limitations, monthly, trusts

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN1[] **Responses, Defenses, Demurrers & Objections**

Fed. R. Civ. P. 23(a) lists four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] Prerequisites for Class Action, Predominance

Fed. R. Civ. P. 23(b) provides that a class action may be maintained if the requirements of Fed. R. Civ. P. 23(a) are satisfied and in addition: (1) the prosecution of separate actions would create a risk of establishing incompatible standards of conduct for the party opposing the class as a result of inconsistent or varying adjudications or that adjudication as to individual members would as a practical matter dispose of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby rendering injunctive or declaratory relief as to the whole class appropriate; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions effecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] Class Actions, Prerequisites for Class Action

Because the declaration of class representation is attended by serious consequences, the plaintiff has the burden of establishing compliance with Fed. R. Civ. P. 23. The plaintiff's complaint must allege the existence of facts which satisfy the requirements of Rule 23.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] Class Actions, Prerequisites for Class Action

A party seeking to utilize the class action format need not establish the merits of his or her case before a preliminary determination of the class action question can be made. Before an evidentiary hearing is afforded, the plaintiff must a minimal showing that his or her class action claims have substance.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Parallel behavior itself does not constitute a Sherman Act offense. It is merely circumstantial evidence of the existence of a conspiracy which violates the Act and the probative value of such parallel behavior varies depending on the circumstances in which it is found.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN6[] Pleadings, Rule Application & Interpretation

While a plaintiff is entitled to all favorable inferences, he or she is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

The antitrust laws do not prohibit combined lobbying for the purpose of influencing legislation.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

HN8[] Effect & Operation, Prospective Operation

Statutes have prospective effect unless the legislature clearly manifests its intention that the statute act retrospectively.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN9[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 15b provides that any action to enforce any cause of action under *15 U.S.C.S. §§ 15* or *15a* are forever barred unless commenced within four years after the cause of action accrued.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

The Sherman Act forbids the extension of market dominance over one product into the market for another product by making the purchase of the first product a condition of purchasing the second. The preliminary determination to be made at the outset of every tie-in case is whether two separate products are in fact involved.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

Governments > Legislation > Statute of Limitations > Time Limitations

Banking Law > Consumer Protection > Truth in Lending > General Overview

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

Governments > Legislation > Statute of Limitations > General Overview

HN11[] Truth in Lending, Disclosure

The Truth in Lending Act (TILA), *15 U.S.C.S. § 1601 et seq.*, specifically exempts escrows for future payment of taxes from disclosure. *15 U.S.C.S. § 1605(e)(3)*, *12 C.F.R. § 226.4(e)*. Even if such costs were not exempt from disclosure, actions brought under the TILA are subject to a one year statute of limitations. *15 U.S.C.S. § 1640(e)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN12[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Reciprocity is the policy of favoring one's customers in purchasing commodities sold by them.

Banking Law > ... > Bank Accounts > Trust Accounts > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

HN13[] **Bank Accounts, Trust Accounts**

A mortgagor who claims that the bank does not have the right to treat tax escrow funds as its own must show a clear understanding of that effect.

Counsel: [1]** Albert P. Zabin, Michael E. Mone, Joseph Schnieder, Boston, Mass., for Henry Bass, et al.

William S. Monahan, Harrison, Maguire & Monahan, Boston, Mass., for Boston Five Cents Savings Bank.

Albert P. Zabin, Michael E. Mone, Joseph Schneider, Boston, Mass., for Laurence Chait et al.

Robert F. White, Sherburne, Powers & Needham, Boston, Mass., for Watertown Sav. Bank.

Albert P. Zabin, Michael E. Mone, Joseph Schneider, Boston, Mass., for Herbert Feinstein et al.

James J. Myers, Paul F. Hannah, Gadsby & Hannah, Boston, Mass., for Waltham Federal Sav. and Loan Ass'n.

Albert P. Zabin, Michael E. Mone, Joseph Schneider, Boston, Mass., for Nathan Liskov et al.

Henry E. Foley, David W. Walker, William J. Cheeseman, Foley, Hoag & Eliot, Boston, Mass., for Cambridgeport Sav. Bank.

Thomas E. Connolly, Albert P. Zabin, Michael E. Mone, Joseph Schneider, Boston, Mass., for Henry Plotnick.

Gael Mahony, Hill & Barlow, Boston, Mass., for Suffolk Franklin Sav. Bank.

Michael E. Mone, Joseph Schneider, Boston, Mass., for Albert P. & Judith Zabin.

Alfred P. Tropeano, Lexington, Mass., Robert D. Canty, Gaston, Snow & Ely, Boston, Mass., for Lexington Trust Co.

Albert P. Zabin, **[**2]** Schneider, Reilly, Zabin, Connolly & Costello, P. C., Boston, Mass., for Anna Pandiscio.

George L. Wainwright, Brockton, Mass., for Security Federal Sav. & Loan of Brockton.

Bernard A. Dwork, Barron & Stadfeld, Boston, Mass., for Home Owners Federal Sav. & Loan Ass'n.

Opinion by: CAFFREY

Opinion

[*743] OPINION

In 1972 eight virtually identical actions were filed in this court. Each of the eight complaints alleged that a named defendant mortgagee bank had required, as a condition on the extension of credit under a mortgage agreement, that the plaintiff mortgagor property owners make monthly deposits in a tax escrow account with the defendant bank of 1/2 of the estimated annual real estate taxes on the mortgaged property. It was further alleged that although the defendant mortgagee bank enjoyed full use of the escrow funds until such time as the taxes became due to the taxing authority, it unlawfully refused to pay interest on the money held in escrow to the plaintiff property owner.

Count I alleged that the refusal to pay interest was the result of a conspiracy in the banking community in restraint of trade in violation of the Sherman Antitrust Act *15 U.S.C.A. § 1 Et seq.*

[3]** Count II alleged that the nonpayment of interest on the required escrow deposits was an illegal tie-in arrangement in violation of *15 U.S.C.A. §§ 1* and *2* and *12 U.S.C.A. § 1972*.

[*744] Count III alleged that as to mortgagors who became mortgagors after July 1, 1969, the defendant had failed to disclose the costs incident to the defendant mortgagee's refusal to pay interest on the tax escrow deposit, in violation of the Truth in Lending Act, *15 U.S.C.A. § 1601 Et seq.* (TILA).

Four judges of this Court who are also parties to mortgage agreements have disqualified themselves from sitting on a trial or any other proceeding in these cases because plaintiffs purport to bring these actions as representatives of all other mortgagors of the defendant mortgagee banks.

Inasmuch as the same law firm represented all plaintiffs and because the factual and legal issues set forth in the eight complaints were substantially similar, the cases were determined to be "related" under local rule 8(e)(2) and all were assigned to one judge in the interest of judicial economy.

Over a period of fifteen months plaintiffs amended their complaints to add Count IV which alleged that the non-interest **[**4]** paying escrow account is the result of a reciprocal agreement which plaintiffs were forced to enter as a result of defendants' exercise of monopoly power in violation of the federal ***antitrust law*** *15 U.S.C.A. §§ 1* and *2*. Plaintiffs in seven of the eight cases were also allowed to amend their complaints to add Count V which asserted an express and implied trust theories under State law and called upon the Court to exercise pendent jurisdiction.

Five defendants have filed the following motions:

In Chait v. Watertown Savings Bank (72-2283-C) the defendant has moved for dismissal of the plaintiffs' complaint which centers around a 1968 mortgage agreement.

In Feinstein v. Waltham Federal Savings and Loan Association (72-2284-C) the escrow account in issue had been provided for in the parties' December 1965 mortgage agreement. Defendant mortgagee has filed a motion to dismiss and for summary judgment.

The complaint in Liskov v. Cambridgeport Savings Bank (72-2285-C) involves a 1970 mortgage agreement. Defendant bank has pleaded in its answer that the complaint fails to state a claim upon which relief may be granted and has also filed a motion for summary judgment or judgment on the **[**5]** pleadings.

In Plotnick v. Suffolk Franklin Savings Bank (72-2286-C) the defendant moved for dismissal or summary judgment in response to plaintiffs complaint which is based on a 1964 mortgage agreement between the parties.

In Zabin v. Lexington Trust Co. (72-2286-C) the plaintiffs' claim is based on a mortgage agreement dated June 29, 1966. Defendant has filed motions to dismiss.

The motions currently before the Court for consideration also include plaintiffs' motions for determination of class action status in all eight cases and plaintiff's motion for partial summary judgment in Liskov v. Cambridgeport Savings Bank. The plaintiffs' motion for determination of class action status will be discussed first. Having in mind that, in large part the defendants' motions encompass the same issues, they will be discussed simultaneously thereafter.

PLAINTIFFS' MOTIONS FOR DETERMINATION OF CLASS ACTION STATUS

HN1[] *Fed.R.Civ.P. 23(a)* lists four prerequisites to a class action:

(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 **[**6]** 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[] *Fed.R.Civ.P. 23(b)* provides that a class action may be maintained if the requirements of 23(a) are satisfied and in addition (1) the prosecution of separate actions would create a risk of establishing incompatible standards of conduct for the party opposing the class as a result of inconsistent or varying adjudications or that adjudication as to individual members would as a **[*745]** practical matter dispose of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests, or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby rendering injunctive or declaratory relief as to the whole class appropriate, or (3) the Court finds that the questions of law or fact common to the members of the class predominate over any questions effecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

HN3[] Because **[**7]** the declaration of class representation is attended by serious consequences, plaintiff has the burden of establishing compliance with *Fed.R.Civ.P. 23*. *Cook County College Teachers Union, Local 1600, A.F.T. v. Byrd, 456 F.2d 882* (7th Cir.), Cert. denied, *409 U.S. 848, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972)*; *Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D.Pa.1967)*. The complaint must allege the existence of facts which satisfy the requirements of that rule. *Cook County College Teachers Union, Local 1600, A.F.T. v. Byrd, supra.* *Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969)*; 7A Wright and Miller Federal Practice and Procedure: Civil § 1798 at 241-242 (1972).

Although plaintiffs in each of the eight consolidated complaints now under consideration by the Court allege that the class consists of all mortgagors of each of the eight defendant mortgagee banks who are "too numerous to permit practical joinder", beyond that numerosity they allege no facts which would render the class action procedure appropriate here.

While it is clear that ***HN4***[] a party seeking to utilize the class action format need not establish the merits of his case before a preliminary **[**8]** determination of the class action question can be made *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*; *Wilcox v. Commerce Bank of Kansas, 474 F.2d 336 (10th Cir. 1973)*; *Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971)*; *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, before an evidentiary hearing need be afforded, plaintiffs should make a minimal showing that their class action claims have substance. *Rossin v. Southern Union Gas Co., 472 F.2d 707 (10th Cir. 1973)*.

In light of the foregoing and because the tolling of the statute of limitations insures no damage will result to purported class members by denying class action status in this case despite the excessive passage of time. *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, plaintiffs' motions for class action status should be denied.

Count I

In count one of their complaints, plaintiff mortgagors allege that they have been required as a condition of obtaining their mortgages, to make monthly deposits of one twelfth of their annual property taxes, with the defendant mortgagees, and that the defendants have **[**9]** declined to pay interest on the amounts so deposited. Plaintiffs further allege that defendants' failure to pay interest is the result of "agreements, combinations and conspiracies with other banks, lending institutions and organizations" in violation of *15 U.S.C.A. § 1*.

Although they make their allegations in individual complaints, all plaintiffs have used the same words to allege the existence of the same conspiracy. All five complaints were filed on the same day at a time when all plaintiffs were represented by the same counsel. Clearly, therefore, when they alleged the existence of a conspiracy in count one of their complaints, all plaintiffs had access to the same information.

It is not possible to determine from the complaints themselves exactly what that information was. Plaintiffs' allegations of conspiracy are conclusory and do not recite operative facts as required by the ruling in *Heart Disease Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972)*. However, in the time period which has elapsed **[*746]** since the complaints were filed, discovery in three of the five cases [1] has revealed that plaintiffs had only two bases for their conclusory allegations **[**10]** of conspiracy:

(1) that virtually all banks require such an interest free tax escrow arrangement as a condition of extending credit in real estate mortgage cases
(2) that banks have joined together to lobby against bills which would reform that practice.

I rule that, even assuming that both of these basis exist in fact, defendants are entitled to summary judgment on count one.

HN5[] Parallel behavior itself does not constitute a Sherman Act offense. It is merely circumstantial evidence of the existence of a conspiracy which violates the act, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*, and the probative value of such parallel behavior varies depending on the circumstances in which it is found *Delaware Valley Marine Supply Co. v. American Tobacco Company, 297 F.2d 199 (3rd **[**11]** Cir. 1961)*, Cert. denied *369 U.S. 839, 82 S. Ct. 867, 7 L. Ed. 2d 843 (1962)*. Discovery has revealed that plaintiffs have no knowledge of circumstances which cast suspicion on the parallel business behavior in this case. It is just as likely therefore that the banks acted independently as it is that they acted pursuant to an agreement. Illegal conduct will not be presumed.

As stated by counsel for Cambridgeport Savings in his memorandum "the plaintiffs' contention is that, adorned with no more than the knowledge that a business policy is common to the mortgage industry, they are entitled to select some members of the industry at random and to root through their files and records in the hope of finding some hard evidence of an agreement."

> ***HN6***[] While we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture.
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> *Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir. 1975)*, Quoting, *Manganaro v. Delaval Separator Co., 309 F.2d 389, 393 (1st Cir. 1962)*.

Similarly the combined lobbying efforts of defendants and others in the banking industry lend no support to plaintiffs' allegations **[**12]** of conspiracy. It is clear that ***HN7***[] the antitrust laws do not prohibit combinations for the purpose of influencing legislation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. Evidence of an agreement between the defendants and others to unite

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[1] Feinstein v. Waltham Federal Savings and Loan Association, Liskov v. Cambridgeport Savings Bank, and Plotnick v. Suffolk Franklin Savings Bank.

their lobbying efforts would therefore not provide the basis for a claim under *15 U.S.C.A. § 1*. Additionally, the fact that the banks joined together for a lawful purpose is not evidence that they joined together for an unlawful one. Therefore no inference may be drawn from the existence of such an agreement which casts suspicion on the parallel behavior discussed above.

In light of the foregoing and without considering the other defenses raised, I rule that summary judgment should enter for the defendants on count one.

Count II

Count two alleges that requiring a mortgagor to make a monthly deposit with the mortgagee of one twelfth of the annual real estate taxes assessed against the mortgaged property as a condition of obtaining a mortgage constitutes an illegal tie-in arrangement in violation of *12 U.S.C.A. § 1972* and *15 U.S.C.A. §§ 1* and *2*. Plaintiffs' theory is **[**13]** that such a tax escrow account requires plaintiffs to provide additional property to the defendant banks as a condition to the extension of credit.

As a general rule, ***HN8***[] statutes have prospective effect unless the legislature clearly manifests its intention that the statute act retrospectively. There is no indication of any such intent in the legislative history of *§ 1972* or in the act itself. Therefore, **[*747]** since *12 U.S.C.A. § 1972* became effective on December 31, 1970 it has no applicability to the five mortgage agreements currently under the court's consideration which were all executed prior to that date.

Plaintiffs also contend in count two that the mandatory tax escrow account constitutes a tying arrangement in restraint of trade which violates *15 U.S.C.A. §§ 1* and *2*.

Defendants Waltham Federal Savings and Loan Association and Suffolk Franklin Savings Bank maintain that any claims against them under the Sherman Antitrust Act are banned by the statute of limitations. At least insofar as the allegations of count two are concerned, this court so rules.

The mortgage agreement between the Feinsteins and Waltham Federal Savings and Loan Association was executed in 1965. **[**14]** The mortgage agreement between the Plotnicks and Suffolk Franklin Savings Bank was executed in 1964. ***HN9***[] *15 U.S.C.A. § 15b* provides:

> Any action to enforce any cause of action under *sections 15* or *15a* of this title shall be forever barred unless commenced within four years after the cause of action accrued . . .

I rule that if those agreements constituted illegal tying arrangements plaintiffs had four years after the agreements were executed to bring suit in the United States District Court pursuant to *15 U.S.C.A. § 15* and that the statute of limitations had run as to both actions prior to July 24, 1972 when the complaints were filed.

Accordingly, the motions to dismiss of defendants Waltham Federal Savings and Loan Association and Suffolk Franklin Savings Bank should be allowed as to count two and the court will go on to consider the allegations of illegal tying arrangements under the Sherman Antitrust Act only against the three remaining defendants.

HN10[] The Sherman Act forbids the extension of market dominance over one product into the market for another product by making the purchase of the first product a condition of purchasing the second.

In *Fortner Enterprises, Inc.* ***[**15]*** *v. United States, 394 U.S. 495, 507, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*, the Supreme Court stated that the preliminary determination to be made at the outset of every tie-in case is whether two separate products are in fact involved. Plaintiffs contend that in order to obtain credit from the defendants, the plaintiffs were also required to accept defendants' tax escrow services. The issue therefore is whether extension of credit and tax escrow services are two separate services or separate elements of the same service.

In *Stavrides v. Mellon National Bank & Trust Co., 353 F. Supp. 1072 (W.D.Pa.1973)* the court ruled that a complaint containing similar factual allegations stated a claim upon which relief could be granted. This court agrees "whether the defendants are selling one product or two, whether there is any legitimate business justification for the escrow requirement, and whether the escrow service is an ancillary part of the loan itself are clearly questions of disputed fact" *Stavrides v. Mellon National Bank & Trust Co., supra at 1077*. Therefore, the motions of the remaining three defendants for dismissal or judgment on count two should be denied.

Count III

In count **[**16]** three of their complaints, plaintiffs allege that as to plaintiffs who became mortgagors after July 1, 1969 the defendants have failed to disclose the costs incident to the defendants' refusal to pay interest on tax escrow deposits. Plaintiffs contend that such a failure to disclose violates the TILA *15 U.S.C.A. § 1601 Et seq.* and the regulations promulgated thereunder, specifically *12 C.F.R. 226.1 Et seq.*

As discussed above, the court has denied class action status to the plaintiffs in all eight of the consolidated cases now before it. As a result, the allegations of count three fail to state a claim upon which relief can be granted in Chait v. Watertown Savings Bank (72-2283-C), Feinstein v. Waltham Federal Savings and Loan Assoc. (72-2284-C), Plotnick v. Suffolk Franklin Savings **[*748]** Bank (72-2286-C) and Zabin v. Lexington Trust Co. (72-2287-C) because the mortgage agreements of the individual plaintiffs in those cases were executed prior to the effective date of the statute. Accordingly the motions to dismiss of the defendants in those cases should be allowed as to count three.

In Liskov v. Cambridgeport Savings Band (72-2285-C) the mortgage agreement at issue was **[**17]** executed in 1970, after the effective date of the disclosure provisions. Notwithstanding that fact, however, plaintiff is not entitled to recover under the TILA.

HN11[] The TILA specifically exempts escrows for future payment of taxes from disclosure *15 U.S.C.A. § 1605(e)(3)*, *12 C.F.R. 226.4(e)*. *Stavrides v. Mellon National Bank & Trust, 487 F.2d 953 (3d Cir. 1973)* and even if such costs were not exempt from disclosure, actions brought under the TILA are subject to a one year statute of limitations. *15 U.S.C.A. § 1640(e)*. Reference to the case file establishes that when plaintiffs filed their action on July 24, 1972, the statute of limitations had already run as to their mortgage agreement with the defendant.

Accordingly, defendant Cambridgeport Savings Bank's motion for summary judgment should be allowed as to count three.

Count IV

In count four, plaintiffs allege that the defendant mortgagees acting in concert with other banks have monopoly power in the real estate credit market in Massachusetts. Plaintiffs further allege in count four that the defendants have made use of that monopoly power by imposing upon plaintiffs a reciprocal agreement under the terms of which defendants **[**18]** extend credit to plaintiffs in return for which plaintiffs deposit money with the defendants in interest free accounts. Plaintiffs contend that these are reciprocal agreements which violate the Sherman Antitrust Act, *15 U.S.C.A. § 1*. I rule that such a practice, even if established at trial, would not constitute a reciprocal dealing arrangement.

HN12[] Reciprocity is basically the policy of favoring one's customers in purchasing commodities sold by them." *United States v. Penick and Ford, Ltd., 242 F. Supp. 518, 521 (D.N.J.1965)*. To hold that the plaintiffs' willingness to open interest free accounts was a "product" would stretch the concept of reciprocity too far. *Stavrides v. Mellon National Bank & Trust Co., supra at 1077*. Count four should be dismissed as to all five defendants.

Count V

In count five of their complaints the plaintiff mortgagors ask the court to exercise pendent jurisdiction over a claim which is based on state law. Plaintiffs allege that the defendant mortgagees are accountable to them for monies earned through the investment of funds which plaintiffs deposited in tax escrow accounts as required by their mortgage agreements.

Plaintiffs' theory appears to be that **[**19]** any monies earned through the investment of the tax escrow funds were held by the defendant mortgagees in trust for the benefit of the plaintiff mortgagors by reason of trusts created by the mortgage instruments. Plaintiffs further assert that even in the absence of express trusts created by the agreements, the court should impose constructive trusts because each of the defendant mortgagees has been unjustly enriched by the tax escrow arrangements.

A copy of the mortgage agreement form used by each defendant mortgagee has been filed in each of the five cases which have motions currently under consideration. Because the court will refer to the copies of those agreements in the process of ruling on the motions before it, those motions will be treated as motions for summary judgment as to count five.

I rule that the mortgage agreements filed in these cases are integrated agreements which are subject to the parol evidence rule. *Restatement (Second) of Contracts §§ 235*, *239* (Tent. Drafts Nos. 1-7, 1973) and that the court may as a matter of law interpret those agreements to determine the understanding of the parties. **[*749]** *Robert Industries Inc. v. Spence, 362 Mass. 751, 755,* ***[**20]*** *291 N.E.2d 407 (1973)*.

Four of the five agreements in question [2.] provide for the payment of monthly estimated tax payments into an escrow account and contain no provision with regard to the investment of those funds or the payment of interest of the mortgagor.

Under Massachusetts law, ***HN13***[] a mortgagor who claims that the bank does not have the right to treat tax escrow funds as its own, must show a clear understanding of that effect, *Carpenter v. Suffolk Franklin Savings Bank, 370 Mass. 314, 346 N.E.2d 892 (1976)*. I rule that due to the absence of any provision in the contract tending to show such a clear understanding between the parties, no trusts were created by those agreements as a matter of law.

In the case of Feinstein v. Waltham Federal Savings and Loan Association **[**21]** (72-2284-C) the agreement required the plaintiff to make monthly tax escrow payments to the mortgagee "in trust" but no provisions were included for the investment of those funds or the payment of interest. In addition, plaintiff Feinstein testified in deposition that he knew at the time that he entered the agreement that he would not be paid interest on the amounts deposited in the escrow account. In light of the foregoing, I rule that no trust was created by the mortgage agreement in that case.

The plaintiffs also contend that the court should impose constructive trusts because the defendant mortgagees have been unjustly enriched. I rule that even assuming all of plaintiff's allegations to be true, in the absence of an allegation of fraud under Massachusetts law no such unjust enrichment has occurred as to justify the imposition of a constructive trust in this case *Carpenter v. Suffolk Franklin Savings Bank, supra.* Accordingly, summary judgment should enter for the five defendants as to count five.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT IN LISKOV V. CAMBRIDGEPORT SAVINGS BANK

Plaintiffs' motion for partial summary judgment in Liskov v. Cambridgeport Savings Bank should **[**22]** be denied.

End of Document

[2.] Those four agreements are the agreements at issue in Chait v. Watertown Savings Bank (72-2283-C), Liskov v. Cambridgeport Savings Bank (72-2285-C), Plotnick v. Suffolk Franklin Savings Bank (72-2286-C), and Zabin v. Lexington Trust Co. (72-2287-C).

In re Fine Paper Antitrust Litigation

United States District Court for the Eastern District of Pennsylvania.

October 2, 1979; Vacated and Remanded October 2, 1980

Dkt. No. MDL 323.

Reporter

1979 U.S. Dist. LEXIS 9414 *; 1980-1 Trade Cas. (CCH) P63,120

In re Fine Paper Antitrust Litigation (This document relates to: Moses Jaroslawicz, etc. v. Boise Cascade Corp., et al.; The Pengad Companies, Inc. v. Boise Cascade Corp., et al.; Joli Greeting Card Co., Inc. v. Boise Cascade Corp., et al.; State of South Dakota v. Boise Cascade Corp., et al.; State of Illinois v. Boise Cascade Corp., et al.; Campbell Office Supply Co. v. Boise Cascade Corp., et al.; Herst Litho, Inc. v. Boise Cascade Corp., et al.; Magazine Management Co., Inc. v. Boise Cascade Corp., et al.; William Grader v. Boise Cascade Corp., et al.; Copies Unlimited, Inc. v. Boise Cascade Corp., et al.; State of Connecticut v. Boise Cascade Corp., et al.; William Fels t/a Fels Printing v. Boise Cascade Corp., et al.; Phillip Meroney, etc. v. Boise Cascade Corp., et al.; State of Minnesota v. Boise Cascade Corp., et al.; Artcraft Press, Inc. v. Boise Cascade Corp., et al.; Irving Kanter v. Boise Cascade Corp., et al.; David Weis Wholesale Jewelers v. Boise Cascade Corp., et al.; State of Kansas v. Boise Cascade Corp, et al.; Archdiocese of Philadelphia v. Boise Cascade Corp., et al.; Fred Ernst v. Boise Cascade Corp., et al.; Milbank Mutual Insurance Co. v. Boise Cascade Corp., et al.; Eagle Drugs, Inc. v. Boise Cascade Corp., et al.; The Hennepin Press, Inc. v. Boise Cascade Corp., et al.; Franz Stationery Co. v. Boise Cascade Corp., et al.; Royal Stationery Co. v. Boise Cascade Corp., et al.; National School Studios, Inc. v. Boise Cascade Corp., et al.; Advertising Unlimited, Inc. v. Boise Cascade Corp., et al.; The Mead Corp. v. Boise Cascade Corp., et al.).

Core Terms

settlement, Purchaser, antitrust, class action, overcharge, partial, parties, proposed settlement, entities, merchant

LexisNexis® Headnotes

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN1[] **Settlements, Settlement Agreements**

The main judicial concern in approving settlements is that the rights of the passive class members not be jeopardized by the proposed action.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN2[] **Settlements, Settlement Agreements**

Approval of a compromise depends upon whether the proposal is "fair, reasonable, and adequate." The Manual for Complex Litigation, § 1.46, identifies a number of factors to be considered: the opinion of counsel as to the fairness of the settlement; the calculation and size of the settlement figure; the strength of plaintiff's case; the complexity of further suit; adequacy of recovery; and opposition to the settlement.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN3[] **Private Actions, Standing**

Each merchant has one cause of action against a defendant for any antitrust violations. This claim is either retained by the merchant or assigned to another. One claim does not give rise to separate actions to be prosecuted by different plaintiffs. The law prohibits such splintering of actions and multiplication of suits.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] **Purchasers, Direct Purchasers**

In the area of antitrust, the policy against fragmentation is buttressed by the United States Supreme Court, which states that the "pass-on" theory of ***antitrust law*** (that is, overcharges are "passed on" at every step in the chain of distribution) cannot be used in litigation, either offensively or defensively. The practical effect of this decision is to allow only direct purchasers to sue for damages under the antitrust laws.

Opinion by: [*1] McGLYNN

Opinion

Memorandum of Decision

McGLYNN, J.:

I. Motion for Approval of Partial Settlements

A hearing on the partial settlement agreements in the Fine Paper Antitrust Litigation was held on September 10, 1979. The proposed agreements resolve all claims which the private purchaser class and five state [1] government entity classes have against six of the named defendants. [2] The settling defendants hold a share of approximately 38% of the fine paper market and have compromised the claims for $30 million.

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[1] Connecticut, Illinois, Kansas, Minnesota and South Dakota.

[2] St. Regis Paper Company, International Paper Company, Potlach Corporation, Union Camp Corporation, Weyerhaeuser Company and Boise Cascade Corporation.

The settlement agreements were filed of record on January 10, 1979 and January 25, 1979. On May 11, 1979, preliminary approval of the settlement was entered (Pretrial Order No. 44). The Notice of Pendency of Class Action and Proposed Settlements was mailed to the classes on June 29, 1979 and published in the Wall Street Journal on July 2, 1979.

No member of any of the plaintiff classes have objected to the settlements. ***HN1***[] "The main judicial concern **[*2]** [in approving settlements] is that the rights of the passive class members not be jeopardized by the proposed action." Wright and Miller, Federal Practice and Procedure: Civil § 1797. I am satisfied that the negotiated settlements are fair and reasonable to the settling parties. The settlements do not impinge in any way on the nonsettling defendants' ability to litigate further or to negotiate their own settlements. Consequently, the nonsettling defendants are in no position to object. See *Seiffer v. Topsy's Int'l Inc., 70 F.R.D. 622 (D. Kan. 1976)*; *Wainwright v. Kraftco Corp., 53 F.R.D. 78 (N.D. Ga. 1971)*; *Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967)*.

HN2[] Approval of a compromise depends upon whether the proposal is "fair, reasonable and adequate". The Manual for Complex Litigation, § 1.46, identifies a number of factors to be considered: the opinion of counsel as to the fairness of the settlement, the calculation and size of the settlement figure, the strength of plaintiff's case, the complexity of further suit, adequacy of recovery, and opposition to the settlement.

(a) Opinion of Counsel

Counsel for all settling parties are **[*3]** experienced in the field of antitrust litigation and unequivocally recommend approval. Their opinion that the settlements are fair, reasonable and adequate must be accorded weight.

The settlement of litigation on terms agreeable to all parties is one of the most important tasks we undertake… [It] cannot be disputed that a court should refrain from merely substituting its own judgment of the merits of a settlement for that of counsel ultimately associated with the litigation and consequently far more able to weigh its relative strengths and weaknesses. *Jamison v. Butcher and Sherrerd, 68 F.R.D. 479, 481 (E.D. Pa. 1975)*.

(b) Calculation and Size of Figure

The settlements of $30 million average $790,000 for each 1% of total industry sales during the five year period, 1973 to 1977. The settlement figures were reached by means of a well-documented economicstatistical study. The alleged overcharge on net sales by settling defendants was estimated, and a percentage of those figures was agreed upon as the settlement amount. Sufficient economic data and factual information validate this result. The monies have been invested in interest-bearing Certificates of Deposit and are **[*4]** ready for distribution.

(c) Case Strength

The strength of plaintiffs' case is another factor to be weighed in the approval process. It cannot be estimated with absolute precision in the case of a partial settlement. "… [Class] counsel are naturally reluctant to expose their case to the full view of other parties who are still actively litigating their positions and who are in direct opposition to the stance of plaintiffs and the class." *Seiffer, supra at 629*. Plaintiffs continue to conduct extensive discovery in this case and are convinced that the law and facts would compel a judgment against settling defendants. Of course, counsel for the defendants dispute plaintiffs' claims with great vigor. And unquestionably, there are many intricate issues of law and fact which may be resolved adversely to one side or the other. Given these contingencies, plaintiffs feel that a middle course is prudent, and I have no reason to disagree.

(d) Complexity of Further Suit

All settling parties benefit substantially from this compromise. This litigation has already proven complex and time consuming and may continue to be for some time. By settling, six of the defendants are relieved **[*5]** of the costs in time and expense and the risks involved in further litigation. Plaintiffs are guaranteed an early recovery of at least part of their claims and at the same time eliminate the risk of a totally adverse judgment.

(e) Adequacy

In light of the fact that these settlements are partial in the sense that plaintiffs can pursue their claims against the remaining nine defendants which have substantial assets and earnings, the amount of the settlements are more than adequate.

(f) Opposition

Perhaps the most salient aspect of the settlements is that the terms have not been opposed by any members of the classes, thus demonstrating that in the view of many, the settlements are fair, reasonable and adequate.

Accordingly, the settlements are approved.

II. Objections of the State of New York to the Proposed Settlements

The State of Connecticut filed an amended complaint in the Fine Paper litigation purporting to act "… on behalf of all persons and governmental entities in the United States…" In its motion for class certification, however, Connecticut requested to be designated class representative of a class consisting solely of the State of Connecticut and all **[*6]** governmental subdivisions within that state. The court granted the request and certified a statewide governmental entity class for Connecticut. This class is participating in the settlement with the six mill defendants.

The state of New York has filed objections to the proposed settlement contending that it relied upon Connecticut's representation of a nationwide class of governmental entities but that Connecticut is going to participate in the settlement only on behalf of itself and its political subdivisions. New York also has asked leave to serve special interrogatories directed to special counsel for Connecticut to which Connecticut has objected.

New York is not a named plaintiff, nor is it a member of any class certified in this litigation, and, therefore, it does not have standing either to object to the settlements or to serve interrogatories.

New York argues that under *Fed. R. Civ. Pro. 23(e)*, a noncertified class cation cannot be dismissed or settled without court approval. In support of this contention, New York relies on cases which hold that in the pre-certification stage, a suit filed as a class action is treated as such for purposes of compromise or dismissal. **[*7]** *Kahan v. Rosenstiel, 424 F. 2d 161 (3d Cir. 1970)*; *Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971)*; *Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970)*; *Philadelphia Electric Company, supra.*

In all of these cases, however, the class representative sought either a complete dismissal of the class action or a compromise before the class had been certified. Here, Connecticut is not attempting to dismiss or settle the claims of a nationwide class. It is acting only on behalf of itself and its political subdivisions. There is no abandonment of any member of a nationwide class of governmental entities since such a class has not been certified. See *Wood v. RexNoreco, Inc., 61 F.R.D. 669 (S.D.N.Y. 1973)*. Thus, there is no prejudice to New York since none of its claims [3] or rights will be compromised by Connecticut. Moreover, there is no prejudice to New York by reason of the passage of time since under the rule of *American Pipe and Construction Co. v. Utah, 414 U.S. 538 38 L. Ed. 2d 713 (1974)*, the statute of limitations was tolled from the commencement of the action by Connecticut to at least the date of the entry of the order designating the classes on February 16, 1979. **[*8]** [4]

III. Objections of the State of Washington

[3] It is not certain that New York has any claims. According to papers filed in support of its objections, New York states "[To] date… New York has not been shown sufficient evidence upon which a responsible complaint of its own could be based." (Objections of the State of New York to the Proposed Settlement with Certain Defendants, p. 5, filed 8/20/79).

[4] The record discloses that New York had knowledge that Connecticut intended to limit its class representation. (Response to Objections of the State of New York to the Proposed Settlement with Certain Defendants, exhibit B, filed 9/7/79).

In addition, notice of class designation excluding a nationwide governmental class was published on July 2, 1979 in the Wall Street Journal.

The state of Washington has filed a Notice of Exclusion of Claims from Class Action and Proposed Settlement. The claims to which Washington refers are those purportedly assigned to the state by various paper merchants. Whenever the state purchased fine paper in the years involved in this litigation, the purchase orders contained the following clause.

Vendor and Purchaser recognize that **[*9]** in actual economic practice overcharges resulting from antitrust violations are in fact borne by Purchaser. Therefore, Vendor hereby assigns to Purchaser any and all claims for such overcharges. (Notice of Exclusion of Claims from Class Action and Proposed Settlement, p. 2, filed 8/20/79).

Based on this provision, Washington maintains that it can split its claims out of the settlement either to pursue them in a private suit or assert them in this litigation.

These claims cannot be excluded from the settlement for two reasons. First, assuming arguendo that the claims are validly assigned, Washington was not timely in objecting or opting out. The Notice of Exclusion is an ambiguous pleading which does not comport with the established optout procedure.

Second, to allow Washington's claims to be split out of the settlement would result in an impermissible fragmentation of the suit. ***HN3***[] Each merchant has one cause of action against a defendant for antitrust violations. This claim is either retained by the merchant or assigned to another. Washington's conception implies that a merchant's right of action is divided into as many claims as there are resales. Each resale then would **[*10]** constitute a separate cause of action against defendants.

One claim does not give rise to separate actions to be prosecuted by different plaintiffs. The law prohibits such splintering of actions and multiplications of suits.

… [In] accordance with public policy, partially to conserve the court's time but probably in the main to prevent the hardship upon defendant of unnecessary piecemeal litigaion, a single cause of action cannot be split so as to be properly made the subject of different actions… 1B Moore's Federal Practice P0.410[2].

HN4[] In the area of antitrust, this policy against fragmentation has been buttressed by the Supreme Court's decision in *Ill. Brick Co. v. Ill., 431 U.S. 720, 52 L. Ed. 2d 707 (1977)*, reh. denied *434 U.S. 881 (1977)*. The Court ruled that the "pass-on" theory of ***antitrust law*** (i.e., overcharges are "passed on" at every step in the chain of distribution) cannot be used in litigation, either offensively or defensively. The practical effect of this decision is to allow only direct purchasers to sue for damages under the antitrust laws. One prong of the Court's analysis was the potential problems of multiple litigation and liability.

Permitting **[*11]** the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery amount all potential parties that could have absorbed part of the overcharge… However appealing this attempt to allocate the overcharge might seem in theory it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness, *431 U.S. at 737*.

To allow Washington to assert these "partial assignments" would essentially effect a circumvention of the holding and rationale of Illinois Brick. The merchants, as direct purchasers, would retain their claims except for the resales to Washington. Washington would then seek to sue the manufacturers on the basis of indirect purchases.

Furthermore, *Fed. R. Civ. Pro. 23* is designed to prevent a multiplicity of suits which can be conveniently litigated in one forum as a class action. Washington's assignment theory is totally inconsistent with the present state of the law and, therefore, its attempt to opt out unspecified parts of the claims of unidentified middleman must be denied.

Oleksy v. Sisters of Mercy

Court of Appeals of Michigan

August 29, 1979, Submitted ; October 2, 1979, Decided

Docket No. 44455

Reporter

92 Mich. App. 770 *; 285 N.W.2d 455 **; 1979 Mich. App. LEXIS 2395 ***; 1980-1 Trade Cas. (CCH) P63,066

OLEKSY v. SISTERS OF MERCY OF LANSING, MICHIGAN

Subsequent History: [*1]** Leave to appeal applied for.

Leave to appeal denied by *Olesky v. Sisters of Mercy of Lansing, Mich., 408 Mich. 882, 1980 Mich. LEXIS 395 (1980)*

Disposition: Affirmed, and the cross-appeal is dismissed.

Core Terms

attorney general, anti-trust, charitable trust, plaintiffs', Appeals, quo warranto, restrictions, ultra vires, non-profit, parties, convey, merger, deed, summary judgment motion, witnesses, purposes, terms

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Conferences > General Overview

HN1[] **Pretrial Matters, Conferences**

A pre-trial order limiting the issues to be presented at trial controls the subsequent course of the litigation. Mich. Gen. Ct. R. 301.3 (1963).

Civil Procedure > ... > Justiciability > Standing > General Overview

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Estate, Gift & Trust Law > Trusts > General Overview

HN2[] **Justiciability, Standing**

Prosecution of violations of the terms of a charitable trust has, by Michigan statute, been assigned exclusively to the attorney general.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN3[] **Business & Corporate Law, Nonprofit Corporations & Organizations**

Michigan's General Corporation Act provides: § 125. Any non-profit corporation, the objects of which require the transaction of business the care and custody of property, shall have the right and power to acquire, hold, protect and convey such properties as are naturally or properly within the scope of its articles. Mich. Comp. Laws Ann. § 450.125 (Mich. Stat. Ann. § 21.126).

Business & Corporate Law > Corporations > Articles of Incorporation & Bylaws > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Business & Corporate Law > Corporations > Corporate Governance > General Overview

HN4[] **Corporations, Articles of Incorporation & Bylaws**

Michigan's Business Corporation Act provides, in part, that a corporation, subject to any limitation provided in this act, in any other statute of this state or in its articles of incorporation, shall have power in furtherance of its corporate purposes to: purchase, receive, take by grant, gift, devise, bequest or otherwise, lease or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with, real or personal property, or an interest therein, wherever situated; sell, convey, lease, exchange, transfer or otherwise dispose of any of its property, or an interest therein, wherever situated. *Mich. Comp. Laws Ann. § 450.1261* (Mich. Stat. Ann. § 21.200(261)).

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Evidence > Inferences & Presumptions > General Overview

HN5[] **Corporate Formation, Corporate Existence, Powers & Purpose**

The burden rests on the one charging ultra vires conduct to sustain the charge.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Estate, Gift & Trust Law > Trusts > Charitable Trusts

HN6[] **Corporate Formation, Corporate Existence, Powers & Purpose**

A violation of the terms of a charitable trust can be an ultra vires act.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Private Actions, Standing**

The persons who are entitled to seek relief under Michigan's anti-trust law are described in two different sections of the law: *Mich. Comp. Laws. Ann. § 445.702* (Mich. Stat. Ann. § 28.32), directs the attorney general or the prosecuting attorney to protect the public interest: For a violation of any of the provisions of this act by any corporation or association mentioned herein, it shall be the duty of the attorney general or the prosecuting attorney of the proper county, to institute proper suits or quo warranto proceedings. *Mich. Comp. Laws. Ann. § 445.711* (Mich. Stat. Ann. § 28.38), permits the enforcement of private rights: In addition to the criminal and civil penalties provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor and to recover two-fold the damages by him sustained.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Quo Warranto

HN8[] **Justiciability, Standing**

Mich. Gen. Ct. R. 715.2(1) (1963) provides that actions for quo warranto shall be brought by the attorney general when the actions are against: (a) persons specified in Mich. Gen. Ct. R. 715.1(1); (b) persons who usurp, intrude into, or wrongfully hold or exercise any office in any public corporation created by the authority of this state; (c) any association, or number of persons, acting as a corporation within this state without being legally incorporated; (d) a corporation that offends against any of the provisions of the act or acts creating, offering, or renewing the corporation; (e) a corporation that violates the provisions of any law by which the corporation shall have forfeited its charter by misuser; (f) a corporation that has forfeited its privileges and franchises by non-user; (g) a corporation that has done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or has exercised any franchise or privilege not conferred upon it by law.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Private Actions, Standing**

The attorney general has authority to prosecute anti-trust actions under Mich. Gen. Ct. R. 713.2 (1963), which has precedence over conflicting *Mich. Comp. Laws Ann. § 445.702*, and his anti-trust power is found within Mich. Gen. Ct. R. 713.2(1)(c)-(g) (1963)--areas where, under Mich. Gen. Ct. R. 713.2(3)-(4), private citizens are given power to act if the attorney general refuses to.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Public Enforcement, State Civil Actions**

Michigan's Anti-Trust Law, *Mich. Comp. Laws Ann. § 445.701 et seq.* (Mich. Stat. Ann. § 28.31 et seq.), provides in part in *Mich. Comp. Laws Ann. § 445.701(1)*, that a trust is a combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes: to carry out restrictions in trade or commerce. Every such trust as is defined herein is declared to be unlawful.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN11[] **Sherman Act, Scope**

Michigan's Anti-Trust Law is patterned after the Sherman Act adopted in 1890. Although Michigan courts are not required to follow the interpretations of the Sherman Act by the federal courts, it is in the federal law where Michigan courts find most discussion relative to the restraint of trade provisions.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

In order to constitute a reasonable restraint of trade, competitors must not be oppressed or coerced; prices must not be arbitrarily fixed or maintained; the quality must not be impaired so that the old price buys a worse article. The fundamental test is a detriment to the public. All the circumstances surrounding the contract should be taken into consideration. The court should consider the relationship of the parties and their relation with the subject matter dealt with, and its relation with the general public, the facts peculiar to the business, its condition before and after the restraint was imposed, the purpose or end sought to be attained.

Headnotes/Summary

Headnotes

1. Trial -- Pretrial Orders -- Course of Litigation.

A pretrial order which limits the issues to be presented at trial controls the subsequent course of the litigation.

2. Parties -- Standing -- Residency.

A party who commences an action in Michigan while then a resident of Michigan does not lose his standing by subsequently removing his residence from the state.

3. Motions -- Summary Judgment -- Allegations -- Res Judicata.

A plaintiff's allegations must be accepted as true when ruling upon a defendant's motion for summary judgment; such a ruling does not decide as a substantive matter that those allegations are in fact true nor is the ruling res judicata as to those matters.

4. Corporations -- Ultra Vires -- Sale of Real Property.

The sale of a hospital by the corporate owner of the hospital was not an ultra vires action where neither Michigan's corporation law nor the articles of incorporation of any of the successive owners of the hospital place any restrictions on the ownership, acquisition or conveyancing of any of the corporation's real or personal assets.

5. Quo Warranto -- Corporations **[***2]** -- Parties -- Court Rules.

An action in quo warranto asserting a violation by a corporation of the state's antitrust laws may be brought by private citizens to enforce a public interest where the Attorney General has refused to bring such an action (GCR 1963, 715.2).

6. Monopolies -- Antitrust Laws -- Detriment to Public Factors Considered.

The fundamental test of whether or not a monopoly violates the ***antitrust law*** is whether there is a detriment to the public; a contract of sale which allegedly creates a restraint of trade should be considered by taking into account such factors as the circumstances surrounding the contract, the relationship of the parties and their relationship to the subject matter dealt with, the subject matter's relation to the general public, the facts peculiar to the business, its condition before and after the restraint was imposed, and the purpose or end sought to be attained.

Syllabus

Stanley P. Oleksy, M.D., and several others brought an action in quo warranto against Sisters of Mercy of Lansing, Michigan and W. A. Foote Memorial Hospital, Inc., seeking to set aside the sale of Mercy Hospital in Jackson by the Sisters of Mercy to W. A. Foote Memorial Hospital. **[***3]** The Jackson Circuit Court, Richard Robinson, J., entered a pre-trial order limiting the issues at trial to whether the defendants exceeded their corporate powers and whether the defendants violated the antitrust laws. Trial was held on these issues and a judgment was entered for the defendants. The plaintiffs appeal, and the defendants cross-appeal raising various issues challenging the plaintiffs' ability to maintain the action. *Held*:

1. Plaintiff Oleksy did not lose his standing to participate in the action by virtue of his removing his residence from the state after the action was commenced.

2. In the pleadings of a previous action between these parties it was alleged that the Sisters of Mercy held the property as a charitable trust. That action was concluded by a summary judgment for the defendants. For purposes of the summary judgment the plaintiffs' allegations were necessarily accepted as true, but the summary judgment was not res judicata as to the issue because the issue was not decided as a substantive matter.

3. The Sisters of Mercy did not abuse their corporate authority or engage in ultra vires conduct in selling the hospital. No restrictions on the ownership, **[***4]** acquisition or conveyancing of property were placed in the articles of incorporation of the Sisters of Mercy or any of the previous successive owners of the hospital, nor are any such restrictions contained in the corporation laws of the state.

4. The plaintiffs have standing to assert a violation of the state's antitrust laws by virtue of a court rule which allows private citizens to act to prosecute antitrust actions where the Attorney General, who has statutory authority to bring such an action, has refused to do so.

5. The sale of Mercy Hospital did not violate the antitrust laws of Michigan. The sale was not made with the purpose of restricting trade or commerce, the record does not indicate that the sale created a monopoly in hospital care in Jackson County, the business is a highly regulated one, and the evidence does not indicate that the quality of care changed after the sale or that the price of care is significantly different than elsewhere.

Counsel: *Alvin G. Dahlem* and *Phillip H. Berkemeier*, for plaintiffs.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *John H. Schomer, Jack C. Radcliffe, Jr*., and *James B. Falahee, Jr.)*, for W. A. Foote Memorial Hospital, **[***5]** Inc.

Colombo & Colombo (by *Louis J. Colombo, Jr*., and *Lawrence F. Raniszeski)*, for Sisters of Mercy of Lansing, Michigan.

Judges: J. H. Gillis, P.J., and R. B. Burns and N. J. Kaufman, JJ.

Opinion by: PER CURIAM

Opinion

[*772] **[**456]** The plaintiffs in this cause appeal from an order of the Jackson County Circuit Court denying their action in quo warranto seeking to set aside the sale of Mercy Hospital in Jackson, Michigan, by defendant Sisters of Mercy of Lansing, Michigan, to defendant W. A. Foote Memorial Hospital.

After a pretrial conference, the trial court entered a pretrial order limiting **[**457]** the issues to be presented at trial to: whether defendants have **[*773]** exceeded their corporate powers; and, whether defendants have violated the anti-trust laws. It is fundamental that this ***HN1***[] pre-trial order controls the subsequent course of the litigation. See GCR 1963, 301.3 and *Bednarsh v Winshall, 374 Mich 667; 133 N.W.2d 202 (1965)*.

After an extensive trial upon these questions, the trial court set forth its conclusions in a well-written, well-reasoned opinion. We recognize the trial court's unique position, allowing it to survey the briefs and facts **[***6]** presented first-hand, and observe the witnesses appearing before it. Moreover, we find ourselves in complete accord with the trial court's conclusions. Therefore, as we do not feel that we can improve upon the trial court's opinion, we adopt it as our own and set it forth in full herein. Our adoption of this opinion necessarily renders moot the various procedural challenges to plaintiffs' maintenance of this action that defendants have raised in their cross-appeal, to-wit: questions of standing, estoppel, laches, and res judicata.

As the trial court stated:

"This is an action in the nature of quo warranto seeking to set aside the August 29, 1975, sale of Mercy Hospital in Jackson, Michigan, by defendants, Sisters of Mercy of Lansing, Michigan (hereinafter called 'Mercy'), to defendant, W. A. Foote Memorial Hospital, Inc. (hereinafter called 'Foote'). At that time Foote operated a private non-profit hospital in Jackson and the Sisters of Mercy operated Mercy Hospital also in Jackson. Prior to the sale of Mercy Hospital to Foote, plaintiffs had unsuccessfully attempted to purchase Mercy Hospital. The plaintiff, Committee to Preserve Mercy Hospital, is a non-profit corporation **[***7]** organized for the purpose of taking over ownership and operation of Mercy Hospital.

"In 1975, the Sisters of Mercy entered into an agreement to sell Mercy Hospital to Foote, such agreement **[*774]** being consummated on August 29, 1975. On July 31, 1975, while negotiations between the Sisters of Mercy and Foote were still pending, the individual plaintiffs filed a complaint against the Sisters of Mercy (Jackson County No. 75-004921-CZ) seeking a preliminary injunction restraining the Sisters of Mercy from conveying Mercy Hospital; an injunction restraining the Sisters of Mercy from using the proceeds from such sale in any community other than Jackson; and an order transferring Mercy Hospital to a then unspecified group. This complaint (hereinafter called 'Oleksy I') alleged that the proposed sale violated a charitable trust created by the contributions of plaintiff and others.

"In response to this complaint, the Sisters of Mercy filed a motion for summary judgment, which was heard by Judge Russell Noble on August 5, 1975, together with a motion to intervene filed by Bruce A. Barton, then prosecuting attorney for Jackson County. On August 11, 1975, Barton filed an amended motion **[***8]** to intervene which attached a proposed complaint of intervener. In addition to adopting all the allegations of the Oleksy I complaint, Barton's complaint set forth the basis for an action in the nature of Quo Warranto. He further alleged that the Sisters of Mercy lacked corporate authority to convey the hospital facilities to Foote.

"On August 15, 1975, Judge Noble dismissed Oleksy I and denied Barton's motion to intervene, holding that the Attorney General was the proper party to maintain the actions since the complaints sought enforce the terms of a charitable trust under *MCLA 554.351 et seq.*

"Motions for rehearing were filed by the parties and denied and plaintiffs appealed to the Michigan Court of Appeals. Barton took no appeal. However, on August 19, 1975, Barton filed a complaint in the nature of Quo Warranto (Jackson County Circuit Court No. 75-005068-CZ) naming only the Sisters of Mercy as a defendant, this complaint containing essentially the same allegations as were set forth in Oleksy I.

"On September 2, 1975, the Sisters of Mercy filed a motion for summary judgment and thereafter Barton filed an amended complaint in the nature of quo **[**458]** warranto adding Foote **[***9]** as a defendant and further alleging that the sale constituted an abuse and misuse of corporate **[*775]** authority between Sisters of Mercy and Foote, and further asserting that the sale constituted a violation of the Michigan Anti-trust Statutes.

"Defendants' motion for summary judgment was granted as to all of plaintiffs' allegations and Barton thereupon appealed to the Michigan Court of Appeals. The two appeals then pending before the Court of Appeals were consolidated for purpose of hearing and disposition, and on March 9, 1977, the Court of Appeals issued an opinion affirming the judgments of dismissal *(Oleksy, et al. v Sisters of Mercy of Lansing, Michigan, et al., 74 Mich App 374 [253 N.W.2d 772 (1977)])*. No appeal was taken by either of the plaintiffs or Barton to the Supreme Court.

"Approximately 10 months later plaintiffs requested and this court granted leave to file a complaint in the nature of quo warranto. The defendants filed motions to set aside the order granting leave to file said action of quo warranto and alternatively for accelerated judgment and summary judgment of dismissal, such motions being denied by this court on April 26, 1978. Defendants **[***10]** then filed an application for leave to appeal and designation of appeal as emergency appeal and a motion for immediate consideration thereof with the Court of Appeals. On June 7, 1978, the Court of Appeals [Docket No. 78-1515] denied defendants' application for leave to appeal for failure to persuade the Court for the need for immediate appellate review. The defendants then filed an application for leave to take an emergency appeal to the Michigan Supreme Court, which application was denied *[403 Mich 827 (1978)]*.

"On October 12, 1978, pursuant to a stipulation of the parties, this court entered an order dismissing all allegations of the complaint respecting the existence and representation of a class of persons in the prosecution of this action.

"Other than the two central issues of ultra vires conduct and violation of the anti-trust laws, which will be addressed last, the pleadings and proofs raised several lesser issues which can be disposed of with little discussion:

[*776] "I

"Should Plaintiff, Stanley P. Oleksy, be dismissed as a party, being no longer a resident of Michigan?

"The answer is no. Defendants have been unable to direct our attention to any authority **[***11]** in support of their claim that one who commences an action in Michigan while then a resident of Michigan, loses his standing by subsequently removing his residence from the state. It is this writer's opinion that the two main issues in this case (ultra vires conduct and anti-trust violations) are not issues which turn on residency.

"II

"Is plaintiffs' claim that the Sisters of Mercy held as trustees of a charitable trust res judicata?

"The answer is no. As pointed out by defendants, their motions for summary judgment, pursuant to GCR 1963, 117.2(1), must accept as true plaintiffs' allegations that Mercy Hospital was held as a charitable trust, and do not constitute an admission by them that such a charitable trust existed. In like manner, the opinion in *Oleksy v Sisters of Mercy, 74 Mich App 374 (1977)*, in ruling on defendants' motion for summary judgment, of necessity, had to accept as true plaintiffs' allegation that the hospital held in charitable trust. It did not decide, as a substantive matter, that such was the case.

"III

"The religious issue.

"Defendants have renewed their challenge to the court's jurisdiction over this dispute on grounds that it is a religious **[***12]** dispute under the *First* and *Fourteenth Amendments to the United States Constitution*. In determining that this court does **[**459]** have jurisdiction, I find nothing in the trial record which would cause a change in this court's opinion dated April 18, 1978.

"IV

"Did defendants, Sisters of Mercy, abuse their corporate authority or engage in ultra vires conduct in selling Mercy Hospital to Foote?

"The answer is no. Plaintiffs presented ten witnesses (counsel stipulated that an additional twenty witnesses **[*777]** would have if sworn and questioned, testified to the same effect) who testified that they made contributions to Mercy Hospital during the hospital fund drive held in the mid-1950's. There was evidence that the solicitation of contributions by Mercy stressed Mercy's desire to continue to provide hospital facilities for the Jackson area. Nine of the ten witnesses stated that they would not have contributed had they known that twenty years later Mercy would sell the hospital and take the proceeds out of the Jackson community (although no clear proof was offered on this subject, defendants did not seriously oppose plaintiffs' claim that the sale proceeds were to be used **[***13]** by Mercy elsewhere than in Jackson).

"The foregoing testimony is supportive of plaintiffs' claim that defendants breached the terms of a charitable trust. However, assuming a charitable trust had been created, the issue of whether its terms were violated by defendants was not before the court, since the Michigan Court of Appeals in *Oleksy I* has determined that ***HN2***[] prosecution of such violations has, by statute, been assigned exclusively to the Attorney General.

"It may well be that had Michigan's Attorney General elected, as did California's Attorney General, to act to prohibit this sale as a violation of the terms of a charitable trust, a Michigan court would have found such violation, based on Mercy's fund solicitations, as did the California court in *Queen of Angels Hospital v Younger, [66 Cal App 3d 359]* 136 Cal Reptr 36 (1977). Our Attorney General did not so elect.

HN3[] "Michigan's General Corporation Act provides:

"'Section 125. Any non-profit corporation, the objects of which require the transaction of business * * * the care and custody of property, * * * shall have the right and power to acquire, hold, protect and convey such properties as are naturally or properly **[***14]** within the scope of its Articles * * *' MCLA 450.125 [MSA 21.126].

HN4[] "Our Business Corporation Act provides:

"'Section 261. A corporation, subject to any limitation provided in this act, in any other statute of this state or in its Articles of Incorporation, shall have power in furtherance of its corporate purposes to:

(f) purchase, receive, take by grant, gift, devise, bequest **[*778]** or otherwise, lease or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with, real or personal property, or an interest therein, wherever situated;

(g) sell, convey, lease, exchange, transfer or otherwise dispose of * * * any of its property, or an interest therein, wherever situated.' *MCLA 450.1261* [MSA 21.200(261)].

"Title to the real estate on which Mercy Hospital is situated was acquired in 1915 by deed (Def Mercy Ex 4) to Sisters of Mercy, Diocese of Detroit, a predecessor to the present defendant, Mercy. This deed contained no restrictions as to the use of the lands or as to reconveyance. The Articles of Association of the grantee (Def Mercy Ex 21b) set forth as the purpose of the corporation 'the diffusing of moral and religious knowledge'.

"In 1937, **[***15]** the Sisters of Mercy, Diocese of Detroit, conveyed the hospital lands by deed (Def Mercy Ex 6) to its successor, Mercy Hospital of the City of Jackson, a non-profit corporation, organized in 1915, whose Articles of Association (Def Mercy Ex 22a) stated its purpose to be:

"'Article II * * * To conduct a hospital and furnish care and medical attendance to sick and disabled persons'.

[460]** This deed (Def Mercy Ex 6) likewise contained no restrictions as to use or as to reconveyance.

"In 1946, Mercy Hospital of the City of Jackson conveyed the hospital lands by deed (Def Mercy Ex 8) to its successor, The Sisters of Mercy, Lansing, Michigan. This deed, like the others, contained no restrictions as to use or as to reconveyance. The Articles of Incorporation of this non-profit corporation (Def Mercy Ex 25) set forth its purpose as:

"'Article II. To establish, maintain and conduct charitable institutions in the State of Michigan for the care and relief of indigent and other sick, infirm, aged or orphaned persons; * * * to perform corporal * * * works of mercy and to hold, own, manage and control real and personal properties and funds to be used for the * * * purposes aforesaid'.

[*16]** "In 1976, subsequent to the sale which is the subject **[*779]** of this lawsuit, The Sisters of Mercy, Lansing, Michigan merged with the following:

The Sisters of Mercy of Hammond, Indiana

The Sisters of Mercy of Grand Rapids

St. Joseph's Mercy Hospital of Dubuque (Iowa)

Sisters of Mercy Health Corporation

St. Joseph's Mercy Hospital of Detroit to form the present ownership of the hospital lands in question, Sisters of Mercy Health Corporation. The plan of merger (Def Mercy Ex 25) adopted as the purposes of the Health Corporation the purposes of its constituent predecessors.

"The proofs indicate that the original corporation, Sisters of Mercy, Diocese of Detroit, owned and operated various hospitals throughout Michigan, one of which is the hospital owned and operated by defendant, Mercy, in Jackson.

"Neither Michigan's corporation laws nor the Articles of Incorporation of the successive owners of the hospital at Jackson place any restrictions on the ownership, acquisition or conveyancing of real or personal assets. As pointed out by defendant, Mercy, in its brief, ***HN5***[] the burden rests on the one charging ultra vires conduct to sustain the charge. *American Employers' Insurance* ***[***17]*** *Company v H G Christman & Bros Co, 284 Mich 36, 43 [278 NW 750 (1938)]*. This plaintiffs have not done.

"Plaintiffs apparently rely on *Queen of Angels Hospital v Younger, supra*, to support their claim that ***HN6***[] a violation of the terms of a charitable trust can also be an ultra vires act. This writer does not quarrel with such a contention, but merely points out, as was pointed out by the California court, that the power given to the Angels of Mercy by its Articles of Incorporation 'to establish, own, maintain and operate a hospital in the City of Los Angeles' did not include the power to abandon its hospital in favor of out-patient clinics. No comparable restriction on the instant conveyance is contained in Mercy's Articles of Incorporation.

"V

"Do plaintiffs have standing to assert a violation of Michigan's anti-trust laws?

"The answer is yes. ***HN7***[] The persons who are entitled to **[*780]** seek relief under Michigan's anti-trust law are described in two different sections of the law:

" *MCLA 445.702* [MSA 28.32] directs the Attorney General or the Prosecuting Attorney to protect the public interest:

"'For a violation of any of the provisions of this act by any corporation **[***18]** or association mentioned herein, it shall be the duty of the attorney general or the prosecuting attorney of the proper county, to institute proper suits or quo warranto proceedings * * *'

" *MCLA 445.711* [MSA 28.38] permits the enforcement of private rights:

"'In addition to the criminal and civil penalties provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor * * * and to recover **[**461]** two-fold the damages by him sustained * * *'

"Defendants are correct in asserting that plaintiffs have no standing to sue to enforce a private right under the act because they are not engaged in commerce and they have not shown any injury to their business or property. (See *MCLA 445.711* above.)

HN8[] "GCR 1963, 715.2 provides:

"'(1) *Actions by Attorney General*. Actions for quo warranto shall be brought by the Attorney General when the actions are against:

(a) persons specified in sub-rule 715.1(1);

(b) persons who usurp, intrude into, or wrongfully hold or exercise any office in any public corporation created by the authority **[***19]** of this state;

(c) any association, or number of persons, acting as a corporation within this state without being legally incorporated;

(d) a corporation that offends against any of the provisions of the act or acts creating, offering, or renewing the corporation;

(e) a corporation that violates the provisions of any law by which the corporation shall have forfeited its charter by misuser;

[*781] (f) a corporation that has forfeited its privileges and franchises by non-user;

(g) a corporation that has done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or has exercised any franchise or privilege not conferred upon it by law.'

"Our Court of Appeals in *Oleksy I, supra*, in holding that ***HN9***[] the attorney general has authority to prosecute anti-trust actions under the above rule, not only gave the rule precedence over conflicting *MCLA 445.702*, but found his anti-trust power within subsections (c)-(g) above -- areas where, under subsections (3) and (4) of the Rule, private citizens are given power to act if the attorney general refuses to. Plaintiffs are correct when they say that they have stepped into the attorney general's **[***20]** shoes to enforce a public interest.

"VI

"Did the sale of Mercy Hospital to Foote violate Michigan's anti-trust law?

"The answer is no. ***HN10***[] Michigan's Anti-Trust Law, *MCLA 445.701* [MSA 28.31] *et seq*. provides:

"'445. 701 Sec. 1. That a trust is a combination of capital, skill or arts by 2 or more persons, firms, partnerships, corporations or associations of persons, or of any 2 or more of them, for either, any or all of the following purposes:

1. To carry out restrictions in trade or commerce.

5. * * * Every such trust as is defined herein is declared to be unlawful * * *'

"As stated in *Barrows v Grand Rapids Real Estate Board, 51 Mich App 75 [214 N.W.2d 532] (1974)*:

HN11[] "'The Michigan Act is patterned after the Sherman Act adopted in 1890. Although Michigan courts are not required to follow the interpretations of the Sherman Act by the federal courts, it is in the federal law where we find most discussion relative to the restraint of trade provisions'.

"58 CJS 989-90 has this to say about the factors to be considered in determining whether one is looking at a monopoly which violates or does not violate the Sherman Act (so far as those factors are applicable to this case): **[***21]** ***HN12***[]

[*782] "'* * * in order to constitute a reasonable restraint of trade, competitors must not be oppressed or coerced; prices must not be arbitrarily fixed or maintained; the quality must not be impaired so that the old price buys a worse article * * * The fundamental test is a detriment to the public. All the circumstances surrounding the contract should be taken into consideration. The court should consider the relationship of the parties and their relation with the subject matter dealt with, and its relation with the general public, the facts peculiar to the business, its condition before and **[**462]** after the restraint was imposed, the purpose or end sought to be attained.'

"We shall attempt an analysis of the facts in this case in light of these factors, not necessarily in the order mentioned above.

"1. *All the circumstances surrounding the contract and the relationship of the parties*. Mercy Hospital has served the City of Jackson and its environs since 1915. In the late 1960's the sisters who operated the hospital were confronted with two problems, (i) they were unable to attract nuns in sufficient numbers to staff the hospital, (ii) in order to meet state standards, **[***22]** they would have to spend several millions of dollars in renovations. This would require them to assume a debt which they felt unable to meet. In 1973, they publicly announced their decision to withdraw from operation of the hospital, and invited the citizens of the area to assume ownership and operation of the hospital. For 15 months, the sisters engaged in negotiations with a group, composed in part of these plaintiffs, directed to that end. When these negotiations collapsed, the contract of sale which is before us was entered into between Mercy and Foote.

"This situation contains some of the element of 'economic necessity' found by our Supreme Court in *Attorney General, ex rel. State Banking Commissioner v Michigan National Bank; Grand Ledge State Bank v State Banking Commissioner, 377 Mich 481 [141 N.W.2d 73] (1966)*, as a justification for permitting the reduction of banking services in the City of Grand Ledge from two to one bank. Another aspect of the Grand Ledge merger situation which the court looked upon with **[*783]** favor was the 'open and competitive bidding' by two outside banks prior to the merger. Although our record does not reveal competitive bidding between **[***23]** Foote and any other bidder, it was only after 15 months of negotiations between Mercy and other interested parties failed that Foote entered the picture. In the absence of evidence to the contrary, Foote's offer, made only after another offer had been rejected, points to a purpose other than one to restrict trade or commerce. Surely lacking here is the picture of 'high finance and less lofty subterfuge' which the court found so repugnant in *Peoples Savings Bank v Stoddard, 359 Mich 297 [102 N.W.2d 777] (1960)*.

"2. *The parties relation with the subject matter dealt with and its relation to the general public*. Both Mercy and Foote and their predecessors, have been in the health care business for many years, and it is probably safe to say that between them they have provided most of the health care for the residents of the City of Jackson and the immediately surrounding area. Nothing in the record indicates that either party has offered any specialized hospital care which could characterize them as other than general hospitals. The single difference between them may be that Mercy espoused a prolife philosophy and Foote did not.

"One witness testified that the 'primary service **[***24]** area' for both Mercy and Foote was Jackson County. On the other hand, the testimony of other witnesses indicated that a substantial number of Jackson County residents use hospitals in adjoining counties. It does not appear from this record that Foote and Mercy, before their contract, enjoyed a hospital care monopoly in Jackson County, or that Foote enjoys one since their contract, either geographically or as to types of service offered. Additionally, as to the service aspect of the claimed monopoly, the record indicates that while Foote is now the only allopathic hospital left in Jackson County, osteopathic doctors serve on its staff as well as on the staff of the county's only osteopathic hospital. This issue is probably made moot however by the evidence to the effect that the distinctions between allopathy and osteopathy are rapidly disappearing if not already extinct.

"3. *The facts peculiar to the business*. The hospital **[*784]** care business in Michigan is a highly regulated industry. Cost containment restrictions are imposed upon all hospitals not only by state but by federal agencies. In addition, cost controls are imposed indirectly by the three major third party **[***25]** payors (Blue Cross/Blue Shield, Medicare and Medicaid) as a result of the restrictions which they attach to their hospital reimbursement. Although, none of the agencies **[**463]** can absolutely control a hospital's costs or charges, it is safe to say that both of these items are highly controlled. Likewise, through their sanctions, these agencies are able to exercise a measure of control over the quality of physical plant, equipment and care.

"4. *The condition of the industry before and after the contract*. This is directed to the quality of care and the level of patient care charges, before and after the contract of merger. Plaintiffs offered no proofs as to the quality of care at either Mercy or Foote, either before or after the merger, so one must assume that it is at least no worse now than it was before.

"Plaintiffs' witness, Furlong and Denton, testified that the situation since the merger places it within the power of Foote to control prices without limitations. This flies in the face of existing facts: a plaintiffs' witness testified that the cost of a bed in the intensive care unit had gone from $ 111.00 per day at Mercy in 1974 to $ 269.00 per day at Foote in **[***26]** 1978. No information was supplied concerning what portion of the increase resulted from inflation. His testimony that the highest cost for intensive care unit care elsewhere in the state in 1978 was $ 190.00 was contradicted by testimony of defendant's witness who testified that hospitals comparable to Foote and with comparable ICU charged between $ 200.00 and $ 300.00 per day. Defendant's witness further testified that patient per day cost at Foote for the 12 month period ending March 31, 1978, was $ 167.00, and that the average for the twenty-six other hospitals within the same category for the same period was $ 190.00.

"Summing up, I cannot find a monopoly in this record. And if one does exist, I find no intent to restrict trade thereby, nor any such restriction in fact.

"In view of the rulings herein on the issues of ultra **[*785]** vires conduct and violation of the anti-trust laws, it is not necessary to discuss the issues of estoppel and laches raised by defendants.

"Judgment may enter for defendants in accordance with this Opinion. No costs, a public question being involved.

"Dated February 7, 1979.

/s/Richard Robinson

Circuit Judge."

In recognizing the wisdom **[***27]** of this trial court opinion, we are not unmindful of the factors that prompted plaintiffs' actions. It is difficult to accept change, especially where, as here, a hospital facility, owned and operated by the Sisters of Mercy for so many years, is sold. Many emotions are aroused when such a sudden transfer occurs. Historical, ethnic, and sentimental values all come into play with the emphasis placed on preservation.

On the other hand, however, neighborhoods and businesses, including non-profit organizations, as here, do change with the times. This might be for any number of reasons. In the instant case, it was mainly due to financial pressures. Realistically, when all the legal arguments are set aside, what we have here is a sale from a willing seller to a willing buyer. Our sympathies go out to the plaintiffs who might feel abandoned by this transaction. Legally, however, we deem it to be a proper one.

Affirmed; defendants' cross-appeal is dismissed. No costs, a quasi-public question being involved.

Citicorp v. Interbank Card Asso.

United States District Court for the Southern District of New York

October 3, 1979

No. 78 Civ. 1632 (JMC)

Reporter

478 F. Supp. 756 *; 1979 U.S. Dist. LEXIS 9371 **; 1980-1 Trade Cas. (CCH) P63,108

CITICORP and CITICORP SERVICES, INCORPORATED, Plaintiffs, against INTERBANK CARD ASSOCIATION, et al., Defendants, against CITIBANK, N.A., et al., Counterdefendants.

Core Terms

travelers, checks, credit card, parties, counterclaim, issuer, card, allegations, defendants', purchaser, selling agent, confidential, subsidiary, Counts, disclosure, antitrust, discovery, merchants, banks, cardholder, contracts

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN1[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

It would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Not all conduct that might be characterized as advocacy before legislative, administrative or judicial bodies is automatically protected. That the objective of perjury, fraud, and bribery may be to influence some governmental action can hardly be considered redeeming. Consequently, there are exceptions to the rule that resort to governmental bodies is conduct immune from antitrust attack. Where such conduct is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor application of the Sherman Act would be justified. Similarly, where the objective of the conduct is to harass and deter competitors from having free and unlimited access to the agencies and courts, it will not be immune.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN3[] Exemptions & Immunities, Noerr-Pennington Doctrine

Where conduct properly proscribed is coupled with conduct protected by the *first amendment*, the latter does not cure the former. *First Amendment* rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. They may not be used as the means or the pretext for achieving substantive evils, which the legislature has the power to control. Thus, an otherwise illegal scheme to restrain competition is not legitimated simply because it includes plans to lobby the legislature, commence a lawsuit, or speak to the press.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Tying Arrangements, Clayton Act

Where a corporation and its wholly owned subsidiary avail themselves of the privilege of doing business through separate corporations, the fact of common ownership can not save them from any of the obligations that the law imposes on separate entities. As a general proposition, a parent and its subsidiary may constitute independent conspirators purposes of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. Whether or not the affiliated corporations are competing or non-competing is not dispositive; even non-competing affiliated corporations may act in concert to adversely affect free market competition, e.g., by tying one product to another; by compelling restrictive purchase agreements; by fixing maximum resale prices.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN5[] Defenses, Demurrers & Objections, Motions to Strike

A pleading should be stricken only when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis; otherwise it would deprive a party of his right to a trial of the issues posed by his complaint it would mean trial by affidavits.

Civil Procedure > Judicial Officers > Magistrates > Duties & Powers

Governments > Courts > Judges

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Civil Procedure > Judicial Officers > Magistrates > Trial by Consent

Civil Procedure > Judicial Officers > References

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN6[] Magistrates, Duties & Powers

A court may reconsider discovery matters referred to a Magistrate pursuant to *28 U.S.C.S. § 636(b)(1)(A)* if the Magistrate's rulings are clearly erroneous or contrary to law. Moreover, in resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused.

Trade Secrets Law > Civil Actions > Discovery

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Trade Secrets Law > Civil Actions > Protection Orders

Trade Secrets Law > Protection of Secrecy > General Overview

HN7[] **Civil Actions, Discovery**

Those who seek to avoid disclosure of commercial information by a protective order under *Fed. R. Civ. P. Rule 26(c)* bear a heavy burden of demonstrating that disclosure will work a clearly defined and very serious injury.

Counsel: [1]** Rogers & Wells, New York City by John J. Sheehy, James B. Weidner, and James V. Ryan, New York City, for plaintiffs and counterdefendants.

Rogers, Hoge & Hills, New York City by Frank H. Gordon, New York City, and Covington & Burling, Washington, D. C. by Harry L. Shniderman, and James C. McKay, Jr., Washington, D. C., for defendants.

Winthrop, Stimson, Putnam & Roberts, New York City by John B. Daniels, New York City, for third party American Express Company.

Opinion by: CANNELLA

Opinion

[*758] MEMORANDUM AND ORDER

Motion to dismiss Counts 1 and 2 of defendants' counterclaim, for failure to state a claim upon which relief can be granted, is denied. *Fed.R.Civ.P. 12(b) (6)*.

Motion to dismiss Count 3 of defendants' counterclaim, on the ground that the defendants do not have standing to raise it, is denied.

Motion to strike portions of defendants' counterclaims, as sham and false, is denied. *Fed.R.Civ.P. 11*.

Defendants' objections, to rulings made by the Honorable Leonard A. Bernikow, United States Magistrate, at a hearing held on October 24, 1978, are dismissed. *28 U.S.C. § 636(b)(1)(A)*.

Defendants' motion, for an Order placing materials on the public record, is denied.

[2]** Jurisdiction in this case is based on *15 U.S.C. §§ 15*, *26*.

[*759] BACKGROUND

The plaintiffs Citicorp and Citicorp Services Inc. ("CSI") are Delaware and New York corporations, respectively, both with their principal places of business in New York City. Citicorp conducts a wide range of financial and banking activities, and most pertinent to the instant case, is the issuer of "First National City Travelers Checks," which CSI, its wholly owned subsidiary, distributes and sells.

The defendants Interbank Card Association ("Interbank") and MCTC Corporation ("MCTC") are both not-for-profit membership corporations organized under the laws of Delaware, with their principal places of business in New York City. The defendant John J. Reynolds is President and a director of both Interbank and MCTC. Interbank has over 8,000 members, largely commercial banks and other thrift institutions located throughout the United States. It is the owner and exclusive licensor of the service mark "Master Charge" and an accompanying logo, which it has licensed most of its members to use on credit cards. Interbank is governed by a Board of Directors selected by its members.

According to the complaint, **[**3]** some of Interbank's members created MCTC for the purpose of entering the travelers check market. The defendants concede, as they must to uphold MCTC's standing to raise its counterclaim, that Interbank has licensed MCTC to use the "Master Charge" service mark and logo on travelers checks, and that MCTC has definite plans to issue, distribute and sell "Master Charge Travelers Cheques" through the members of Interbank.

A travelers check is a device for payment. Its "issuer" is the company that prints the check and offers it for sale, usually through a bank acting as selling agent. The check, which is customarily issued in various standard denominations of American or foreign currency, is much like a cashier's check in that the issuer is, in effect, drawer and drawee. [1.] Upon purchasing a travelers check, the purchaser must sign it in the presence of the selling agent. Then, upon negotiating the check, the purchaser must fill in the date and countersign it in the presence of the person who accepts it as payment. He may also designate that person as payee. The extent of the issuer's promise is to pay on demand the amount indicated by the denomination of the check, provided that **[**4]** the check is properly countersigned, and, in the event that the check is lost or stolen, after having been signed at purchase, but before being countersigned, to provide the purchaser with an immediate refund or replacement. [2.]

Although they have been in use since 1891, the legal status of travelers checks remains largely unresolved. [3.] They have been characterized as "contracts," [4.] "money," [5.] **[**6]** and various types of "negotiable instruments, **[*760]** " [6.] including "cashier's checks" [7.] and "certificates of deposit." [8.] Fortunately, for the purposes of this case, their

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1. See 6 Michie on Banks and Banking 363 (rev. perm. ed. 1975).

2. See Hawkland, American Travelers Checks, 15 Buffalo L.Rev. 501, 502-07 (1966).

3. See id. at 501.

4. See id. at 522; Brady on Bank Checks § 1.6A (1978 Cum.Sup.No. 1).

5. See *Ashford v. Thos. Cook & Son (Bankers) Ltd., 52 Haw. 113, 471 P.2d 530, 42 A.L.R.3d 836 (1970)*.

It is common knowledge that any establishment issuing travelers checks intends its checks to be readily and freely passable from one person to another as money. This is not only intended, but it is widely advertised that travelers checks are readily accepted in commerce as money and that they are safer. The public is made to believe that travelers checks are a substitute for money, a medium of exchange, which are self-identifying and accepted everywhere, but, unlike currency, they can be carried without danger of loss or theft because of the protective device of signature and countersignature.

We believe that if travelers checks are intended by the issuer and accepted by the public as a medium of exchange to take the place of money, they should be subjected to the same rules of law applicable to money under like circumstances.

We therefore hold that travelers checks upon being printed become a medium of exchange or acquire negotiable characteristics and all the risk of theft is with the issuer. The issuer is thus liable to any bona fide holder of stolen travelers checks who has paid valuable consideration.

471 P.2d at 533-34, 42 A.L.R.3d at 842-43.

6. Official comment 4 of *section 3-104 of the Uniform Commercial Code* provides: "Traveler's checks in the usual form . . . are negotiable instruments under this Article when they have been completed by the identifying signature."

commercial attributes are more important than their legal ones. Because they are issued in standard denominations, easily negotiated, and readily accepted worldwide, they are the virtual equivalent of money, but because of the issuer's promise to refund or replace lost or stolen checks, they **[**5]** are safer.

The issuer's gain from the sale of travelers checks derives from two sources. One is a "commission," as much as one percent of the face amount of the check, charged to the purchaser, a portion of which the selling agent retains. [9] **[**7]** The other is the "float," which is the money paid for the checks which remains at the disposal of the issuer until the purchaser negotiates them. [10] An established issuer doing a steady business can expect a steady "float," and thus will have a fairly constant amount of money available for investment. According to one estimate, American Express had a $ 1.9 billion float at the end of 1977. [11]

The market in United States dollar travelers checks is highly concentrated. Estimates vary, and, of course, ultimate proof on this question must await trial, but many sources suggest that 90% To 95% Of the United States dollar travelers checks sold are issued by three companies: American Express, with approximately 55% To 60% Of sales; Citicorp, with approximately 20%; and BankAmerica Corp., with approximately 15%. Other issuers with small market shares are Thos. Cook & Son (Bankers) Ltd., Barclays Bank, and Republic Money Orders, Inc.

Citicorp and CSI filed the complaint in this case on April 12, 1978, charging that the defendants' plan to issue and market Master Charge Travelers Cheques violates *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and *section 7* of the Clayton Act, *15 U.S.C. § 18*. Plaintiffs allege that purchasers of travelers checks ordinarily do not express a strong preference for a particular brand, and that **[**8]** the vast majority of purchasers will actually accept whatever check a selling agent offers them. Since most selling agents are banks that are also members of Interbank, plaintiffs contend that Interbank would be in a unique position to determine the brand purchased by most purchasers of travelers checks. No other issuer would have such power at the "point of sale." According to plaintiffs, the members of Interbank would be able to foreclose competition because 90% Of a bank's customers who wish to purchase travelers checks will buy whatever brand the bank favors.

The defendants have counterclaimed against the plaintiffs, and have joined as additional counter-defendants Citibank, N.A., its Senior Vice President David M. Phillips, Citicorp Credit Services, Inc., and Citibank (New York State), N.A. (Hereinafter these parties and the plaintiffs will be referred to collectively as the "Citicorp parties.") Phillips, in addition to being Senior Vice President of Citibank, N.A., has been, at all pertinent times, a director of Interbank.

The counterclaim is divided into three counts. Counts One and Two charge the Citicorp parties with conspiracy "among themselves and with others" to prevent **[**9]** Interbank's and MCTC's entry into the travelers check market. Aside from conclusory allegations, the particular conduct alleged as constituting this conspiracy consists essentially of only six acts or practices: (1) from 1969 through 1977, cooperating with **[*761]** Interbank in the development of Master Charge Travelers Cheques, in the hope of protecting their own "interests in the travelers check field"; [12] (2) when cooperation failed, threatening to sue; [13] (3) publicizing a legal opinion letter that Interbank's and MCTC's proposed entry violated ***antitrust law***; [14] (4) disclosing to a trade publication controlled by American Express a confidential contrary opinion prepared by Interbank's counsel; [15] (5) bringing this suit; [16] and (6) making with CSI's

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7. See 6 Michie on Banks and Banking, Supra, at 363.

8. See *Williams v. Clark, 202 Misc. 1022, 112 N.Y.S.2d 26, 28-29 (Sup.Ct.Broome Co.1952)*.

9. Some issuers charge no commission.

10. See, e.g., Hawkland, Supra, at 506.

11. Paper War: American Express Co. Braces for Competition in Traveler's Checks, Wall St.J., Aug. 30, 1978, at 1.

12. Counterclaim P 14 (filed April 28, 1978).

13. Id. P 10.

14. Id.

selling agents, which, as noted above, are mostly banks, "discriminatory arrangements and contracts . . . (,) the effect of which is to impede or prevent other financial institutions from entering the travelers check market through the Master Charge Travelers Cheque program." [17.] The defendants also allege that Phillips breached his contractual and fiduciary obligations to Interbank by disclosing the confidential legal opinion. **[**10]**

Count Three of the counterclaim alleges that the Citicorp parties have violated ***antitrust law*** also by arranging to acquire Carte Blanche Corporation ("Carte Blanche"). Carte Blanche's principal business is allegedly the issuance of "general purpose credit cards" bearing the "Carte Blanche" service mark and logo, and the provision of services to cardholders and to the merchants who honor the cards. The defendants assert that the acquisition will substantially reduce competition in the general purpose credit card market, as well as the travelers check market, and is therefore prohibited by *section 7* of the Clayton Act, *15 U.S.C. § 18*.

"General purpose credit cards," according to the counterclaim, are "credentials which provide (their holders) with the right to purchase goods or services on credit at a wide variety of business establishments," as distinguished from credit **[**11]** cards issued by individual companies, such as oil companies, airlines, and large retail chains. Allegedly, "(t)here are only five domestic general purpose credit cards accepted on a national scale by merchants and available to consumers": Master Charge, Visa, American Express, Diners Club, and Carte Blanche. [18.]

Like a travelers check, a credit card is a device for payment that is in some ways equivalent to cash. Unlike a travelers check, however, a credit card is also a device for borrowing money. In exchange for goods and services, the cardholder gives the merchant his promise to pay. The "issuer" of the card "in effect finances the merchant's accounts receivable by discounting the sales slips and collecting payment from the cardholder, either at once or on a deferred revolving credit basis." [19.]

[12]** DISCUSSION

Counts One and Two

The Citicorp parties seek dismissal of Counts One and Two of the counterclaim on two grounds. First, they argue that their conduct is protected by the so-called Noerr-Pennington doctrine, which is essentially a claim that it is protected by the *first amendment*. Second, they assert that since they are subsidiaries and an employee of a single corporate entity, they cannot legally be guilty of conspiracy.

In *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, the Supreme Court summarized the principles of its earlier decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*:

> **[*762]** ***HN1***[] (I)t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests Vis-a-vis **[**13]** their competitors.

404 U.S. at 510-11, 92 S. Ct. at 612. The Court noted, however, that ***HN2***[] not all conduct that might be characterized as advocacy before legislative, administrative or judicial bodies is automatically protected. That the objective of perjury, fraud, and bribery may be to influence some governmental action can hardly be considered

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15. Id. P 11.

16. Id. P 12.

17. Id. P 13.

18. Id. P 20.

19. B. Clark & A. Squillante, The Law of Bank Deposits, Collections and Credit Cards 187 (1970).

redeeming. See *id. at 512-13, 92 S. Ct. 609*. Consequently, there are exceptions to the rule that resort to governmental bodies is conduct immune from antitrust attack. Where such conduct is a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . application of the Sherman Act would be justified." *Noerr, supra, 365 U.S. at 144, 81 S. Ct. at 533*. Similarly, where the objective of the conduct is "to harass and deter . . . competitors from having "free and unlimited access' to the agencies and courts," it will not be immune. See *California Transport, supra, 404 U.S. at 515, 92 S. Ct. at 614*.

There is an even more fundamental principle of *first amendment* doctrine which applies here. ***HN3***[] Where conduct properly proscribed is coupled with conduct protected **[**14]** by the *first amendment*, the latter does not cure the former. See, e.g., *Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)*; *Runyon v. McCrary, 427 U.S. 160, 175-76, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)*; *Cox v. Louisiana, 379 U.S. 559, 563, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965)*. As the Supreme Court stated flatly in California Transport, "*First Amendment* rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. . . . (They) may not be used as the means or the pretext for achieving "substantive evils' . . . which the legislature has the power to control." *404 U.S. at 514-15, 92 S. Ct. at 613-614* (citing *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949)*, and *NAACP v. Button, 371 U.S. 415, 444, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963))*. Thus, an otherwise illegal scheme to restrain competition is not legitimated simply because it includes plans to lobby the legislature, commence a lawsuit, or speak to the press. See *Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793, 800* (2d Cir.), Cert. denied, *434 U.S. 923, 98 S. Ct. 400, 54* ***[**15]*** *L. Ed. 2d 280 (1977)*; *United States v. Braniff Airways, Inc., 453 F. Supp. 724, 730-31 (W.D.Tex.1978)*.

The defendants' counterclaim charges that the Citicorp parties entered into discriminatory contracts with the selling agents for First National City Travelers Checks. Although this allegation is rather sparse in detail, the Court finds that, together with allegations of the Citicorp parties' intentions to exclude defendants from the travelers check market, it is sufficient to state a claim upon which relief can be granted. Viewed in a light most favorable to the defendants, the counterclaim alleges that the contracts between the Citicorp parties and the selling agents were designed to prevent or impede new entry into the travelers check market, and that they had that effect. If proven, this could constitute a group boycott violative of *section 1* of the Sherman Act. See, e.g., *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Klor's Inc. v. Broadway-Hale Stores, Inc.. 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Consequently, the counterclaim does not seek to predicate an antitrust violation solely on activity protected by the **[**16]** *first amendment*, and, therefore, cannot be dismissed on the basis of the Noerr-Pennington doctrine.

The second ground proffered for dismissal of Counts One and Two of the counterclaim, namely, that commonly-owned corporate entities cannot be held to have conspired with one another, is not the law. In *Perma Life Mufflers, Inc. v. International* ***[*763]*** *Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*, the Supreme Court held that ***HN4***[] "since (a corporation and its wholly owned subsidiary) 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." *Id. at 141-42, 88 S. Ct. at 1986*. As Judge Neaher has aptly summarized:

> As a general proposition, a parent and its subsidiary may constitute independent conspirators for *§ 1* purposes. . . .
>
> Whether or not the affiliated corporations are competing or non-competing is not dispositive; even non-competing affiliated corporations may act in Concert to adversely affect free market competition, E. g., by tying one product to another; by compelling restrictive purchase agreements; **[**17]** by fixing maximum resale prices.

Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110, 116-17 (E.D.N.Y.1976) (citations and footnotes omitted).

Moreover, the counterclaim alleges that the Citicorp parties entered into discriminatory contracts with selling agents, most of which allegedly are independent banks. Thus, it also alleges a conspiracy with entities that are not Citicorp subsidiaries.

Count Three

The Citicorp parties maintain that Interbank lacks standing to complain of the Carte Blanche acquisition, since Interbank does not actually issue credit cards, but merely licenses its members to use the Master Charge service mark and logo on the cards they issue. They rely primarily on *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970)*, Cert. denied, *401 U.S. 923, 91 S. Ct. 877, 27 L. Ed. 2d 826 (1971)*, in which the Second Circuit held that a franchisor and trademark licensor was an inappropriate plaintiff to sue for "damage caused by illegal interference with the marketing of its franchisees' products." *Id. at 189*.

While it is conceded that Interbank does not issue credit cards, it is not conceded that its interest lies merely in the royalties **[**18]** paid by its members. Interbank allegedly provides the promotional and administrative services without which a credit card would be unmarketable. It advertises the Master Charge mark; without such promotion it is doubtful that merchants would honor the card or that customers would carry it, irrespective of who issued it. In addition, Interbank provides data transmission services to its members. [20]

Most important, credit **[**19]** cards are not soft drinks. The value of a card lies not in its inherent qualities, but in the services to which the card entitles its owner. Competition does not cease when a customer chooses a card from among the "big five." Each time a cardholder uses a card to purchase goods and services from a participating merchant, he purchases commodities and services from the credit card organization: goodwill and credit, and remittance and billing services. Not all issuers provide all these services. Apparently, Carte Blanche does. The banks that issue Master Charge cards do not.

It is therefore inaccurate to say that only issuers compete in the "credit card market," because competition is not limited to signing up cardholders. This is further evidenced by the fact that many persons carry more than one card. Interbank, the actual seller of some of the goodwill and services purchased by holders of Master Charge cards, has a substantial interest in preserving competition for these services, and any conduct that tends to diminish that competition would directly injure Interbank. **[*764]** Thus, Interbank has standing to challenge the Citicorp parties' acquisition of Carte Blanche.

[20]** As to MCTC, the Citicorp parties point out quite correctly that it does not have standing to complain of conduct aimed at the market for credit card services. Nevertheless, the Court is inclined to uphold its standing on two grounds.

First, at this stage of the case, the pertinent product market has yet to be defined. There may be significant "interchangeability of use or . . . cross-elasticity of demand between" credit card services and travelers checks. See *Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1203 (2d Cir. 1978)*. If so, then a merger between a leading issuer of travelers checks and one of the five major providers of credit card services might be shown to diminish competition in a market that properly includes both products. Such a diminution would directly injure a corporation on the verge of entering the travelers check market.

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[20] In *Sulmeyer v. Seven-Up Co., 411 F. Supp. 635 (S.D.N.Y.1976)*, Judge Stewart upheld a soft drink franchisor's standing to complain of unlawful marketing and distribution of soft drinks, where it had been shown that the franchisor:

manufactured concentrates, franchised bottlers, supplied advertising and promotional material, offered substantial assistance to its franchisees, and was actively involved in supervising the work of the franchisees.

Id. at 638. In addition, the franchisor had alleged that the defendants had coerced its potential franchisees to refrain from doing business with it.

Second, MCTC alleges that Citicorp plans to use Carte Blanche as a vehicle for marketing its travelers checks, which, it is claimed, would raise substantial barriers to new entry in the travelers check market. See, e.g., *FTC v. Procter & Gamble Co., 386 U.S. 568, 579, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)*. At this stage, **[**21]** the Court cannot say that this claim is unprovable. And, while MCTC might be in a position to overcome such a barrier by exploiting its relationship with Master Charge card issuers this alone cannot defeat its standing, since it would still have an interest in an unfettered market. The antitrust laws protect "Competition, not Competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*.

Motion to Strike

Counts One and Two also allege that David M. Phillips, Senior Vice President of Citibank, revealed a confidential opinion letter, prepared by Interbank's outside counsel, to Phillip Brooke, who was at the time editor of a trade publication entitled "Action Report." Action Report is published by Payment Systems, Inc., allegedly a subsidiary of American Express. Action Report subsequently published an article written by Brooke which revealed the contents of the letter. The counterclaim further alleges that Phillips was at the time a director of Interbank, and thus had fiduciary obligations not to reveal its confidences.

The **[**22]** Citicorp parties have now moved to strike as sham and false the allegations concerning Phillips. They charge that the only basis for the allegations is speculation. Furthermore, they contend that they have proven them false.

The defendant John J. Reynolds, Chief Executive Officer of Interbank, concedes that he has no direct evidence that Phillips or anyone else at Citibank actually released the opinion letter. He does claim to know, however, that Phillips had the letter, and that as an Interbank director, Phillips voted against the Master Charge Travelers Cheque plan for the express reason that it would be detrimental to Citicorp's travelers check subsidiary, CSI. The defendants also claim to have evidence that CSI, although not an Interbank member, had a copy of the opinion letter before its general publication.

The evidence that purportedly proves the falsity of the allegations consists of the following: (1) Phillips' denial; (2) Brooke's refusal to answer questions as to his source; and (3) a Payment Systems Vice President's disavowal of any knowledge of Brooke's source.

Fortunately, all parties agree with Judge Weinfeld's statement of the law in Murchison v. Kirby:

> **[**23]**
>
> ***HN5***[] A pleading should be stricken only when it appears beyond peradventure that it is sham and false and that its allegations are devoid of factual basis; otherwise it would deprive a party of his right to a trial of the issues posed by his complaint it would mean trial by affidavits.

27 F.R.D. 14, 19 (S.D.N.Y.1961) (footnotes omitted).

[*765] The Court finds that the moving parties have not proven the allegations against Phillips to be false beyond peradventure. Indeed, on the basis of what the parties have presented thus far, the Court cannot discern where the truth lies, which is precisely why this matter should be decided by trial and not affidavit.

Objections to Magistrate's Discovery Rulings

Defendants served a subpoena duces tecum on American Express, not a party to this action. Included in their document requests were the following:

(9) All documents referring to any contacts or proposed contacts with the Department of Justice, or any other federal or state agency concerning the Master Charge or VISA travelers checks.

(19) Studies, reports, surveys or memoranda estimating the size or the expansion of the size of the United States dollar travelers **[**24]** check market.

(20) Studies, reports, surveys, or memoranda estimating the market share or predicting the future market share of any issuer of United States dollar travelers checks.

(21) Studies, reports, surveys or memoranda concerning relevant aspects of travelers checks including but not limited to the 1973 A.C. Nielsen Retailer Attitude Survey and the 1975 A.C. Nielsen Retailer Acceptability Survey.

(22) Studies, reports, surveys, or memoranda concerning consumer acceptance of travelers checks or consumer preference for a particular brand of travelers check.

At a hearing on October 24, 1978, Magistrate Bernikow sustained American Express' objections to all of these requests. Defendants now seek this Court's reconsideration of the Magistrate's rulings.

Defendants bear a heavy burden. ***HN6***[] The Court may reconsider discovery matters referred to a Magistrate pursuant to *section 636(b)(1)(A)* of Title 28, if the Magistrate's rulings are "clearly erroneous or contrary to law." Moreover, in resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused. See *Sherrell Perfumes, Inc. v. Revlon, Inc., 77 F.R.D.* ***[**25]*** *705, 707 (S.D.N.Y.1977)*. In considering, on the one hand, the defendants' need for information, especially information that could help to define the relevant markets in this case, and, on the other, American Express' interests in protecting its privacy and property, the Magistrate's rulings were neither clearly erroneous on the facts nor contrary to law. Accordingly, the Court will not reconsider them.

Motion to Disclose Confidential Materials

Defendants seek to have various materials produced by the Citicorp parties and others who are not parties to this suit made public. Defendants argue, quite correctly, that even with respect to materials disclosed for pretrial discovery purposes, secrecy is the exception, not the rule. As Judges Brieant and Edelstein have held, ***HN7***[] those who seek to avoid disclosure of commercial information by a protective order under *Rule 26(c) of the Federal Rules of Civil Procedure* bear a heavy burden of demonstrating that "disclosure will work a clearly defined and very serious injury." *Reliance Insurance Co. v. Barron's, 428 F. Supp. 200, 202-203 (S.D.N.Y.1977)*; *United States v. IBM, 67 F.R.D. 40, 46 (S.D.N.Y.1975)*.

In the instant case, however, the parties **[**26]** including defendants and non-parties that have produced materials in response to discovery requests and orders have done so pursuant to a stipulation prohibiting disclosure. This stipulation provides that where one or more of its signatories wishes to disclose any confidential information, and another objects, they may submit their dispute to the Court, which may order disclosure.

The stipulation is silent about the standard to be applied to determine whether disclosure is warranted, except that it shall be "for good cause shown." But regardless of what may constitute "good **[*766]** cause," the Court is constrained to agree with those opposing the defendants' motion that disclosure now is premature. The motion is in large part predicated on the presumption that the Court would need to refer to confidential materials in order to rule on the combined motions now before it. Since this has not turned out to be so, there is no compelling reason to destroy confidentiality, at least not for now.

CONCLUSION

Accordingly, the motions to dismiss or strike portions of the counterclaim are denied. Defendants' request to place certain materials on the public record is denied, and its objections **[**27]** to Magistrate Bernikow's discovery rulings are dismissed.

SO ORDERED.

End of Document

Duryea v. Third Northwestern Nat'l Bank

United States Court of Appeals for the Eighth Circuit

September 20, 1979, Submitted ; October 9, 1979, Decided

No. 78-1740

Reporter
606 F.2d 823 *; 1979 U.S. App. LEXIS 11341 **

Willis M. Duryea, Jr., Appellant, v. The Third Northwestern National Bank of Minneapolis, a national banking association; Bruce Winslow, John Doe and Mary Roe, Appellees.

Prior History: [1]** Appeal from the United States District Court for the District of Minnesota

Core Terms

attorney's fees, costs, collection, condominium, loans, Bank Holding Company Act, counterclaim

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Banking & Finance > Federal Acts > Bank Holding Company Act

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

HN1[] **Regulated Industries, Financial Institutions**

The Bank Holding Company Act, *12 U.S.C.S. § 1972*, provides in pertinent part: A bank shall not in any manner extend credit on the condition or requirement(3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN2[] **Costs & Attorney Fees, Costs**

When note provisions allow a creditor to charge a debtor for the costs of collection, including attorney fees, such fees may include all costs attributable to collecting the debt.

Judges: Before ROSS, STEPHENSON and HENLEY, Circuit Judges.

Opinion by: STEPHENSON

Opinion

[*824] This is an appeal from the findings and judgment of the district court [1.] in favor of the defendant-counterclaimant bank in the amount of its loan, plus attorney fees and costs, against plaintiff-appellant. The two primary issues on appeal are whether defendant bank violated the Bank Holding Company Act of 1970 in making the loans to plaintiff, and whether the trial court's award of attorney fees and costs was proper. We affirm.

[2]** Originally defendant-appellee herein, Third Northwestern National Bank of Minneapolis (Bank), brought suit in the Minnesota state courts to collect a $ 30,000 obligation evidenced by promissory notes signed by Willis M. Duryea, Jr., plaintiff-appellant herein. Thereafter Duryea commenced this federal court action against the Bank, claiming the loans in question violated the Bank Holding Company Act Amendments of 1970, *12 U.S.C. § 1971, et seq.*; the Sherman Act, *15 U.S.C. § 1*; Minnesota ***antitrust law***, *Minn.Stat.Ann. § 325.8013* (Supp.1979); Minnesota common law fraud and unjust enrichment; violation of the Securities Act of 1933, *15 U.S.C. §§ 77a-77aa*; the Securities Exchange Act of 1934, *15 U.S.C §§ 78a-78hh*; and Minnesota Blue Sky Law, Minn.Stat.Ann. Ch. 80 (1968) (current version Minn.Stat.Ann. Ch. 80A (Supp.1979)). Duryea also named as defendants the Bank's past president, Bruce C. Winslow (Winslow), Robert L. Krause (Krause), Krause Investment Corporation (KIC), and Variable Investment Corporation (VIC). Appellee Bank counterclaimed on its loan for $ 30,000 plus interest and costs of collection, including attorney fees. [2.]

[3]** The magistrate found for the Bank on its counterclaim and against Duryea on all of his claims, and awarded the Bank full recovery of the loan ($ 30,000), a stipulated amount of interest, and $ 22,097.21 as costs of collection, which included attorney fees.

The record discloses that appellant Duryea was approached by Krause, [3.] a long-standing friend, accountant and financial adviser of his, concerning a condominium development in Desert Hot Springs, California, in which Krause was involved. Krause proposed to Duryea that Duryea borrow money from the Bank, where Winslow, a friend of Krause, was president; then the money that Duryea had borrowed from the Bank would be invested in the condominium project of Krause. Krause's corporation, KIC, would pay the cost of the loan and all interest involved. The reason for this roundabout method of obtaining funds was that the Bank at that time did not want to extend credit directly to the project. Krause, Winslow and Duryea were all aware of what was being done with the money.

[4]** Duryea never met or talked with any official of the Bank. Krause prepared and furnished the Bank with Duryea's financial statement. Krause prepared the note and secured Duryea's signature on the note. It was Duryea's belief that he was entering into negotiations with the Bank to borrow money for the purpose of helping Krause finance development of the project which KIC was constructing. When Duryea signed the note, it was his intention to lend the proceeds to Krause for use on the project.

In connection with the loan, Duryea intended, at some unspecified future date, to **[*825]** purchase one of the condominiums from KIC. Although not reduced to writing, it was understood that Duryea would receive some preference and consideration from KIC when it came time to offer the condominiums for sale.

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1. Pursuant to stipulation of the parties the district court ordered that trial of this cause be before the United States Magistrate "and that any appeal be directly to the Court of Appeals for the Eighth Circuit from the judgment entered by this court consistent with and pursuant to the Findings of Fact, Conclusions of Law, and Recommended Order for Judgment of the Magistrate, and without appeal to the undersigned." We "remanded to the district court for consideration of the conclusions of law made by the United States Magistrate and certification of the results to this court." *Duryea v. Third Northwestern National Bank of Minneapolis, 602 F.2d 809 at 810 (8th Cir. 1979)* (footnote omitted). The latter has now been received and considered.

2. Krause, KIC and VIC were dismissed at the commencement of the trial.

3. Duryea had been Krause's personal physician for several years.

Initially, on November 18, 1971, $ 20,000 was loaned by the Bank to Duryea, and the money order was taken by Krause to Duryea, who endorsed it over to KIC. At the same time, Krause gave Duryea a note from KIC for $ 20,000. The notes were due in 90 days and renewed every 90 days thereafter. Approximately a year later an additional $ 10,000 was borrowed from the Bank by Duryea after **[**5]** discussions with Krause. The money was furnished to KIC and subsequently the note from Duryea to the Bank and the note from KIC to Duryea were increased to $ 30,000 to reflect the increased loan. As before, Krause handled all note renewals and paid all interest on Duryea's notes to the Bank. Eventually, KIC went into bankruptcy, the note to Duryea became worthless, and the Bank demanded payment from Duryea on his $ 30,000 note plus interest and costs including attorney fees.

Duryea limits his appeal to the court's finding that there was no violation of the Bank Holding Company Act (BHCA) by the Bank and the amount of attorney fees awarded the Bank.

HN1[] The BHCA, *12 U.S.C. § 1972 (Supp.1978)*, provides in pertinent part:

> A bank shall not in any manner extend credit * * * on the condition or requirement
> (3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan * * *.

The intent of the BHCA Amendments of 1970, which include the above, is "to provide specific statutory assurance that the use of the economic power of a bank will not lead to a lessening of competition **[**6]** or unfair competitive practices." The purpose is to "prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." 1970 U.S.Code Cong. & Admin.News, pp. 5519, 5535. The amendments prohibit certain types of tying arrangements within the banking industry but are not intended to interfere with the conduct of appropriate traditional banking practices. *Clark v. United Bank of Denver Nat'l Ass'n, 480 F.2d 235, 238* (10th Cir.), Cert. denied, *414 U.S. 1004, 94 S. Ct. 360, 38 L. Ed. 2d 240 (1973)*. The intent and purpose of the amendments are very similar to those of the antitrust laws in that both seek to guard against unfair competition. *Swerdloff v. Miami Nat'l Bank, 584 F.2d 54 (5th Cir. 1978)*.

The trial court found with reference to the alleged violation of the BHCA Amendments that "Duryea was not coerced, required, or encouraged by the Bank to loan money to Krause or KIC;" further that "Duryea provided no service to the Bank in connection with its loans to him," and concluded, "(t)he Bank has not violated the Bank Holding Company **[**7]** Act of 1970 (*12 U.S.C. § 1972*)."

Duryea contends that the court's findings are clearly erroneous and therefore its conclusion that there was no violation of the BHCA was in error. We disagree.

Initially we note that the record discloses that Duryea was never in the Bank and never met the Bank officials. The most that can be said is that during a discussion between Winslow (Bank president) and Krause, Winslow told Krause that Winslow would be willing to loan money to Krause's credit-worthy Minnesota friends if they wanted to help. Thereafter, Krause asked Dr. Duryea if he wanted to participate, and Duryea willingly agreed. The court found and the record discloses that as early as 1970 Duryea and his wife visited the project at the request of Krause, and were impressed with it, and expressed interest in purchasing a condominium in the project at some future time. However, no agreement was made then or at any subsequent time **[*826]** with respect to any future sale of a condominium unit.

Thereafter, in November 1971, Krause, acting in Duryea's behalf, secured the loan papers which Duryea executed. The notes contained no unusual restrictions or conditions. Likewise the Bank's **[**8]** money orders issued to Duryea were without restriction. They were delivered by Duryea's friend, Krause. No one from the Bank was present when Duryea received the money orders and endorsed them to KIC. Duryea simply reloaned the money to KIC and in exchange received KIC's note in the same amount personally guaranteed by Krause. At that time KIC was a solvent corporation engaged in several real estate development projects in Minnesota. Duryea renewed the note every 90 days for approximately a year and then loaned the additional $ 10,000 to KIC on November 13, 1972.

KIC was not one of the Bank's customers during this period. The trial court was fully justified in finding that Duryea was not coerced, required or encouraged by the Bank to loan money to Krause or KIC.

The Bank did not participate in the management of, or control, or direct the development of the project. It imposed no condition or requirement upon Duryea. Duryea re-lent the money to KIC, not because the Bank demanded it, but because Duryea wanted to participate in the transaction. Krause was Duryea's friend, accountant and financial adviser. Furthermore, Duryea was interested in obtaining a condominium in the **[**9]** project at some time in the future. Duryea performed no service to the Bank in connection with its loans to Krause. We are satisfied the district court correctly concluded that the Bank had not violated the Bank Holding Company Act of 1970.

Appellant further claims the court erred in awarding attorney fees and costs to the Bank in the sum of $ 22,097.21, because it included legal services rendered the Bank in defending Duryea's claims of illegal banking practices. [4.] Appellant contends attorney fees should have been limited to those directly incurred in collecting the note, i. e., the cost of prosecuting the counterclaim.

The district court in approving the award of attorney fees stated:

> If the Bank had instituted suit to collect the note and plaintiff had, by way of counterclaim, served the complaint that is the basis of this action, all costs of both bringing suit and defending against the counterclaim would be "costs of collection" of **[**10]** the note. See *Taylor v. Continental Supply Co., 16 F.2d 578 (8th Cir. 1926)*. This court sees little difference where plaintiff brings suit to Prevent collection of the note. Because it is necessary for the Bank to defend against such an action in order to collect on the note, attorney's fees incurred in defending against plaintiff's suit are a "cost of collection" as that term is used in the note. A contrary result would permit the maker of a note by winning the "race to the courthouse" to coerce settlement. This would render the "cost of collection" provision of little value, apparently contrary to what the parties to the note intended.

We agree with the district court. For additional authority supporting the proposition that ***HN2***[] when note provisions allow a creditor to charge a debtor for the costs of collection, including attorney fees, such fees may include all costs attributable to collecting the debt. See *Vandeputte v. Soderholm, 298 Minn. 505, 216 N.W.2d 144 (1974)*, and in other jurisdictions, *Michael-Regan Co. v. Lindell, 527 F.2d 653 (9th Cir. 1975)*. **[**11]**

Affirmed.

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4. The attorney fees are not otherwise claimed to be excessive.

Hometowne Builders v. Atlantic Nat'l Bank

United States District Court for the Eastern District of Virginia, Norfolk Division

October 10, 1979

Civ. A. No. 79-481-N

Reporter

477 F. Supp. 717 *; 1979 U.S. Dist. LEXIS 9285 **

HOMETOWNE BUILDERS, INC., a Virginia corporation, and ROBERT H. MERRIMAN, Plaintiffs, v. ATLANTIC NATIONAL BANK, CHARLES M. REYNOLDS, JR., LEVI E. WILLIS, and G. WESLEY HARDY, Defendants.

Core Terms

punitive damages, damages, cause of action, treble damages, anti trust law, legislative history, defendants', contributions, banks, loans, violations, deposits, bribery, claim for punitive damages, tying arrangement, plaintiffs', antitrust, alleges

LexisNexis® Headnotes

Banking Law > ... > National Banks > Loans > Lending Limits

Civil Procedure > Remedies > Damages > Punitive Damages

HN1[] Loans, Lending Limits

12 U.S.C.S. § 1975 provides that any person who is injured in his business or property by reason of anything forbidden in 12 U.S.C.S. § 1972 of this title may sue therefor and shall be entitled to recover three times the amount of the damages sustained.

Banking Law > Commercial Banks > Directors & Officers > Conflicts of Interest

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Negotiable Instruments > Bills of Exchange

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

HN2[] Directors & Officers, Conflicts of Interest

18 U.S.C.S. § 215 reads that whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or

endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $ 5,000 or imprisoned not more than one year or both.

Banking Law > Commercial Banks > Directors & Officers > Conflicts of Interest

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

HN3[] **Directors & Officers, Conflicts of Interest**

By virtue of *12 U.S.C.S. § 503*, named officers and directors may be civilly liable in their individual capacities for alleged violations of *18 U.S.C.S. § 215*.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN4[] **Damages, Punitive Damages**

Common law cannot provide a basis for claiming punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > Remedies > Damages > General Overview

HN5[] **Damages, Punitive Damages**

In trebling the amount of actual damages, it seems indisputable that the statutes carry their own symbol of punishment. The plaintiff can recover only what the statutes give him.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > Remedies > Damages > General Overview

HN6[] **Private Actions, Remedies**

Both treble damages and punitive damages are not recoverable under the antitrust laws.

Banking Law > Commercial Banks > Directors & Officers > Conflicts of Interest

Civil Procedure > Remedies > Damages > Punitive Damages

Banking Law > ... > Directors & Officers > Duty of Loyalty > General Overview

HN7[] Directors & Officers, Conflicts of Interest

12 U.S.C.S. § 503 reads in pertinent part that if the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of *18 U.S.C.S. § 220*, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

Banking Law > Commercial Banks > Directors & Officers > Conflicts of Interest

HN8[] Directors & Officers, Conflicts of Interest

The sustaining of actual damage is an essential element of a cause of action under *12 U.S.C.S. § 503*.

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

HN9[] Criminal Offenses, Employee Fraud

Bribery is defined as the offering, giving, receiving, or soliciting of any thing of value to influence action as official or in discharge of legal or public duty.

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN10[] Criminal Offenses, Employee Fraud

Extortion is defined as unlawful obtaining of money from another. The distinction between bribery and extortion is the former offense consists in the offering a present, or receiving one, if offered; the latter, in demanding a fee or present, by color of office. Furthermore, extortion and bribery, by definition, are mutually exclusive.

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

Criminal Law & Procedure > ... > Racketeering > Extortion > Penalties

HN11[] Criminal Offenses, Employee Fraud

Exaction is defined as the wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due. The distinction between extortion and exaction, then, is a fine one. Extortion involves a case in which the person illegally obtains more than is due, when something is initially due him; exaction involves obtaining something of value when there was nothing due him in the first instance. In the present case, it is arguable under the alleged facts that both, or either, extortion and exaction occurred, and, therefore, the fine distinction is of little importance.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN12[] **Damages, Punitive Damages**

Misconduct sufficient to justify an award of compensatory damages also justifies the imposition of a punitive award.

Counsel: [1]** Robert M. White, White & Selkin, Norfolk, Va., for plaintiffs.

Edward Delk, Delk, James & Jackson, Conrad M. Shumadine, Kaufman & Oberndorfer, Norfolk, Va., for defendants.

Opinion by: CLARKE

Opinion

[*718] MEMORANDUM OPINION AND ORDER

The plaintiffs, Hometowne Builders, Inc. (hereinafter "Hometowne"), and Robert H. Merriman, President of Hometowne, filed a Complaint in this Court on April 27, 1979, against defendants, Atlantic National Bank (hereinafter "Atlantic"), Charles M. Reynolds, Jr., President of Atlantic, Levi E. Willis, an acting President of Atlantic at the time of certain alleged injurious actions, and G. Wesley Hardy, an officer of Atlantic. Hometowne is a Virginia corporation with its principal place of business in Virginia Beach, Virginia, and Atlantic is a bank organized under the federal banking laws with its principal place of business in Norfolk, Virginia. All other named individual defendants and plaintiff Merriman are residents of the State of Virginia. Jurisdiction of this Court is based upon *28 U.S.C. § 1331*, as plaintiffs have alleged violations of *12 U.S.C. § 1972*, thereby entitling them to sue for damages under *12 U.S.C. § 1975*, and of *18 U.S.C. [**2] § 215*, thereby subjecting defendants to potential civil liability under *12 U.S.C. § 503*.

Specifically, Count One of the Complaint alleges that defendants violated *12 U.S.C. § 1972*, a statute which prohibits certain tying arrangements by banks, namely that an extension of credit cannot be conditioned upon agreements to obtain additional credit, property, or service from the lending bank. Plaintiffs contend that Atlantic tied increases in mortgage loan commitments to plaintiff Merriman's sons, for which plaintiff Merriman had cosigned as surety, to the purchase of stock in Atlantic by both Hometowne and Merriman. Accordingly, plaintiffs have brought suit under *HN1*[] *12 U.S.C. § 1975*, which provides, in pertinent part: "Any person who is injured in his business or property by reason of anything forbidden in *section 1972* of this title may sue therefor . . . and shall be entitled to recover three times the amount of the damages sustained . . . ." Plaintiffs seek both treble damages ($ 3,000.00) and punitive damages ($ 250,000.00) for the alleged violation of *12 U.S.C. § 1972*.

Count Two of the Complaint alleges that plaintiffs Hometowne and Merriman conducted a substantial amount of business **[**3]** with Atlantic during 1974, 1975, and 1976, and that at various times during this period defendants

Willis and Hardy, as officers and directors of Atlantic, extracted certain illegal contributions from plaintiffs payable to Willis or Hardy or to corporations or organizations with which Willis or Hardy were connected. Plaintiffs contend that they made these contributions because they did not wish to endanger their existing and future loan transactions with Atlantic and because "plaintiffs were informed by the defendants that the aforesaid so-called donations were of a religious and charitable nature, and that such solicitation of funds was an entirely legal and normal practice of the defendant, Atlantic National Bank." Complaint at P 24. The Complaint further claims that the aforesaid actions of defendants violated ***HN2***[] *18 U.S.C. § 215*, a criminal statute, which reads:

> Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees **[**4]** **[*719]** to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $ 5,000 or imprisoned not more than one year or both.

Then, ***HN3***[] by virtue of *12 U.S.C. § 503*, the named officers and directors would be civilly liable in their individual capacities for the alleged violations of *18 U.S.C. § 215*, and plaintiffs seek compensatory ($ 880.00) and punitive ($ 750,000.00) damages.

This matter now comes before the Court on defendants' Motion to Dismiss filed pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. Defendants have asserted two grounds for dismissal: (1) Plaintiffs are not entitled to claim punitive damages over and above the treble damages authorized by *12 U.S.C. § 1975*; consequently, the claim for punitive damages in Count One should **[**5]** be dismissed. (2) Plaintiffs lack standing under *12 U.S.C. § 503* to assert their private cause of action, and all of the claims in Count Two should be dismissed. The Court has heard oral argument, has reviewed the briefs submitted with the authorities cited therein, and will now address separately defendants' grounds for dismissal.

Count One: Punitive Damages

It is important to note initially that plaintiffs have not alleged in Count One any facts which constitute a cause of action under the common law, as the common law did not prevent tying the sale of one product or service to the sale of another. Rather, plaintiffs specifically rely upon their statutory cause of action in *12 U.S.C. § 1975* because of the violation of *12 U.S.C. § 1972*, which latter section does prohibit certain tying arrangements by banks and bank holding companies. Defendants do not challenge in their current motion plaintiffs' standing to assert the cause of action in Count One or the applicability of *12 U.S.C. § 1972* to the facts of this case; however, they do challenge plaintiffs' claim for punitive damages under this statutory cause of action.

Since the ***HN4***[] common law cannot provide a basis for claiming punitive **[**6]** damages, it is necessary to examine the statute to determine if plaintiffs can maintain such a claim. The statute specifically provides for recovery of treble damages and a reasonable attorney's fee but makes no reference to punitive damages of any kind. Therefore, it is necessary to examine the legislative history of *12 U.S.C. § 1972 Et seq.* to determine whether plaintiffs have any implied right to recover punitive damages under these sections. The legislative history does not mention punitive damages, with the only comment on damages being: "(Private) parties are given the right to sue for injunctive relief as well as treble damages when they have sustained damages, or are threatened by loss or damage, by reason of a violation of this section's prohibitions." Senate Report No. 91-1084, 91st Cong., 2d Sess., Reprinted in (1970) U.S.Code Cong. & Admin.News, pp. 5519, 5536. The absence of any discussion of punitive damages in excess of treble damages is a strong indication that such damages were not contemplated by Congress and were not implied in the statute.

Moreover, the legislative history of *12 U.S.C. § 1972 Et seq.* clearly demonstrates that these sections were considered additions **[**7]** to the antitrust laws. In "(The) Supplementary Views of Messrs. Bennett, Tower, Percy, and Packwood" to Senate Report No. 91-1084, Supra, these senators pointed out that the Senate Banking and Currency Committee was "writing new ***antitrust" law*** in the tying arrangement provision. Id. at 5546. These senators also argued that the Senate version of the tying arrangement provision made certain legitimate banking practices "per se violations of ***antitrust law***." Id.

[*720] In his supplementary views, Senator Brooke discussed the antitrust nature of the proposed tying provisions. He cited *Standard Oil Co. v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*, an antitrust tying case, in his analysis and quoted extensively from a letter containing the views of the Antitrust Division of the Justice Department as set forth by Assistant Attorney General Richard W. McLaren. Senate Report No. 91-1084, Supra at 5558-61. This letter indicated that the Justice Department considered the tying arrangement proposal a "most valuable supplement" to the antitrust laws. Furthermore, the Justice Department suggested a four-year statute of limitations, rather than the proposed seven-year **[**8]** period, for "(consistency) with Section 4b of the Clayton Act." Id. at 5561. Thus, the legislative history of *12 U.S.C. § 1972 Et seq.* indicates that Congress designed these sections as part and parcel of the antitrust laws.

The question then becomes whether there is any implied right to recover punitive damages under *12 U.S.C. § 1972 Et seq.* as part of the antitrust laws. In *Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (S.D.N.Y.1936)*, the district court addressed the issue of the availability of punitive damages under the antitrust laws as follows: ***HN5***[] "In trebling the amount of actual damages, it seems indisputable that the statutes carry their own symbol of punishment. The plaintiff can recover only what the statutes give him." *16 F. Supp. at 788*. The court then struck the claim for punitive damages.

Similarly, in *John Mohr & Sons, Inc. v. Jahnke, 55 Wis.2d 402, 198 N.W.2d 363 (1972)*, the Supreme Court of Wisconsin addressed the question of whether punitive damages were recoverable under § 133.01 of the Wisconsin Antitrust Act. This section was a substantial reenactment of § 1 of the Sherman Act. The Supreme Court of Wisconsin denied punitive damages on dual grounds. First, **[**9]** the court ruled that the recovery of both treble damages and punitive damages amounted to the "double recovery of a penalty" in violation of the due process clause of the United States Constitution. 198 N.W.2d at 367. Second, the court held that since § 133.01 created the cause of action and provided only for treble damages as the statutory remedy, the statutory remedy was exclusive. *198 N.W.2d at 368*. Therefore, punitive damages were not recoverable under the Wisconsin antitrust laws.

This Court agrees with the district court in New York, as well as with the Wisconsin Supreme Court, that ***HN6***[] both treble damages and punitive damages are not recoverable under the antitrust laws. The combination of treble damages and punitive damages is necessarily duplicative as a punitive element is inherent in the trebling of actual damages. Since the legislative history clearly indicates that *12 U.S.C. § 1972 Et seq.* is an addition to the antitrust laws, an award of punitive damages in excess of the treble damages specifically provided for in the statute is not recoverable under this statutory cause of action. Accordingly, the Court GRANTS defendants' Motion to Dismiss the claim for punitive damages **[**10]** in Count One of the Complaint.

Count Two: Standing

Count Two alleges that defendants extracted illegal contributions from plaintiffs in violation of *18 U.S.C. § 215*, and plaintiffs seek to recover the contributions, as well as punitive damages, from defendants. The statutory basis for the private cause of action is ***HN7***[] *12 U.S.C. § 503*, which reads in pertinent part:

> If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of *sections . . . 220* (now *section 215*) . . . of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or Any other persons shall have sustained in consequence of such violation. (emphasis added).

[*721] Defendants argue that plaintiffs received the benefit of several loans from Atlantic; consequently, they suffered no injury and lack standing to assert a cause of action under *12 U.S.C. § 503*. The Court agrees with defendants that *HN8*[] the sustaining of actual damage is an essential element **[**11]** of a cause of action under *§ 503*; the issue then becomes whether plaintiffs have suffered any damages "in consequence of" the alleged violation of *18 U.S.C. § 215*.

Defendants essentially contend that the contributions were additional consideration for inducing the bank to exceed normal risk criteria and to make an improvident loan to plaintiffs. In their "Memorandum in Support of Motion to Dismiss" at 9, defendants state: "Plaintiffs received the benefit of several loans from Atlantic which no other lending institution would grant on substantially similar terms and conditions in accordance with sound banking practices." Although the defendants do not specifically use the term, they, in effect, accuse the plaintiffs of bribery. [1.]

Plaintiffs, on the other hand, have characterized the transaction **[**12]** differently by contending that they initially wished to further Atlantic's efforts to help the Black community and took out a loan for two automobiles followed by several construction loans over a period of a few years. Then, they were unable to say "no" to a bank officer's request for a "donation" to an allegedly non-profit enterprise controlled by that officer because all of the loans were "tied together under a cross-collateralization scheme, whereby a default on any one of the loans, however minor, (would) result in foreclosure on any or all of the outstanding loans, leading to financial ruin." "Memorandum in Support of Motion to Overrule Defendants' Motion to Dismiss" at 3. In effect, plaintiffs argue that they had no choice but to make the contributions because their overall continued financial viability was at stake. Such an argument characterizes the transactions in question as extortion [2.] **[**13]** or exaction. [3.]

The characterization of the actions and contributions complained of as bribery or extortion controls whether plaintiffs have been damaged by such actions. If it is assumed from the outset, as defendants contend, that plaintiffs engaged in bribery and therefore are not injured because they received the benefit of their bargain, then the Court can conclude that plaintiffs were not damaged by the violations **[**14]** of *18 U.S.C. § 215*. If the violations are considered to be acts of extortion, on the other hand, a different conclusion results. However, whether the transactions in question are to be considered as bribery or as extortion is certainly a question over which reasonable men may differ. Accordingly, this determination should be based upon the evidence presented at trial. The defendants are well within their rights in asserting bribery as a defense; but the plaintiffs are well within their rights to argue under the same set of facts that they have been damaged.

Defendants further argue that plaintiffs are not among the group of persons whom **[*722]** *18 U.S.C. § 215* was designed to protect. They rely upon *United States v. Lane, 464 F.2d 593* (8th Cir.), Cert. denied, *409 U.S. 876, 93 S. Ct. 127, 34 L. Ed. 2d 129 (1972)*, and *United States v. Etheridge, 414 F. Supp. 609 (E.D.Va.1976)* (Kellam, J.). The Court in Lane stated:

> It seems clear to us that the purpose of the Act was to protect the deposits of banks having federal insurance by preventing unsound and improvident loans to be made from such deposits by officers and directors of the bank. The Congress was not interested in who **[**15]** received the commission but was merely insulating loan

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1. *HN9*[] Bribery is defined in Black's Law Dictionary, at 239 (4th ed. 1968) as: "The offering, giving, receiving, or soliciting of any thing of value to influence action as official or in discharge of legal or public duty."

2. *HN10*[] Extortion is defined in Id. at 696 as: "Unlawful obtaining of money from another." The distinction between bribery and extortion is: "the former offense consists in the offering a present, or receiving one, if offered; the latter, in demanding a fee or present, by color of office." Id. at 697. Furthermore, extortion and bribery, by definition, are mutually exclusive. *People v. Feld, 262 App.Div. 909, 28 N.Y.S.2d 796, 797 (1941)*.

3. *HN11*[] Exaction is defined in Black's Law Dictionary, Supra at 664, as: "The wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due." The distinction between extortion and exaction, then, is a fine one. Extortion involves a case in which the person illegally obtains more than is due, when something is initially due him; exaction involves obtaining something of value when there was nothing due him in the first instance. Id. In the present case, it is arguable under the alleged facts that both, or either, extortion and exaction occurred, and, therefore, the fine distinction is of little importance.

> transactions from the influence of such a practice. When a commission is stipulated by an officer of a bank, the probability is that his judgment on the merits of the loan is adversely affected tremendously. This evil is not removed by a stipulation that provides for payment of a commission to a third party, especially where an interest in the third party is traceable directly to the banker. In such a case, the banker is violating a position of trust that he owes to the bank. This position is buttressed by the fact that *Section 215* is found in the Bribery, Graft and Conflicts of Interests Chapter of the Title (Chapter XI).

464 F.2d at 595, passage Cited in *United States v. Etheridge, supra at 610-11*.

This Court agrees that *18 U.S.C. § 215* was designed "to protect the deposits of banks" from dissipation through unwise lending practices and that plaintiffs are not depositors. However, because the statute protects depositors in one situation does not necessarily mean that this is the only class of persons protected by the statute. First, the statute is a criminal one and in and of itself protects the public in general. Moreover, **[**16]** both cases relied upon by defendants involved situations in which the United States brought a criminal action against the bank officer who had violated *§ 215*; such a suit by the United States thereby protects the deposits of the bank. Plaintiffs, however, have alleged that defendants violated *18 U.S.C. § 215*, and then they base their civil cause of action on *12 U.S.C. § 503*, which gives a cause of action to "the member bank, its shareholders, or Any other persons " damaged by the violation by bank officers of *18 U.S.C. § 215*. (emphasis added).

There is no indication in the legislative history, or any other authority to the contrary, that "any other persons" may only be the bank's depositors. Rather, a better interpretation would be that since the civil cause of action in *§ 503* is based upon a violation of a criminal statute, the phrase "any other person" permits plaintiff, or any member of the general public, whether a depositor of the bank or not, to bring an action under *§ 503*, if they allegedly suffered the requisite damage under that section. In the present case, plaintiffs have made sufficient allegations of violations of *18 U.S.C. § 215* by the defendants, and such allegations **[**17]** bring them within the language of *12 U.S.C. § 503* granting a cause of action to "any other persons."

Defendants further contend that even if plaintiffs may maintain their cause of action under *§ 503*, they cannot claim punitive damages under that section. *Section 503* specifically provides for damages but makes no mention of punitive damages. Unlike 12 U.S.C. § 1275, the *§ 503* provision for damages is not clarified in any way by the specification of treble damages or by any legislative history indicating that the statute is an addition to the antitrust laws. See discussion Supra. Rather, *§ 503* merely permits damages, and there is no other statutory language or legislative history to aid in the interpretation of what damages are allowed. It has been settled for years, however, that "the federal law permits the recovery of exemplary or punitive damages," *Basista v. Weir, 340 F.2d 74, 87 (3d Cir. 1965)*, and the Supreme Court has held that ***HN12***[] "misconduct sufficient to justify an award of compensatory damages also justifies the imposition of a punitive award." *Curtis Publishing Co. v. Butts, 388 U.S. 130, 161, 87 S. Ct. 1975, 1994, 18 L. Ed. 2d 1094, 1114 (1967)*.

Since the misconduct **[**18]** complained of in the present case involves violation of a **[*723]** criminal statute and since the rationale for punitive damages is one of deterrence, the claim for such damages seems appropriate under *§ 503*. Absent any indication that punitive damages were not intended under *§ 503*, plaintiffs' Claim for such damages is permissible and defendants' Motion to Dismiss is DENIED. The Court further notes, however, that whether plaintiffs are entitled to the requested punitive damages is a matter to be determined from the evidence at trial.

In summary, defendants' Motion to Dismiss plaintiffs' claim for punitive damages in Count One is GRANTED, and defendants' Motion to Dismiss all or any portion of plaintiffs' claim in Count Two is DENIED. Finally, the Court in its discretion DENIES defendants' Motion for Certification of an interlocutory appeal of this Order pursuant to *28 U.S.C. § 1292*. The Court is not of the opinion that an interlocutory appeal will "materially advance the ultimate termination of the litigation" as required for certification under *§ 1292(b)*.

End of Document

[H. J. Hodes & Co. v. Triangle Brass & Specialties Co.](#)

United States District Court for the Western District of Missouri, Western Division.

October 11, 1979.

No. 79-0673-CV-W-3.

Reporter

1979 U.S. Dist. LEXIS 9249 *; 1982-1 Trade Cas. (CCH) P64,701

H.J. Hodes and Co. v. Triangle Brass and Specialties Co., Inc., et al.

Core Terms

conspiracy, allegations, antitrust, individual defendant, plumbing, factual allegations, anti-competitive, monopolize, specialty, supplies, anti trust law, Sherman Act, relevant market, alleged facts, geographic, commerce, probability of success, attempt to monopolize, motion to dismiss, probability, entities, salesmen

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN1[] **Standing, Clayton Act**

The Clayton Act, *15 U.S.C.S. §§ 15* and *26*, confers a private cause of action for damages or injunctive relief upon any person who is injured in his business or property as a result of violations of the antitrust laws.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN2[] Motions to Dismiss, Failure to State Claim

The standards for ruling a motion to dismiss are well settled. The complaint must be liberally construed in favor of the plaintiff; the facts alleged by him must be taken as true, and he is entitled to the benefit of all reasonable inferences in his favor that may be drawn from the alleged facts. Furthermore, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court also takes note that the United States Court of Appeals for the Eighth Circuit has only recently repeated the United States Supreme Court's admonition that summary procedures should be used sparingly in complex antitrust litigation.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

The Sherman Act, *15 U.S.C.S. § 1*, provides that every contract, combination or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal. To state a cause of action under *§ 1* a party must set forth the following factual allegations in its pleading: (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

It is not necessary to plead a formal agreement. An allegation that conduct was joint or collaborative is sufficient.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

It is beyond dispute that the Sherman Act, *15 U.S.C.S. § 1*, and the antitrust laws in general were aimed at the anti-competitive acts of business firms or entities, but two persons or entities can constitute a conspiracy.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Sherman Act, Remedies**

The antitrust laws were enacted for the protection of competition, not competitors. Thus, if an antitrust plaintiff alleges nothing more than that a competitor in interstate commerce has by means of unfair business practices deprived plaintiff of key employees, business and confidential records or information and customers, but does not allege any public injury resulting from the defendant's conduct, plaintiff must seek relief at common law and not under the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Since the United States Court of Appeals for the Eighth Circuit has joined other circuits in holding that a conspiracy to eliminate a competitor by means of unfair trade practices must be tested under the rule of reason, plaintiff must allege facts to establish that defendants alleged wrongful acts unreasonably restrained trade in a particular sector of the economy. To demonstrate such unreasonable and anti-competitive impact, it is obviously necessary that a plaintiff must identify the product and geographical markets allegedly affected by antitrust violations.

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 rule of reason is applied to business practices that are not substantially devoid of redeeming attributes.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Because the court is sensitive to the recent reminder of the United States Court of Appeals for the Eighth Circuit that motions to dismiss antitrust actions should be sparingly granted, and the United States Supreme Court's instruction that allegations should not be disregarded merely because they appear to be mere conclusions of the pleader, the court is reluctant to dismiss an action without concurrently giving plaintiff an opportunity to cure the deficiencies noted in the court's order.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

An antitrust complaint must allege facts from which it can be determined that conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restraining the flow of interstate commerce. The absence of such public injury allegations in plaintiff's present complaint demands dismissal of plaintiff's Sherman Act, *15 U.S.C.S. § 1*, claim.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN11[] **Remedies, Damages**

The Sherman Act, *15 U.S.C.S. § 2*, condemns any 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. To maintain an action to recover for damages sustained from an attempt to monopolize a party must plead, in addition to the obvious element of business injuries, the following factual elements: (1) an overt act or acts, or a course of conduct; (2) a specific intent to monopolize a relevant market; and,(3) a dangerous probability of success.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

Specific intent to monopolize must be well pleaded.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Monopolies & Monopolization, Attempts to Monopolize**

Specific intent to monopolize or to obtain monopoly power may be defined for purposes of the Sherman Act, *15 U.S.C.S. § 2*, as an intent to control prices or to restrict competition unreasonably.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN14[] **Monopolies & Monopolization, Attempts to Monopolize**

The United States Court of Appeals for the Eighth Circuit, along with a majority of courts, has ruled that demonstration of a dangerous probability of success of an attempt to monopolize must include a showing of the relevant market within which that probability occurred. The relevant market is comprised of two components -- (1) relevant product market and (2) relevant geographic market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN15[] **Monopolies & Monopolization, Attempts to Monopolize**

The United States Court of Appeals for the Eighth Circuit has indicated that the factors which point to dangerous probability consist primarily of economic data, such as the number of firms within the relevant market and the defendant's percentage share of that market, the defendant's power to control prices, and barriers to entry into the relevant industry-product market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN16[] **Monopolies & Monopolization, Attempts 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.

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

HN17[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The elements of the offense of a conspiracy to monopolize are somewhat different from those of an attempt to monopolize, namely: (1) the existence of a combination or conspiracy; (2) overt acts in furtherance of that combination or conspiracy; (3) a substantial amount of commerce affected; and (4) specific intent to monopolize.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN18[] **Private Actions, Standing**

The Sherman Act, *15 U.S.C.S. § 1*, was not enacted to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be-purchasers.

Counsel: [*1] For plaintiff: John M. Edgar and Samuel J. Goldberg, of Stinson, Mag & Fizzell, Kansas City, Mo., Myron E. Sildon, Kansas City, Mo. For defendants: Joseph J. Kelly, Jr. and Carl N. Helmstetter, Kansas City, Mo., John M. Kilroy, Jr. and George A. Barton, of Shughart, Thomson & Kilroy, Kansas City, Mo.

Opinion by: CLARK

Opinion

Memorandum and Order

CLARK, D.J.: Plaintiff, H.J. Hodes & Co. (Hodes), a Missouri corporation, commenced this action against defendant Triangle Brass & Specialities Co. (Triangle), and several of Triangle's officers, by filing its complaint on July 27, 1979, alleging, inter alia, that defendants had violated *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2 (1976)*. Defendants responded by filing their motion to dismiss on August 30, 1979. After reviewing the thorough briefs submitted by counsel on each side, the Court has concluded that the motion to dismiss should be granted.[1]

[*2] I. Factual Background

Plaintiff Hodes, a corporation, which is organized under the laws of Missouri and has its principal place of business in Kansas City, Missouri, is engaged in the business of distributing plumbing specialty supplies to wholesale and retail outlets in various parts of the United States.The individual defendants -- Robert H. Hodes, James R. Fitts and James E. Caton -- are all residents of Missouri and are officers and employees of the corporate defendant Triangle, which is also engaged in the distribution of plumbing specialty supplies throughout the United States. While Triangle is organized under the laws of Missouri, its principal place of business is located in Lenexa, Kansas. Prior to the incorporation of Triangle, the individual defendants were employed in various capacities by plaintiff Hodes. Robert H. Hodes had served as president of Hodes until his resignation from that position on November 24, 1978; he also had been a member of the Board of Directors of Hodes for a considerable period of time until he resigned from that position on May 15, 1979. James R. Fitts had served as the sales manager of Hodes until his resignation from that employment **[*3]** on November 15, 1978. James E. Caton had been Hodes' sales representative in the Kansas City, Missouri metropolitan area until he was discharged in December, 1978.

Plaintiff alleges that at some point in time during the period extending from September, 1978 through January, 1979 the individual defendants formed a conspiracy or combination to eliminate Hodes from the plumbing specialty supplies distribution market. In furtherance of that conspiracy, it is said that defendants Robert H. Hodes and James R. Fitts resigned their positions with plaintiff Hodes, taking with them certain confidential corporate records, including Hodes' customer lists. Mr. Hodes then allegedly incorporated Triangle for the purpose of conducting business in such a manner that plaintiff Hodes would be injured in its business and eventually destroyed. All these individual defendants apparently became officers of the newly incorporated Triangle, and in carrying out Triangle's business, it is alleged that they engaged in various unfair tactics designed to injure Hodes: they approached customers, suppliers and independent salesmen of Hodes and made deceptive and/or false representations such as statements **[*4]** that Trinagle was a "new Hodes company", and that H.J. Hodes Co. was going out of business and Triangle was its successor; they employed a tradename deceptively similar to that used by Hodes; [2] they attempted to induce various independent-contractor salesmen to cancel their contracts with plaintiff Hodes and enter into contracts with Triangle; they induced some of the same salesmen to submit to Triangle products orders they had received from customers who had originally selected Hodes as their supplier; and they contacted Hodes'

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[1] Defendant has submitted various exhibits and affidavits with its brief in support of its motion to dismiss. Were we to consider these materials in ruling the present motion, we would be required to treat the motion as one for summary judgment under *Rule 56, Fed. R. Civ. P.* See *Jennings v. Davis, 476 F. 2d 1271, 1273-4 (8th Cir. 1973)*; *Rule 12(b), Fed. R. Civ. P.* The Court believes, however, that defendant's motion can be granted on the pleadings in this case, and thus, the motion will be treated as one for dismissal under *Rule 12(b)(6), Fed. R. Civ. P.*

[2] Plaintiff's tradename is "Red Dog"; defendant Triangle allegedly is using the tradename "Black Tom". While any deceptive similarity between these two tradenames escapes the Court's scrutiny on the record before us, we will accept this allegation as a proven fact, as we must in reviewing a motion to dismiss. See *Profesional Beauty Supply v. National Beauty Supply, Inc. [1979-1 TRADE CASES P62,485], 594 F. 2d 1179, 1181 (8th Cir. 1979)*.

suppliers and by representing that Triangle was Hodes' successor, persuaded said suppliers to divert limited supplies of certain materials, which Hodes had ordered, from Hodes to Triangle.

Claiming that it has **[*5]** suffered substantial monetary damages to its business and is in need of injunctive relief to prevent further irreparable damage, Hodes filed this action under Sections 4 and 16 of ***HN1***[] the Clayton Act, *15 U.S.C. §§ 15* and *26 (1976)*, which confer a private cause of action for damages or injunctive relief upon any person who is injured in his business or property as a result of violations of the antitrust laws. In Counts I and II of its complaint Hodes alleges that the defendants' activities contravened *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2 (1976)*. In addition to its federal antitrust claims, Hodes raised various claims under Missouri law: Count III alleges that all of the defendants violated the Missouri ***Antitrust Law***, *MO. REV. STAT. §§ 416.031* (1969); Count IV alleges that all of the defendants have engaged in unfair competition and tortious interference with Hodes' business; Count V alleges that all of the defendants engaged in tortious interference with contractual relationships between Hodes and its independent-contractor salesmen; Count VI charges defendant James E. Caton with the breach of a restrictive covenant not-to-compete; and Count VII charges defendant **[*6]** Robert H. Hodes with a breach of his fiduciary duty to Hodes while he was a director of that corporation. Since diversity of citizenship is neither alleged nor exists, it appears that plaintiff is basing its submission of its state law claims (Counts III to VII) to this Court on the doctrine of pendent jurisdiction set forth in *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Thus, if Hodes has failed to state a claim under Section 4 of the Clayton Act, its state law claims must be dismissed along with its federal antitrust claims. See *id. at 726, 16 L. Ed. 2d at 228*; *Seven-Up Bottling Co. v. Seven-Up Co., 561 F. 2d 1275, 1281 (8th Cir. 1977)*.

II. Standards for Ruling a Motion to Dismiss

HN2[] The standards for ruling a motion to dismiss are well settled. "The complaint must be liberally construed in favor of the plaintiff; the facts alleged by him must be taken as true, and he is entitled to the benefit of all reasonable inferences in his favor that may be drawn from the alleged facts." *Stifel, Nicolaus Co., Inc. v. Dain, Kalman & Quail, Inc., 578 F. 2d 1256, 1260 (8th Cir. 1978)*. Furthermore, "a complaint should not be dismissed for failure to **[*7]** state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Quality Mercury, Inc. v. Ford Motor Co., 542 F. 2d 466, 472 (8th Cir. 1976)*, cert. denied, sub. nom. *Prestige Lincoln-Mercury, Inc. v. Quality Mercury, Inc., 433 U.S. 914, 97 S. Ct. 2986, 53 L. Ed. 2d 1100 (1977)* [quoting *Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746-7, 96 S. Ct. 1848, 1853, 48 L. Ed. 2d 338, 344-5 (1976)]*. The Court also takes note that the Eighth Circuit has only recently repeated the Supreme Court's admonition that "summary procedures should be used sparingly in complex antitrust litigation." Penne v. Greater Minneapolis Area Bd. of Realtors, No. 78-1776, slip opinion at 18 (8th Cir. September 5, 1979) [quoting *Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458, 464 (1962)]*. Applying these principles, the Court has determined that various, significant deficiencies in plaintiff's complaint mandate dismissal of the same, with the qualification that plaintiff shall have the opportunity to cure such deficiencies by filing an amended complaint within thirty **[*8]** days of the date of this order.

III. Sherman Act *§ 1* Conspiracy Claim

Plaintiff contends that the individual defendants -- Hodes, Fitts, and Caton -- entered into a conspiracy [3] in contravention of *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1976)*.Section ***HN3***[] 1 provides that "[e]very

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[3] While plaintiff's conspiracy allegations suffer from some ambiguity and might be construed as setting forth contentions that the three individual defendants engaged in a conspiracy, and that the corporate defendant Triangle also engaged in that conspiracy, in its suggestions, plaintiff disclaims any intention to state the latter contention. Indeed, in identifying the participants in the alleged conspiracy in paragraph 14 of its complaint, plaintiff avers that "Defendant Hodges, Defendant Fitts and Defendant Caton conspired and agreed", but makes no mention of Triangle as a conspirator. We agree with the defendants however, that absent an allegation that they -- the individual defendants, officers and employees of Triangle -- were acting beyond the scope of any corporate authorization when allegedly engaging in anticompetitive acts, Triangle could not legally and conceptually have been a co-conspirator to the alleged conspiracy of the individual defendants. See *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc., 531 F. 2d 910, 917 (8th Cir. 1976)*. ("Since more than one entity or person is required to establish a conspiracy, the

contract, combination… or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal." *15 U.S.C. § 1*. To state a cause of action under *Section 1* a party must set forth the following factual allegations in its pleading:

[*9] (1) [t]hat the defendants contracted, combined, or conspired among each other;

(2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets;

(3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and

(4) that the plaintiff was injured as a proximate result of that conspiracy. *TV Signal Co. of Aberdeen v. American T. & T Co., 465 F. Supp. 1084, 1087 (D.S.D. 1979)* [quoting *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F. 2d 72, 81 (3rd Cir. 1977)*, cert. denied, *436 U.S. 913, 99 S. Ct. 677, 56 L. Ed. 2d 413 (1978)* (emphasis added)].

See generally 1 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 3.03[1], at 3-62 to 63; 14 id § 105.01, at 105-3.

There is little question that plaintiff has alleged facts satisfying the first, third, and fourth elements of this test. Hodes' allegation that the three individual defendants at some time entered into a conspiracy sufficiently avers the plurality of actors required in the first element. See *Quality Mercury, Inc. v. Ford Motor Co., supra, 542 F. 2d 469* ***HN4***[] ("[I]t… [is] not necessary to plead a formal **[*10]** agreement… An allegation that conduct was 'joint or collaborative'… [is] sufficient.") Defendants, however, contend that conspiratorial plurality is not present in this case, reasoning that since their individual acts were performed on behalf of the corporate defendant Triangle, "their acts are the acts of the corporation, [and thus] there can be no intra-corporate conspiracy." *Kendall Elevator Co, Inc. v. L.B.C. & W. Assoc. of S.C. Inc., 350 F. Supp. 75, 78 (D.S.C. 1972)*. Defendants also cite the Fifth Circuit's statement in *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F. 2d 256 (5th Cir. 1978)*, cert. denied, *U.S. , 99 S. Ct. 1289, L. Ed. 2d. (1979)*, that "[e]ssential to every *§ 1* offense is concert of action between separate business entities", *id. at 286* (emphasis added), apparently as support for the proposition that individual persons, such as themselves, are incapable of forming a conspiracy in contravention of *§ 1*.

To the extent that defendants suggest that only business entities such as corporations can form the conspiracy or concert of action forbidden by *§ 1*, they are clearly incorrect. ***HN5***[] It is beyond dispute that *§ 1* and **[*11]** the antitrust laws in general were aimed at the anti-competitive acts of business firms or entities, see generally L. Sullivan, Handbook of the Law of Antitrust §§ 60 & 61 (1977), but as the court in *Kendall Elevator Co., Inc., supra*, (which defendants cite) recognized, "two persons or entities… [can] constitute a conspiracy." *350 F. Supp. at 78* (emphasis added; see J. Von Kalinowski, supra, § 6.01[2], at 6-22. If plaintiff merely alleged that the individual defendants had performed acts on behalf of Triangle and that these acts were the substance of a conspiracy among the defendants, the Court would have difficulty in finding the requisite plurality of actors. As one commentator observes, "[i]f… the directors of a corporation authorizes the corporation officers to regulate the enterprises's outlet so that the business gets a better price for its product and if the officers assert their authority completely within the framework of the corporation, without any agreements or understandings with competitors, the actions of the directors and officers will not constitute a violation of *§ 1*. The only actor in this instance is one corporation doing business through its agents." **[*12]** Id. § 6.01[2], at 6-22 to 6-23 n. 39. Here, however, plaintiff alleges that the individual conspirators entered into the forbidden concert of action prior to the incorporation of Triangle, and then incorporated and operated Triangle only as "a corporate shell through which to execute said conspiracy." Thus, we cannot say that the individual defendants' actions were those of one entity.

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general rule is that a conspiracy cannot be based on an agreement between a corporation and its officers, agents, or employees. The only exception arises when the officers or agents, were, at the time of the conspiracy, acting beyond the scope of their authority or for their own benefit.") Accordingly, the Court treats plaintiff's complaint as alleging a conspiracy among only the individual defendants.

While the Court believes that plaintiff has adequately alleged the existence of a conspiracy, illegal conduct pursuant to that conspiracy, and business injuries to plaintiff's business, which were proximately caused by the conspiracy, the complaint is fatally deficient in its failure to set forth any factual allegations as to the second element of a § 1 action -- "adverse, anticompetitive effects within relevant product and geographic markets." The only allegations that remotely suggest anti-competitive effect are plaintiff's averments in Paragraph 7 of its complaint that the acts of the "co-conspirators… have occurred in the course of interstate commerce and involve and affect and will continue to involve and affect the interstate commerce", and in Paragraph 14 that the "agreement [of the **[*13]** alleged conspirators] was in restraint of trade." Beyond these averments, plaintiff has only made allegations as to the intent and purpose of the defendants to injure and destroy plaintiff's business. Plaintiff argues in its suggestions that its complaint is only technically defective in the absence of several phrases or words such as the adjective "unreasonable" to characterize the nature of the alleged restraint of trade, but this argument fails to address the critical omission of factual allegations which demonstrate that the alleged wrongful acts are ones that the antitrust laws were designed to reach.

HN6[] 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, 97 S. Ct. 690, 50 L. Ed. 2d 701, 712 (1977)* [quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510, 533 (1962)* (emphasis in original)]. Thus, if "an antitrust plaintiff alleges nothing more than that a competitor in interstate commerce has by means of unfair business practices deprived plaintiff of key employees, business and confidential records or information [and customers], but does **[*14]** not allege any public injury resulting from the defendant's conduct, plaintiff must seek relief at common law and not under § 1 of the Sherman Act." *Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., supra, 578 F. 2d at 1261* (emphasis added). ***HN7***[] Since the Eighth Circuit has joined other circuits in holding that a conspiracy to eliminate a competitor by means of unfair trade practices must be tested under the "rule of reason", [4] see *id. at 1259-60*; see generally 1 J. Von Kalinowski, supra § 6.02[2], at 6-85 to 6-86 n. 32, plaintiff must allege facts to establish that defendants alleged wrongful acts unreasonably restrained trade in a particular sector of the economy. See id. § 6.02[1], at 6-77. To demonstrate such unreasonable and anti-competitive impact, it is obviously necessary that a plaintiff must identify the product and geographical markets allegedly affected by antitrust violations. See *TV Signal Co. of Aberdeen v. American T. & T. Co., supra, 465 F. Supp. at 1086-90*. In Paragraph 8 of its complaint, plaintiff indirectly characterizes the product market as the distribution of "plumbing specialty supplies through independent contractor salesmen to wholesale **[*15]** and retail outlets", and the geographical market as the "United States". Plaintiff fails, however, to further allege facts showing unreasonable restraint of trade in those markets.

HN9[] Because the Court is sensitive to the recent reminder of the Eighth Circuit that motions to dismiss antitrust actions should be "sparingly" granted, see Penne v. Greater Minneapolis Bd. of Realtors, supra, slip op. at 18, and the Supreme Curt's instruction that allegations should not be disregarded merely because they appear to be "'mere conclusions of the pleader'", *United States v. Employing Plasterers **[*16]** Assn., 347 U.S. 186, 188, 74 S. Ct. 452, 98 L. Ed. 618, 623 (1954)*, we are reluctant to dismiss this action without concurrently giving plaintiff an opportunity to cure the deficiencies noted in this order. The Court emphasizes, however, our belief that, under the most favorable reading of all the facts presently set forth in the complaint, plaintiff has not sufficiently pled an unreasonable restraint on trade in the designated market area. The Court agrees with plaintiff that it is not necessary that Hodes allege that defendant Triangle is a "significant factor" in the market. See *Metal Lubricants Co. v. Engineered Lubricants Co., 411 F. 2d 426, 430 (8th Cir. 1969)*. However, as defendants observe, the Metal Lubricants case does not stand for the proposition that antitrust plaintiffs should always be permitted to proceed to an evidentiary hearing, since in that case the Eighth Circuit was reviewing a district court's findings after a trial and not an order dismissing a complaint. Indeed, the Eighth Circuit's approval of a dismissal of a § 1 claim in *Stifel,*

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[4] ***HN8***[] The "rule of reason" set forth by the Supreme Court in *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*, is applied to business practices that are not substantially "devoid of redeeming attributes". *Stifel, Nicolaus & Co., Inc., v. Dain, Kalman & Quail, Inc., supra, 578 F. 2d at 1259*; see generally L. Sullivan, supra §§ 65-68. The rule requires a court to weigh competing factors to determine whether a particular "restraint, on balance, substantially impedes competition, rather than encouraging or regulating it in neutral ways." Id. § 68, at 188-89.

Nicolaus & Co., supra, 578 F. 2d at 1260-2 illustrates that dismissal is an appropriate disposition when the pleadings fail **[*17]** to set forth factual allegations of anti-competitive effect.

It may be that plaintiff could have alleged facts, which if proven, would establish with some specificity that trade has been or is being unreasonably restrained in the plumbing specialties distribution market throughout the United States, but those allegations are not before the Court. However, since defendants have not filed an answer but rather have exercised their option to file a motion to dismiss, which is not a "responsive pleading" within the meaning of Rule 15(a) Fed. R. Civ. P., see 6 C. Wright & A. Miller Federal Practice and Procedure § 1475, at 388 (1970), we believe plaintiff should be given the opportunity to file an amended complaint. See Rule 15(a). supra. In this connection, the Court notes the decision of the district court in Stifel, Nicolaus & Co., supra, to permit the plaintiff in that case to amend its complaint to set forth allegations of anti-competitive effect. In amending its complaint, plaintiff is instructed to bear in mind the Eighth Circuit's observation that ***HN10***[] "[a]n antitrust complaint must 'allege facts from which it can be determined that conduct charged to be in violation of the **[*18]** antitrust laws was reasonably calculated to prejudice the public interest by unduly restraining the flow of interstate commerce.'" Quality Mercury, Inc. v. Ford Motor Co., supra, 542 F. 2d at 472 (emphasis added) [quoting Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F. 2d 891, 894 (5th Cir. 1954)]. The absence of such public injury allegations in plaintiff's present complaint demands dismissal of plaintiff's § 1 claim. See Larry R. George Sales Co. v. Cool Attic Corp., 589 F. 2d 266 (5th Cir. 1979) (and cases cited therein); Bryan v. Stillwater Bd. of Realtors, 578 F. 2d 1319, 1323-4 (10th Cir. 1977); and Kinnear-Weed Corp. v. Humble Oil & Refining Co., supra.

III. Sherman Act § 2 Attempt to Monopolize Claim

Plaintiff Hodes also alleges in Paragraph 14 of its complaint that the conspiracy of the individual defendants and the actions carried out by those defendants and Triangle in furtherance of that conspiracy "constitute an attempt to monopolize the plumbing specialists supplies business in the United States." ***HN11***[] Section 2 of the Sherman Act condemns any "attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade **[*19]** or commerce among the several states, or with foreign nations." 15 U.S.C. § 2 (1976). To maintain an action to recover for damages sustained from an "attempt to monopolize" a party must plead, in addition to the obvious element of business injuries, the following factual elements:

(1) an overt act or acts, or a course of conduct;

(2) a specific intent to monopolize a relevant market; and,

(3) a dangerous probability of success.

See Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., supra, 578 F. 2d at 1262; United States v. Empire Gas Corp., 537 F. 2d 296, 298-9 (8th Cir. 1976), 429 U.S. 1122, 97 S. Ct. 1158, 51 E. Ed. 2d 572 (1977); Agrashell, Inc. v. Hammons Prods. Co., 479 F. 2d 269, 284 (8th Cir. 1973), cert. denied, *414 U.S. 1022, 94 S. Ct. 445, 38 L. Ed. 2d 313 (1973)*; see generally 2 J. Von Kalinowski, supra § 9.01[1].

There is no dispute that plaintiff's complaint sets forth a course of actions allegedly undertaken by all of the defendants pursuant to a conspiracy to monopolize trade; nor do defendants question the suffered injuries as a proximate result of sufficiency of plaintiff's allegations that it has that conduct. In addition, defendants apparently **[*20]** do not claim that plaintiff has failed to adequately allege the second element of specific intent. [5]

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[5] While defendants do not question the sufficiency of plaintiff's pleadings of specific intent, the Court believes that this element has, at best, been only indirectly pleaded. In the only paragraphs of its complaint in which plaintiff makes allegations concerning defendants' intent, paragraphs 14, 16, 18 and 19, its sole repeated claim is that defendants acted with "the intent to injure and destroy the plaintiff in its business and property." ***HN12***[] "Specific intent to monopolize must be well pleaded…." Hiland Dairy, Inc. v. Kroger Co., 402 F. 2d 968, 971 (8th Cir. 1968), cert. denied, ***395 U.S. 961, 89 S. Ct. 2096, 23 L. Ed. 2d 748 (1969)*** (emphasis added.) Not only does plaintiff fail to even make pro forma allegations of intent or purpose to monopolize, but, more

Defendants contend, however, that nowhere in the complaint has plaintiff set forth factual allegations establishing the third element of dangerous probability of success. Upon a thorough review of plaintiff's complaint, the Court is compelled to agree with this criticism.

[*21] ***HN14***[] The Eighth Circuit, along with a majority of courts, has ruled that demonstration of a "dangerous probability of success of an attempt must include a showing of the relevant market within which that probability occurred." *United States v. Empire Gas Corp., supra, 537 F. 2d at 302*. The "relevant market", as previously noted, is comprised of two components -- (1) "relevant product market and (2) relevant geographic market." *Id. at 303*. As the Court observed in its discussion of the *section 1* claim, plaintiff has not directly or expressly addressed these two components in its complaint. However, we liberally infer from its allegations and its suggestions to the Court, that both plaintiff and defendant Triangle compete in the distributions of plumbing specialty supplies in a market extending throughout the United States, and thus that the relevant product market is the distribution of plumbing specialty supplies to wholesale and retail outlets and the relevant geographic market, the entire country.

Plaintiff fails, however, to allege that there was, or is, a dangerous probability that defendants would succeed in their alleged attempt to monopolize the relevant market. This deficiency **[*22]** is not merely one of omission to include the phrase "dangerous probability of success" in the pleadings; plaintiff has not set forth any factual allegations raising the type of factors which courts have considered in determining the existence of dangerous probability. ***HN15***[] The Eight Circuit has indicated that the factors which point to dangerous probability consist primarily of economic data", *Agrashell, Inc. v. Hammons Prods. Co., supra, 479 F. 2d at 285*, such as the number of firms within the relevant market and the defendant's percentage share of that market, *Hiland Dairy, Inc. v. Kroger Co., supra, 402 F. 2d at 974*, the defendant's power to control prices, *Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., supra, 578 F. 2d at 1262*, and barriers to entry into the relevant industry-product market. *United States v. Empire Gas Corp., supra, 537 F. 2d at 305*. See generally 2 J. Von Kalinowski, supra § 9.01[2][a].

Although plaintiff represents to the Court in its suggestions that only 10 companies occupy the plumbing specialties distribution market, [6] it makes no allegations in its complaint as to the status of the positions that plaintiff or defendant Triangle occupy **[*23]** in that market. Indeed, it seems that plaintiff's allegations in paragraphs 15 and 16 acknowledging that Triangle is a relatively new entrant in that market, incorporated sometime in the early months of 1979, suggest that defendant lacked the ability to monopolize the market. [7] The complaint is devoid of any

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significantly, it does not allege "conduct or acts" from which intent to monopolize the relevant market (presumably the plumbing specialties distribution market in the geographical market of the entire United States) might be inferred. See ***id. at 975***. ***HN13***[] "Specific intent to monopolize or to obtain monopoly power may be defined for purposes of *§ 2* of the Sherman Act as an intent to control prices or to restrict competition unreasonably." *United States v. Empire Gas Corp., supra, 537 F. 2d at 302*. In the earlier discussion of the *§ 1* claim, the Court concluded that plaintiff failed to aver any facts demonstrating or even suggesting that the allegedly wrongful acts of defendants were causing anti-competitive effects in the relevant market. It would seem to follow, then, that the complaint lacks allegations of predatory acts or acts unreasonably restraining trade, such as would establish specific intent to monopolize. See *Hiland Dairy, Inc. v. Kroger Co., supra, 402 F. 2d at 975*. Since the Court believes that the issue of dangerous probability is dispositive of dismissal of the present *§ 2* claim, we find it unnecessary to rule as a matter of law that plaintiff's allegations do not allege a specific intent to monopolize. Plaintiff is cautioned, however, that an amended complaint will not withstand a motion to dismiss unless it clearly sets forth allegations of conduct which is exclusionary and anti-competitive in nature. *Union Lender Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 140-41 (D. Mass. 1959)*, aff'd in part and rev'd in part, *284 F. 2d 582 (1st Cir. 1960)*, cert. denied, ***365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)***.

[6] Although the Court has construed plaintiff's allegations in paragraph 8 of its complaint to satisfy the requirement that the relevant market be identified, we believe plaintiff should supply more clarity and specificity in setting forth the area of trade which it contends is adversely affected by defendants' actions. "Without a definition of that market there is no way to measure… [the defendants'] ability to lessen or destroy competition." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247, 251 (1965)*. In redrafting this portion of its complaint, plaintiff is directed to the Eighth Circuit's discussion of the issue of relevant market in *United States v. Empire Gas Corp., supra, 537 F. 2d at 302-5*.

[7] We are not stating that a firm's status as a new entrant ends the inquiry into its ability to monopolize or its possession of market power; but such a factor, in the absence of other information, mitigates against the likelihood that the new entrant possesses

factual allegations as to economic data, and even under a favorable construction, simply does not plead "that the person[s] charged with the attempt [Triangle and the individual defendants] have sufficient market control to make it likely that [they could] achieve… [a] monopoly." 2 J. Von Kalinowski, supra § 9.01[2][a], at 9-7. ***HN16***[] "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…" *American Tobacco Co. v. United States, 328 U.S. 781, 785, 90 L. Ed. 1575, 1581 (1946)* (emphasis added). In view of plaintiff's failure to allege any facts which would indicate a dangerous probability of success by defendants in their alleged attempt to monopolize, plaintiff's *section* ***[*24]*** *2* claim must be dismissed, [8] accord *Hiland Dairy, Inc. v. Kroger Co., supra, 402 F. 2d at 976-7*; *Unibrand Tire & Prod. Co. v. Armstrong Rubber, 429 F. Supp. 470, 477 (W.D.N.Y. 1977)*, again, with the qualification that plaintiff will be afforded an opportunity to cure this defect.

[*25] Conclusion

The Court has determined that plaintiff's *§ 1* and *§ 2* claims suffer from the absence of factual allegations that defendants' alleged actions had caused, or were likely to cause, anti-competitive effects in the relevant market of trade. In reaching this determination, the Court observes that the nature of the wrongful acts alleged by plaintiff may, if proven, constitute a basis for recovery under the common law of Missouri, and indeed, the courts of that state appear to be the appropriate forum for resolving plaintiff's grievances. ***HN18***[] "[T]he Sherman Act 'was not enacted to… afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be-purchasers.'" *Stifel, Nicolaus & Co., Inc. v. Dain, Kalman & Quail, Inc., supra, 578 F. 2d at 1261* [quoting *Apex Hosiery Co. v. Leader, 310 U.S. 469, 512, 60 S. Ct. 982, 1002, 84 L. Ed. 1311, 1333 (1940)]*. However, cognizant of "the long-standing policy of encouraging private enforcement of the antitrust **[*26]** laws", *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 725 (1977)*, we extend to plaintiff an opportunity to cure the critical defects of its complaint, which have been noted in this memorandum.

Since the Court has determined that plaintiff's federal antitrust claims in Counts I and II of its complaint should be dismissed, plaintiff's state law claims in Counts III through VII must also be dismissed because the Court has no basis for exercising pendent jurisdiction over these claims. See *United Mine Workers v. Gibbs, supra, 383 U.S. at 726, 16 L. Ed. 2d at 228*.

Accordingly, it is hereby

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monopoly power or the ability to monopolize, espectially if it has not been transacting business as an established firm in another business market. See generally P. Areeda, Antitrust Analysis P227-241 (2d Ed. 1974); L. Sullivan, supra, §§ 9-11.

[8] The Court has evaluated plaintiff's *§ 2* claim as an "attempt to monopolize" claim in accordance with the language of the pleading. However, since plaintiff also alleged a *§ 1* conspiracy, the *§ 2* claim might be construed to plead a "conspiracy to monopolize". ***HN17***[] The elements of this offense are somewhat different from those of an attempt to monopolize, namely:

> "(1) the existence of a combination or conspiracy;
>
> "(2) overt acts in furtherance of that combination or conspiracy;
>
> "(3) a substantial amount of commerce affected; and
>
> "(4) specific intent to monopolize."

2 J. Von Kalinowski, supra, § 9.02[1], at 9-29 to 9-30. While the Court has found that plaintiff sets forth sufficient factual allegations to state the existence of a conspiracy, overt acts, and arguably specific intent to monopolize (see note 5 supra), our ruling on the *§ 1* claim indicated that plaintiff failed to make any allegation as to the effect of defendants' alleged actions on the relevant market. See Part III supra. Nowhere in the complaint does plaintiff allege facts that could, even when liberally construed, be said to plead an impact on a substantial amount of interstate commerce. Thus, even if we were to infer from plaintiff's complaint an intention to allege a conspiracy to monopolize, an essential element of that offense is not presented in the factual averments of the complaint.

Ordered that defendant's motion to dismiss Counts I and II of plaintiff's complaint for failure to state a claim upon which relief can be granted and to dismiss Counts III through VII for lack of subject matter jurisdiction is granted without prejudice to filing in the proper forum of the claims set forth in Counts III through VII; and it is further

Ordered that plaintiff shall have thirty days from the date of this order within which to file an amended complaint.

Byars v. Bluff City News Co.

United States Court of Appeals for the Sixth Circuit

November 30, 1978, Argued ; October 16, 1979, Decided

No. 77-1227

Reporter

609 F.2d 843 *; 1979 U.S. App. LEXIS 11175 **; 1979-2 Trade Cas. (CCH) P62,928

ANDREW BYARS, Plaintiff-Appellant, v. BLUFF CITY NEWS COMPANY, Incorporated, Defendant-Appellee.

Subsequent History: **[**1]** As Amended on Denial of Rehearing January 9, 1980.

Prior History: APPEAL from the United States District Court for the Western District of Tennessee.

Core Terms

monopolist, periodicals, distributors, monopoly power, district court, monopoly, termination, retail, monopolize, wholesale, antitrust, cases, retail outlet, competitor, regional, customers, integrate, magazines, Refusals, Poster, new owner, vertically, reasons, relevant market, anti-competitive, distributed, possessed, predatory, consumer, supplies

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

15 U.S.C.S. § 2 makes it unlawful for a person to monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, allows private parties to bring civil suits against violators of the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3[] **Monopolies & Monopolization, Actual Monopolization**

Illegal monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, has two distinct elements: 1) possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is defined as the power to control prices or exclude competition. The material consideration in determining whether a monopoly exists, is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The simplest way of showing monopoly power is to marshal evidence showing the exercise of actual control over prices or the actual exclusion of competitors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Regulated Practices, Market Definition**

Market share is the critical factor in antitrust cases brought under § 2 of the Sherman Act, 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] Monopolies & Monopolization, Actual Monopolization

Although courts have been quick to find monopoly power where the market share is 75-80 percent or greater, this should be regarded as a starting point. Thus, while the existence of such monopoly power ordinarily may be inferred from the predominant share of the market, such an inference does not have to follow automatically. Only a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] Monopolies & Monopolization, Actual Monopolization

There are two factors in particular that could offset the inference of monopoly power that goes with possession of a high market share: 1) entry barriers and 2) temporal considerations. If entry barriers are low, the threat of potential competition operates as a significant check on monopoly power since competitors will quickly enter the market if prices are raised significantly. Similarly, possession of monopoly power may only indicate short-term success from innovation that will quickly dissipate as competitors catch up.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Monopolies & Monopolization, Actual Monopolization

Mere possession of monopoly power is not illegal. A monopolist which achieves that status because of a superior product, business acumen, or historic accident cannot be faulted. However, if a monopolist abuses its monopoly power and acts in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals, then § 2 of the Sherman Act, 15 U.S.C.S. § 2, is violated.

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 > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Per Se Rule & Rule of Reason, Per Se Violations

As a general rule, there exists no duty to deal, so long as the determination is made unilaterally. In contrast, concerted refusals to deal are in many situations per se violative of § 1of the Sherman Act. 15 U.S.C.S. § 1.

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Remedies > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN11[] **Distributorships & Franchises, Antitrust Issues**

Franchisees and distributors that have been unilaterally terminated have discovered that ordinarily the law offers them no remedy absent proof that a conspiracy against them took place. An agreement with another distributor to replace the terminated distributor does not count as a conspiracy. Even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

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 > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Private Actions, Remedies**

Under the "bottleneck theory of ***antitrust law***, " a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Situations where a monopolist uses its monopoly power in one market to distort competition in another market by refusing to deal are forbidden, at least absent a valid business justification for the refusal to deal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN15[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Where a monopolist refuses to deal with customers who deal with its rivals is inherently anti-competitive behavior, and it is illegal, either as monopolization or attempt to monopolize.

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Antitrust & Trade Law, Sherman Act

Where a group of competitors control an indispensable facility which cannot be easily duplicated is the classic case where the "bottleneck theory" applies. Absent valid business reasons, equal access is required for all.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN17[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Although a general intent to monopolize is all that is ordinarily required to find a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, cases discussing a monopolist's duty to deal have effectively required a finding of specific intent to monopolize.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN18[] Actual Monopolization, Anticompetitive & Predatory Practices

As preservation of competition is at the heart of the Sherman and Clayton Acts, a practice should be deemed "unfair" or "predatory" only if it is unreasonably anti-competitive. In a case under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

In many cases, a refusal to deal designed to accomplish vertical integration, without more, should not be a basis for imposing antitrust liability. There are situations, however, where a refusal to deal as part of a vertical integration scheme is anti-competitive. That is, 1) where integration facilitates price discrimination so that the monopolist can reap the maximum monopoly profit from different consumers; 2) where integration increases first-level entry barriers so that potential competitors are stymied; and 3) where integration facilitates evasion of regulation of monopoly profits. In such cases, a court should not hesitate to find a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN20[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Situations where a refusal to deal as part of a vertical integration scheme is anti-competitive include: 1) where integration facilitates price discrimination so that the monopolist can reap the maximum monopoly profit from different consumers; 2) where integration increases first-level entry barriers so that potential competitors are stymied; and 3) where integration facilitates evasion of regulation of monopoly profits.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN21[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A finding of anti-trust liability in a case of a refusal to deal should not be made without examining business reasons which might justify the refusal to deal.

Antitrust & Trade Law > Sherman Act > Claims

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Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Sherman Act, Claims**

Predatory conduct on a defendant's part goes a long way toward establishing a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Counsel: Martin W. Brown, Cobb, Edwards, Hamlet, Nichol & Woodall, Michael C. Williams, Memphis, Tenn., for plaintiff-appellant.

Stephen H. Biller, Memphis, Tenn., Sam M. Phelps, Tuscaloosa, Ala., for defendant-appellee.

Judges: Before KEITH and MERRITT, Circuit Judges, and **[**2]** GREEN, * Senior District Judge.

Opinion by: KEITH

Opinion

* The Honorable Ben C. Green, Senior District Judge for the Northern District of Ohio, sitting by designation.

[*846] This case presents intriguing questions of single firm monopoly power under *section 2* of the Sherman Antitrust Act, *15 U.S.C. § 2*. [1] The principle issue presented is one of the most unsettled and vexatious in the antitrust field: under what circumstances does a monopolist have a duty to deal? [2]

[3]** The plaintiff, Andrew Byars (Byars), had a long-standing business relationship with the defendant, Bluff City News Co. (Bluff City). [3] Bluff City changed ownership in 1970 and ended all of its business dealings with Byars. The plaintiff then brought this action, alleging that Bluff City was a monopolist which violated the Sherman Anti-Trust Act when it refused to do business with him. In addition, plaintiff added pendent claims of common-law unfair competition, based on an alleged campaign of "dirty tricks" waged against him by Bluff City. After a bench trial, the district court found for the defendant in all respects. Plaintiff appeals. Because we feel that additional fact-finding is needed, we remand for further proceedings.

[4]** FACTS

Background

Printed materials are published by various publishers in the United States and distributed through approximately 15 national distributors to regional wholesale distributors who, in turn, distribute the periodicals to retail outlets such as newsstands and convenience stores for resale to the general public.

Bluff City is one of a number of regional distributors of periodicals in the United States. For over thirty years, it has been a wholesale distributor of paperback books, magazines, and other periodicals to retail outlets in the Memphis-Shelby County, Tennessee, metropolitan area. As a regional wholesaler, Bluff City thus occupied a middle rung in the distribution chain. Following general industry practice, Bluff City's employees would regularly deliver magazines to the various retail outlets and pick up any unsold magazines for credit. [4]

[5]** **[*847]** Early in 1957, Mr. S. I. Bernbaum, Bluff City's owner at that time, determined that a number of small outlets did not sell enough magazines to justify the cost of the regular pick up and deliveries by Bluff City's employees. Desirous of not losing their business altogether, Mr. Bernbaum arranged to have Mr. Howard Troyer

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[1] *15 U.S.C. § 2* ***HN1***[] makes it unlawful for a person to "monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations . . ." § 4 of the Clayton Act, *15 U.S.C. § 15*, ***HN2***[] allows private parties to bring civil suits against violators of the Sherman Act.

[2] For scholarly commentary on this question, See 3 P. Areeda & D. Turner, ***Antitrust Law*** PP 723-736 (1978); 10 Von Kalinowski Anti-Trust Laws and Trade Regulation § 61.01-03 (Rev. Ed. 1979); Sullivan, Antitrust § 48 (1976); Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv.L.Rev. 1720 (1974); Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich.L.Rev. 373, 440-445 (1974); Buxbaum, Boycotts and Restrictive Marketing Arrangements, 64 Mich.L.Rev. 671, 678-80 (1966); Fulda, Individual Refusal to Deal: When Does Single-Firm Conduct Become Vertical Restraint? 30 Law & Contemp. Prob. 590 (1965); Barber, Refusals to Deal Under the Federal Anti-Trust Laws, 103 U.Pa.L.Rev. 847 (1955); Report of the Attorney General's Nat'l Comm. to Study the Antitrust Laws 132-37 (1955).

[3] Bluff City was a proprietorship owned by Mr. S. I. Bernbaum until 1970 when the business was sold to Mr. Guy Momam and family. At the time of sale, the company was incorporated and remains so to this day. We shall at all times refer to the company as Bluff City, both pre and post incorporation.

[4] As is indicated below, allowing credit for unsold magazines is critical to the industry. Since periodicals go out of date quickly, no retailer would accept more than a minimal number of periodicals for resale if he bore the risk of loss. Accordingly, it is industry practice for regional wholesalers to accept unsold periodicals for credit from retailers so long as returns are made within a certain time period. Similarly, the national distributors accept unsold magazines for credit from the regional wholesalers. It is not clear from the record whether the ultimate loss for unsold magazines is borne by the national distributors or by the publishing companies themselves. Of course, to the extent that the national distributors are owned by the publishing companies, the question is academic.

service these small outlets. Pursuant to the new arrangement, Troyer would buy periodicals from Bluff City at ten per cent less than wholesale price and sell them to small retail outlets which Bernbaum preferred not to service in the regular manner.

Troyer was a friend and co-worker of the plaintiff, Andrew Byars. Later in 1957, Troyer suggested that Byars join him in distributing magazines to the small retail outlets. A year later, Byars and Troyer separated their operations geographically. Troyer would buy periodicals at ten per cent less than wholesale and sell them to small retail outlets in a certain area of the Memphis-Shelby County region; Byars would do the same for the remaining areas.

Byars and Troyer distributed periodicals part-time. Each had the right to solicit new customers, at least so long as they were small retail outlets which Bluff **[**6]** City would not care to service. In 1967, Troyer, desirous of giving up his part-time distribution of periodicals, sold his accounts to Byars. From then on, Andrew Byars was the only person handling the small accounts.

Byars worked diligently. He would solicit additional accounts and make separate payment agreements with his customers. He billed the customers on invoices marked "Andrew Byars News." He drove a truck with this label on the side, and employed various people to help him on a part-time basis. By 1970 the plaintiff was serving approximately 150 retail outlets and had a gross sales volume of almost $ 350,000.00.

The parties have entered into a heated dispute on the issue of whether Byars was an employee of Bluff City. Plaintiff himself characterized his position as that of a "rack jobber." The district court stated that Byars was an employee in the "common law sense" because he was subject to some degree of control by Bluff City. Our review of the record persuades us that Byars' relationship with Bluff City is a classic example of that of an independent contractor that is, someone who is paid to complete a job, but whose day-to-day activities are not subject to control by **[**7]** the employer. [5]

Unlike Bluff City's regular employees, Byars was not paid a salary. Instead, Byars would turn over to Bluff City all of the money which he had collected from the retail outlets he serviced and would receive a monthly check representing his commission on sales. His commission was set at ten percent, later increased to ten and one half percent. [6] Bluff City News was not aware of all of Byars' accounts, and did not directly supervise the manner in which he serviced them. If Bluff City received complaints from one of Byars' retail outlets, the complaint would be referred directly to Byars himself. Similarly, Byars was furnished a federal tax form 1099 at the end of the year, while route salesmen who were Bluff City employees were furnished W-2 forms. [7] Further, the risk of loss from outdated **[**8]** returns or similar difficulties, was borne directly by Byars. [8] In contrast, Bluff **[*848]** City's employees were not held responsible for similar losses incurred on their routes. [9]

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[5] See 57 C.J.S. Master and Servant § 580 Et seq.; 53 Am.Jur.2d, Master and Servant § 4 Et seq.; *41 Am.Jur.2d, Independent Contractors § 5 Et seq.* See also *26 U.S.C. § 3121*; *26 C.F.R. § 31.3121(d)-1 (1978)*.

[6] This was apparently done voluntarily, as a goodwill gesture reflective of then-existing harmonious relations between Byars and Bluff City.

[7] Compare *26 U.S.C. §§ 1401-02* With *26 U.S.C. §§ 3101-02*.

[8] As indicated in n. 4, Supra, there exists a general return privilege in the industry for unsold periodicals. However, sometimes retailers would not return unsold periodicals within allotted time periods. As a matter of goodwill, the wholesale supplier would accept these late returns for credit and bear the loss itself.

[9] Still, as in most such relationships, there is some indication that plaintiff was regarded as an employee of Bluff City. The plaintiff qualified for and received prizes and bonuses awarded from time-to-time by Bluff City to its regular route men. Similarly he also received Christmas certificates and participated in Bluff City's group insurance plans. Bluff City insured plaintiff's inventory and provided free warehouse space where he picked up the magazines. The plaintiff appeared on Bluff City's roster of employees. On balance, however, it is clear that both Byars and Bluff City recognized that Byars was different from a regular employee and that he had considerable discretion in the servicing of his own accounts which Bluff City's regular employees did not.

[9]** The relationship between Byars and Bluff City operated smoothly for many years. In 1970, however, the fortunes of the business world upset the harmony of the Status quo. In May of 1970, Bluff City's owners, S. I. Bernbaum and family, sold the business to Mr. Guy Moman and family. [10] The national distributors from whom Bluff City received its publications were informed of the sale; they continued to do business with Bluff City's new owners. From June 1, 1970, until December 31, 1970, Bluff City's new owners permitted the plaintiff to continue to operate in the same manner which he had previously.

By the end of 1970, the new owners had become unhappy with the arrangement with Byars. Testimony credited by the district court revealed that, as a matter of business preference, the new owners did not want to continue the independent contractor relationship with Byars. Instead, the new owners wanted to revert to the pre-1957 manner of operation in which they directly serviced Byars' small customers **[**10]** themselves.

There is no dispute that a series of meetings took place between Byars and the new owners. There is considerable dispute as to what took place at these meetings. The district court credited testimony that the new owners gave Byars several months in which to convince them that the arrangement should continue. Unconvinced that Byars' route fit in with their way of doing business, Bluff City's new owners decided to terminate the arrangement. Mr. Moman testified, and the district court found, that he determined to terminate the independent "rack jobber" arrangement with Byars and instead to pay Byars a salary, employing him directly in a supervisory position. According to Moman, this arrangement was not acceptable to Byars. [11]

[11]** Whatever the dispute as to the circumstances leading up to Bluff City's termination of its arrangement with Byars, there is no dispute that as of January 1, 1971, Bluff City did terminate the arrangement and refused to deal with him. It then took over and serviced Byars' former accounts itself. [12]

The Industry

The wholesale publication distribution industry recognizes two separate markets for periodicals. The "primary line" periodicals are those which are generally acceptable to the general public. "Primary line" periodicals are limited to those periodicals which are distributed by approximately 15 major national distributors. This classification does not include periodicals categorized by the industry **[**12]** as "secondary line periodicals"; that is, periodicals which are not as acceptable to the general public. Although the distinction between primary and secondary line periodicals is not entirely clear, it appears that the secondary periodicals are those periodicals which are of special interest to a limited public. Thus, highly specialized and/or sexually-oriented periodicals are regarded as being within the secondary **[*849]** line. All agree that the dispute in this case centers around the distribution of primary line periodicals in the Memphis and Shelby County, Tennessee area.

After January 1, 1971, plaintiff was unable to acquire any primary line periodicals for resale. He attempted to obtain such periodicals at wholesale prices from the national distributors who supplied these periodicals to Bluff City. In each instance, he was turned down. Cut off from his former source of supply and unable to locate a new one, plaintiff was unable to sell primary line periodicals to his customers. He struggled along, and was able to stay in business for several years by selling secondary line periodicals which he obtained from other distributors. Throughout this period, Byars tried continuously **[**13]** to obtain primary line periodicals from other sources and requested that Bluff City sell to him, but such requests were refused.

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[10] See n. 3, Supra.

[11] For cases presenting factually similar situations, See *Knutson v. Daily Review Inc., 548 F.2d 795 (9th Cir. 1976)*, Cert. denied, ***433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)***; *McGuire v. Times Mirror Co., 405 F. Supp. 57 (C.D.Cal.1975)*; *Millcarek v. Miami Herald Publishing Co., 388 F. Supp. 1002 (S.D.Fla.1975)*.

[12] It is undisputed that Mr. Moman did not employ limited service independent salesmen in any of his other wholesale distribution agencies in Alabama and Mississippi. Thus it appears that in terminating Byars, Bluff City's new owners acted in accordance with their general approach to conducting their business.

Beginning in October, 1973, Byars was finally able to obtain primary line periodicals from sources outside of normal distribution channels. This source of supply is subject to termination without notice, as was Byars' arrangement with Bluff City News. Although this new source of supply has enabled Byars to compete somewhat with Bluff City in the sale of primary line periodicals, there was testimony that the source of supply is limited. As a result, Byars has been unable to fully compete with the defendant since he cannot expand the number of stores which he services.

In the ordinary case, this tale would elicit much sympathy but no legal redress. Thorny legal issues are presented, however, because of Bluff City's alleged status as a monopolist and because of the alleged "dirty tricks" it played on Byars when he tried to stay in business after the parties' relationship terminated.

I. The Relevant Market

In a typical *section 2* monopolization or attempt to monopolize case, the issues of relevant product market and relevant geographic market are usually hotly **[**14]** contested. [13] In this case, however, there is no dispute whatsoever as to these issues. The parties have stipulated that the relevant product market is over-the-counter sale of "primary line" periodicals. [14] The parties have also stipulated that the relevant geographic market encompasses the area around Memphis where Bluff City distributes periodicals that is Memphis and Shelby County, Tennessee; Southhaven, Mississippi; and West Memphis, Arkansas. The question which this case presents, then, is whether Bluff City's refusal to deal with Byars constituted illegal monopolization within the stipulated market.

[15]** II. Monopolization in Violation of *Section 2* of the Sherman Act

In *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*, the Supreme Court noted that ***HN3***[] illegal monopolization under *Section 2* of the Sherman Act has two distinct elements: 1) possession of monopoly power in the relevant market and 2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Id. [15]

A. Possession of Monopoly Power

The Supreme Court has defined ***HN4***[] monopoly power as "the power to control prices or exclude competition." *United States v. Grinnell, 384 U.S. 563, 571, 86 S. Ct. 1698, 1704,* ***[**16]*** *16 L. Ed. 2d 778 (1966)*; *United States* ***[*850]*** *v. DuPont and Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. ". . . (T)he material consideration in determining whether a monopoly exists, is not that prices are raised and that competition is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco Company v. United States, 147 F.2d 93, 112 (6th Cir. 1944)* (McAllister, J.), *Aff'd, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*.

As the Supreme Court noted in *American Tobacco Company v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*, ***HN5***[] the simplest way of showing monopoly power is to marshal evidence showing the exercise of actual control over prices or the actual exclusion of competitors. This was the approach taken in older cases. See *United States v. Int'l Harvester Co., 274 U.S. 693, 708, 47 S. Ct. 748, 71 L. Ed. 1302 (1927)*; *United*

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[13] See e. g. *United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *United States v. E. I. DuPont DeNemours and Co., 366 U.S. 377, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1956)*; *Telex Corp. v. I.B.M., 510 F.2d 894* (10th Cir.), Cert. dismissed, ***423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)***.

[14] This market excludes "primary line" periodicals distributed through direct readers' subscriptions and excludes all sales of "secondary line" periodicals.

[15] For an excellent discussion of *§ 2* of the Sherman Act, see Judge Kaufman's opinion in *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*. We, of course, express no opinion on whether we agree with the Berkey court's application of the law to the facts of that case.

States v. United States Steel Corporation, 251 U.S. 417, 451, 40 S. Ct. 293, 64 L. Ed. 343 (1920). See also United States v. Swift & Co., 286 U.S. 106, 52 S. Ct. 460, 76 L. Ed. 999 (1932).

In order to better deal with antitrust cases, courts developed **[**17]** what can best be described as a shortcut formula which entails measuring the market share possessed by the alleged monopolist. The leading case taking this approach is United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 424, 429 (2d Cir. 1945), where Judge Learned Hand saw no need for additional analysis when confronted with evidence of massive market control. He simply pointed to the fact that Alcoa possessed a 90 percent share of the relevant market and concluded that the company possessed monopoly power. [16] The Supreme Court expressly approved Judge Hand's views in American Tobacco Co. v. United States, 328 U.S. 781, 813-14, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946), and ever since **HN6**[] market share has been the critical factor in § 2 antitrust cases. [17]

[18]** **HN7**[] Although courts have been quick to find monopoly power where the market share is 75-80% or greater, [18] **[**19]** this should be regarded as a starting point. Thus, while "the existence of such (monopoly) power ordinarily may be inferred from the predominant share of the market" United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966), such an inference does not have to follow **[*851]** automatically. [19] **[**20]** Only a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists. [20]

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[16] In a famous dictum, Judge Hand stated that it was doubtful whether 60 or 64% of the market would be enough to constitute a monopoly and that 33% would certainly not be enough. United States v. Aluminum Co. of America, 148 F.2d 416, 424 (1945).

[17] This is the reason why relevant market is so critical in antitrust cases. How one defines the relevant market determines market share and market share all but determines whether one is a monopolist. See e. g. United States v. DuPont & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956) (Majority's broad definition of relevant market resulted in a finding that DuPont had 20% of that market and was therefore not a monopolist. The dissent would have defined the market more narrowly and inferred monopoly power from DuPont's 75% share of this market). See also Sullivan, Antitrust § 12 Et seq.

[18] See United States v. Grinnell, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (87% of the market); Int'l Boxing Club, Inc. v. United States, 358 U.S. 242, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959) (81% of championship fights); American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125,, 90 L. Ed. 1575 (1946) (80% of market constituted monopoly power); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1 (9th Cir. 1960), Rev'd on other grounds, 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962) (70% of market for by-product oranges); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.) Cert. denied, ***354 U.S. 923, 77 S. Ct. 1381, 1 L. Ed. 2d 1438 (1957)***, (96% of narrowly defined market for communications media operations); United States v. Besser Mfg. Co., 96 F. Supp. 304 (E.D.Mich.1951), Aff'd on the other grounds, 343 U.S. 444, 72 S. Ct. 838, 96 L. Ed. 1063 (1952) (65% of market where balance divided between 50 small competitors); United States v. Paramount Pictures, Inc., 85 F. Supp. 881 (S.D.N.Y.1949) (70% of market for first run theatres in 92 largest American cities). See also United States v. DuPont & Co., 351 U.S. 377, 425, 76 S. Ct. 994, 1022, 100 L. Ed. 1264 (1956) (Warren, C. J. dissenting) ("Since DuPont has the lion's share of that market, it must have monopoly power, as the majority concede").

[19] See P. Areeda, Antitrust Analysis: Problems, Text, Cases. 18-20, 197-203 (2d ed. 1974); Note, The Development of the Sherman Act Section 2 Market Share Test and Its Inapplicability to Dynamic Markets, 49 So.Calif.L.Rev. 154, 182-186 (1975). These commentators have noted that **HN8**[] two factors in particular could offset the inference of monopoly power which goes with possession of a high market share: 1) entry barriers and 2) temporal considerations. If entry barriers are low, the threat of potential competition operates as a significant check on monopoly power since competitors will quickly enter the market if prices are raised significantly. Similarly, possession of monopoly power may only indicate short-term success from innovation which will quickly dissipate as competitors catch up. A careful examination of the publishing industry might reveal other factors which could raise doubts whether the defendant possesses monopoly power.

One factor which deserves assessment is the conduct of the national distributors. It is clear that to the extent that Bluff City does have a monopoly in the relevant market, that monopoly exists at the pleasure of the national distributors. It may be that the national distributors carefully police the conduct of the regional distributor and are quick to withdraw an exclusive franchise at the first sign of consumer dissatisfaction. On the other hand, the national distributors may not care about the regional distributors' conduct so long as they make their profit.

Reverting to pre-Alcoa analysis, the district court did not attempt to measure Bluff City's market share. Thus, it did not address uncontroverted proof **[**21]** that measured both in terms of the number of outlets served and dollar volume of sales, Bluff City possesses approximately ninety percent (90%) of the relevant market. [21] This is hardly surprising since the only sources of wholesale primary-line periodicals in the Memphis area are the two litigants. And, since Byars was cut off by the defendant, he has struggled to get primary-line periodicals to resell to his customers. Indeed, from January 1971 to October 1973, the plaintiff was unable to secure primary-line periodicals from any source and, as a result, Bluff City controlled virtually 100% Of the relevant market.

The district court concluded that Bluff City did **[**22]** not have monopoly power. This determination was based on two facts. First, the court below emphasized that the relationship between Bluff City and the national periodical distributors was terminable at will. The court found that it was the economics of the industry which led the national distributors to deal exclusively with a single regional distributor such as Bluff City. [22] **[**23]** Periodicals are highly perishable; when they get out of date, they are worthless. Few retailers would sell magazines **[*852]** to the public if they bore the risk of loss for unsold out-of-date periodicals. Accordingly, industry practice is to allow unlimited return of unsold periodicals to the regional distributor and from the regional distributor back to the national distributors. Industry experience has shown that where there are two or more regional distributors competing with each other, confusion and high rates of return of unsold merchandise are the order of the day. [23] To minimize these problems, national distributors have made the independent [24] decision to deal with only one regional distributor whenever possible.

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[20] See *Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975)*, Cert. denied, ***425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*** (defendant's share of the relevant distribution market ranged from 45-70%, but competitors were small and defendant had monopoly power over supply market); *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343 (D.Mass.1953)*, Aff'd per curiam, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*, (court gave "some weight" to 75 plus percent market share, but performed careful analysis of the shoe machinery industry to reach its conclusion that defendant possessed monopoly power). Cf. *United States v. General Dynamics Corp., 415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)* (Court did not discuss market share, but concluded from its analysis of the industry that no substantial lessening of competition would result from a merger challenged under § 7 of the Clayton Act).

[21] At the time of trial, the defendant served 554 customers, the plaintiff served 59. Three other retail outlets received publications from other sources. Our examination of confidential dollar sales volume figures submitted under seal shows that between 1973 and 1975, Bluff City had from 94% To 96% Of the relevant market measured in sales volume.

[22] This case does not present any issues involving a violation of *section 1* of the Sherman Act because of a joint refusal to deal, sometimes referred to as a group boycott. 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)*; *William Goldman Theatres v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945)*, Cert. denied, *334 U.S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742 (1948)*. It is true that none of the primary line national periodical distributors would deal with plaintiff, despite his requests that they do so. Testimony in the record reveals that each distributor made an independent decision not to sell to plaintiff, and that no conspiracy or joint refusal to sell took place.

[23] Although we accept this finding, we note that it may not be true under all circumstances. If two distributors both supply the same magazines to a retail store, then there will be an increase in unsold magazines and confusion as to which distributor's magazines were sold. If two distributors compete among themselves as to which retail stores to service, these adverse effects do not necessarily follow so long as only one distributor ends up supplying each store.

[24] The decision made by the national distributors is similar to that made by national film companies to only allow distributors with a full line of products to market posters and other movie display accessories. The Third Circuit upheld this decision because it was independently made for valid business reasons. See *Lawlor v. National Screen Service Co., 270 F.2d 146 (3d Cir. 1959)*, Cert. denied, ***362 U.S. 922, 80 S. Ct. 676, 4 L. Ed. 2d 742 (1960)***.

In another analogous case, the Second Circuit upheld the right of publishing companies to cease doing business with a regional distributor with whom they were dissatisfied and to replace it with a system of 13 smaller regional distributors. Each company acted independently and for a valid business reason. See *Interborough News Co. v. The Curtis Publishing Co., 225 F.2d 289 (2d Cir. 1955)* *Aff'ing 127 F. Supp. 286 (S.D.N.Y.1954)*.

[24]** Secondly, the district court emphasized that since October of 1973, the plaintiff has been able to obtain periodicals from a distributor in another state at an even better discount than he formerly obtained from Bluff City. The court also pointed out that Byars has been doing business with Johnson Publications, a publisher and distributor of black oriented magazines since 1973.

We do not believe that the district court's analysis of Bluff City's market position suffices to support its conclusion that Bluff City did not possess the power to raise prices or exclude competition. Rather, this record fairly supports the conclusion that industry practice has resulted in a limited number of exclusive regional wholesalers. However, the fact that national periodical distributors have legitimately and individually chosen to deal only with Bluff City does not mean that Bluff City lacks monopoly power in the relevant market. On the contrary, it appears that the national distributors have conferred a monopoly upon Bluff City. That there may have been valid business reasons for this cannot disguise Bluff City's market dominance.

The other factors cited by the district court are also flawed. The **[**25]** court did not address evidence that Byars' source of primary line periodicals at the time of trial was limited and that he has been unable to expand his business as a result. The court further failed to address proof that from January 1971 to October 1973, Byars was unable to secure primary line periodicals from any source, and that as a result, Bluff City controlled virtually 100% of the relevant market during that time. Finally, it appears that the "black-oriented" periodicals supplied by the Johnson Distributing Company are not primary line periodicals but secondary line periodicals which are not within the relevant product market in this case. [25]

[26]** We think that fresh fact-finding on this issue is in order. The district court should first consider Bluff City's market share. As indicated, it appears to be at least 90 percent. It may well be, that despite this, Bluff City does not possess monopoly **[*853]** power. Only a careful factual analysis will reveal if this is so. [26]

[27]** B. Abuse of Monopoly Power

If the court below does find that Bluff City possesses monopoly power, the record before us suggests that at worst, such power was thrust upon Bluff City by the national periodical distributors who, for valid business reasons, chose to deal only with it. This is significant because ***HN9***[] mere possession of monopoly power is not illegal. A monopolist which achieves that status because of "a superior product, business acumen, or historic accident," *United States v. Grinnell Corp., supra, 384 U.S. at 571, 86 S. Ct. at 1704*, cannot be faulted. [27] Such monopolists

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[25] In its brief and in a post-argument supplemental letter, Bluff City argued that there were other wholesalers active in the area. However, there is no finding below to this effect and other wholesalers appear to serve only 3 stores in the stipulated geographic market. The existence of potential competition of course, can check the exercise of monopoly power. See n. 19, Supra. The parties are free to argue this issue on remand.

[26] Important to this determination will be an analysis of plaintiff's allegations of adverse effect upon the small retailers. There is evidence in the record, not addressed by the district court, that when Bluff City took over servicing Byars' former small retail customers, the result was inferior service at greater cost which the small retailers were forced to bear since they had nowhere else to turn for primary-line periodicals.

Byars' customers mostly operated neighborhood convenience stores. When Bluff City cut off Byars and took over his accounts, it imposed a service charge on them which Byars had not. In addition, Bluff City provided some of the stores only with drop shipment service, i. e., magazine bundles were simply dropped off. Byars always provided full service, i. e., he always placed the new magazines on the store racks. A number of the small store operators testified that Bluff City's services were very poor compared with Byars'. Specifically, Bluff City was slow in giving credit for returns and was sometimes overly rigid in demanding that retailers carry large numbers of unwanted titles. It appears that the retailers preferred Byars' eager-to-please personalized service to Bluff City's "assembly-line" approach. This evidence, if credited, lends strong support to plaintiff's contention that Bluff City possesses monopoly power.

[27] The classic case is that of a "natural" monopoly such as that possessed by a utility company in a city. For example, in *Otter Tail Power Co. v. United States, 410 U.S. 366, 369, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, the Court noted that "(e)ach town in

are "tolerated but not cherished" because of "considerations of fairness and the need to preserve proper economic incentives." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979)*. However, if a monopolist abuses its monopoly power and acts in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals, then *§ 2* is violated. If, after the additional fact-finding ordered on remand, the district court finds that Bluff City did in fact possess monopoly power, it must then determine whether Bluff City abused this power by refusing to deal with Byars.

[28]** Plaintiff contends that Bluff City abused its monopoly power in two ways: First, by refusing to deal with him and second by engaging in a series of "dirty tricks" against him. The district court agreed that Bluff City had cut the plaintiff off and had refused to deal with him, [28] but ruled that it was perfectly within its rights in doing so. The court further concluded that prior to January 1, 1971, there existed no competition between the plaintiff and Bluff City. Rather, it found a dependent, but non-competitive relationship whereby the defendant serviced the small accounts which Bluff City did not desire. While this finding is fully supported by the evidence, [29] it is unquestionably **[*854]** true that after January 1, 1971, the plaintiff desired to and indeed, finally did, compete against Bluff City. Further, it is also uncontroverted that Bluff City has continued to refuse to deal with the plaintiff and that the plaintiff has had difficulty competing as a result.

[29]** The district court dealt only obliquely with the evidence in the record regarding Bluff City's predatory "dirty tricks" against the plaintiff. [30] It discussed this evidence at the end of its opinion, when dealing with a related claim of common-law unfair competition not when dealing with the antitrust allegations. It specifically referred to testimony indicating that some of plaintiff's magazines had been removed from racks in retail outlets served by both plaintiff and defendant and to testimony of disparaging remarks made about plaintiff and his financial condition. The court concluded that "this testimony is controverted and upon cross examination of the witnesses the willfulness and unfairness was deflated." The court also stated that "the proof does not establish that these (sic) so-called unfair competition was done pursuant to instruction from or in furtherance of an adopted policy of the management of the defendant."

[30]** III. Refusals to Deal

Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail."

Other examples of a "natural" monopoly are the single newspaper in a small-town, See *Times-Picayune Publishing Company v. United States, 345 U.S. 594, 602-603, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960)*, Cert. denied, *365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)*; *United States v. Hartke-Hanks Newspapers, Inc., 170 F. Supp. 227 (N.D.Tex.1959)*, or the single movie in a small town, See *United States v. Griffith, 334 U.S. 100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*; *John Wright & Assoc. v. Ullrich, 328 F.2d 474 (8th Cir. 1964)* which cannot support more than one of those entities. See also *Clark Marine Corp. v. Cargill, Inc., 226 F. Supp. 103 (E.D.La.1964)*, *Aff'd 345 F.2d 79 (5th Cir. 1965)*, Cert. denied, ***382 U.S. 1011, 86 S. Ct. 620, 15 L. Ed. 2d 526 (1966)***.

[28] Indeed, there is absolutely no dispute that this occurred.

[29] To be sure, there is some evidence in the record which indicated that some stores were offered the choice of being served by Byars or by Bluff City. On the whole, however, Byars and Bluff City served distinct customer groups.

[30] There was some testimony in the record which, if credited, could result in a finding of predatory conduct by Bluff City. These alleged activities included: 1) removal of plaintiff's periodicals from sales racks at various retail outlets; 2) covering up of plaintiff's periodicals on the racks to put them out of the view of prospective buyers; 3) below cost pricing of those few periodicals being distributed by the plaintiff; 4) disparagement of the plaintiff, his financial condition, and the periodicals he was able to obtain; 5) surreptitious addition of its own periodicals identical to those placed on racks by plaintiff in order to increase plaintiff's return and diminish plaintiff's profits; 6) intimidation of plaintiff's customers to purchase periodicals solely from defendant; 7) threats to the regional representative of an independent news company with reprisals if he assisted plaintiff in the direct purchase of periodicals from independents. See generally *Photovest Corp v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979)*; 3 Areeda & Turner, ***Antitrust Law*** P 37 Et seq. (1978).

The district court appeared to take the broad view that a company has the unfettered right to deal with whom it pleases regardless of the circumstances. It is true that *HN10*[] as a general rule, there exists no duty to deal, so long as the determination is made unilaterally. See e. g. *Associated Press v. United States, 326 U.S. 1, 14-15, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*. In contrast, Concerted refusals to deal are in many situations Per se violative of section one of the Sherman Act. See *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; McDonnell v. Michigan Chapter # *10 Am. Inst. of Real Estate Appraisers, 587 F.2d 7 (6th Cir. 1978)*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126* (2d Cir.) Cert. denied, *439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)*; Sullivan, Antitrust § 83 Et seq. (1976).

HN11[] Franchisees and distributors which have been unilaterally terminated have discovered to their chagrin that ordinarily the law offers them no remedy **[**31]** absent proof that a conspiracy against them took place. See e. g. *Daniels v. All Steel Equipment, Inc., 590 F.2d 111 (5th Cir. 1979)*; *Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 686 (6th Cir. 1976)*; *Burdett Sound, Inc. v. Attic Corporation, 515 F.2d 1245 (5th Cir. 1975)*; *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 459 F.2d 138 (6th Cir. 1972)*; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71* (9th Cir.), Cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1969)*; *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963)*, Cert. denied, *375 U.S. 922, 84 S. Ct. 267, 11 L. Ed. 2d 166 (1964)*; *Aaron E. Levine & Co., Inc. v. Calkraft Paper Co., 429 F. Supp. 1039, 1046-47 (E.D.Mich.1976)*; *B & B Oil & Chemical Co. v. Franklin Oil Corp., 293 F. Supp. 1313 (E.D.Mich.1968)*. Cf. *Daily Press, Inc. v. United Press Int'l, 412 F.2d 126, 134-35* (6th Cir.), Cert. denied, *396 U.S. 990, 90 S. Ct. 480, 24 L. Ed. 2d 453* ***[*855]*** *(1969)*. An agreement with another distributor to replace the terminated distributor does not count as a conspiracy. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquor, Ltd., supra at* ***[**32]*** *78*, See also *Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S.App.D.C. 161, 163-164, 243 F.2d 418, 420-21* (D.C. Cir.) Cert. denied, *355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 (1957)*. Even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws. See *Northwest Power Products, Inc. v. Omark Ind. Inc., 576 F.2d 83 (5th Cir. 1978)*. But see *Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970)*. See generally Annot., Refusals to Deal as Violations of the Federal Antitrust Laws, 41 A.L.R.Fed. 175 (1979).

The above authorities effectively show that if Bluff City is found on remand not to possess monopoly power, it could have terminated, with impunity, its relationship with Byars. However, if the court on remand finds that Bluff City does possess monopoly power, added obligations are imposed on the defendant which would not attach in the ordinary refusal to deal context. Should the court on remand find that Bluff City possesses monopoly power, we propose below a framework for its analysis of the abuse of such power in the refusal to deal context.

A. General Case Law on Refusals to Deal by Monopolists

[33]** There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is a straightforward "intent" test which originated from Dicta in *United States v. Colgate & Co., supra, 250 U.S. at 307, 39 S. Ct. at 468* where the Court stated that *HN12*[] a business is free to deal with whomever it pleases so long as it has no "purpose to create or maintain a monopoly." See also *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 468-69, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*.

The intent test was applied in *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*. There, the Court affirmed a finding of illegal monopolization where a monopolist refused to deal and the jury inferred monopolistic intent because the defendant's policies were "in pursuance of a purpose to monopolize." *Id. at 375, 47 S. Ct. at 404*. Kodak had monopoly power over the national wholesale market for certain photographic supplies. It desired to vertically integrate and take over retail distribution of these supplies as well. To that end, it began buying out distributors. One such distributor, however, refused to be bought out. Kodak responded **[**34]** by refusing to sell photographic supplies to the distributor at wholesale prices. From these facts, the jury was permitted to infer an illegal intent to monopolize. Kodak comes perilously close to establishing an absolute duty to deal since it permitted a finding of illegal intent where the only evidence of monopolistic purpose was Kodak's desire to buy out retail distributors and its inability to provide an independent business reason for its refusal to deal.

Two other Supreme Court decisions have found refusal to deal by monopolists to be illegal. In *Lorain Journal v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, a newspaper which was indispensable to local businesses refused to sell advertising space to customers who bought advertising on a local radio station. The Court found that this conduct was designed to destroy the competitor and enjoined it as an illegal attempt to monopolize.

In *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, the Court found that a private utility company with monopoly power in a wholesale power market had illegally "sought to substitute for competition anticompetitive uses of its dominant **[**35]** economic power." *Id. at 380, 93 S. Ct. at 1031*. In addition to supplying wholesale power, Otter Tail also was responsible for providing power at retail to the inhabitants of certain small towns. Otter Tail's wrongful conduct was its refusal to sell power at wholesale **[*856]** prices or to "wheel" [31] power to municipalities who proposed to replace Otter Tail in the local retail market with their own power companies.

Two lower-court cases have found a monopolist's refusal to deal unlawful because it was done with intent to preserve a monopoly. See *Poster Exchange, Inc. v. Nat'l Screen Service Corp., 431 F.2d 334 (5th Cir. 1970)*, Cert. denied, *401 U.S. 912, 91 S. Ct. 880, 27 L. Ed. 2d 811 (1971)* (". . . National Screen intentionally used **[**36]** the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level."); *United States v. Klearflax Linen Looms, 63 F. Supp. 32, 39 (D.Minn.1945)* ("(monopolist) cannot refuse to sell if its design and purpose is to establish a wrongful monopoly.").

There also exists a second, related line of cases which has been styled as promulgating ***HN13***[] the "bottleneck theory of ***antitrust law***." [32] **[**37]** Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it. The seminal case is *United States v. Terminal Railroad Assoc., 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)* where a group of railroads acquired ownership over a facility which constituted the only feasible terminal for rail traffic coming to the city of St. Louis from the West. [33] The Court ruled that the terminal owners had to make the facility equally accessible to all users. [34]

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[31] To wheel electricity is to transfer it from one place to another via transmission lines. There were other sources of wholesale power, but Otter Tail would not allow its transmission lines to be used to transfer the power to the municipalities. See *Otter Tail, supra at 368*.

[32] See *United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 (D.Minn.1971)*, Aff'd in relevant part, *410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; A. Neale, The Anti-Trust Laws of the United States of America 66-69, 127-33 (2d ed. 1970); Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv.L.Rev. 1720, 1740-52 (1974).

[33] Areeda & Turner, Supra at P 729g would limit these cases to situations where a Group of competitors obtained a vertically integrated facility. We are not so sure. There may indeed be significant considerations of fairness and efficiency where a single innovative firm builds or obtains a unique facility. However, many such situations arise purely by chance or accident. We question the wisdom of permitting exclusionary behavior by the accidental owner of a unique facility while prohibiting such conduct if the facility is owned by two or more competitors at least so long as the judicial price regulation problem we discuss below can be overcome.

[34] See also *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)* (A.P.'s bylaws, restricting membership by competitors of existing members struck down as unreasonable restraint on competition); ***Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1303-09 (5th Cir. 1971)***, Cert. denied, ***404 U.S. 1047, 92 S. Ct. 701, 30 L. Ed. 2d 736 (1972)*** (defendants hindered plaintiff from extracting natural gas from a field by refusing access to transport facilities, pooling arrangements or a right-of-way); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966)* (Local radio station refused to pay normal commission for material prepared by an advertising agency, effectively refusing to deal with it. Reasonableness of station's action an issue of fact); *Packaged Programs Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958)* (Hastie, J.) (Factual issue whether T.V. station's refusal to accept a competitor's

[38]** In theory, the distinction between the "intent" theory and the "bottleneck" theory is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors. In practice, however, there exist many overlapping considerations. This is especially evident in a situation where a monopolist seeks to vertically integrate into a submarket containing only one potential competitor. Since only one competitor is involved, a refusal to deal simultaneously operates as the intentional maintenance of a monopoly as well as the destruction of competition.

[*857] The overlapping factors are 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)*. There, the Court found unlawful use of monopoly power where Otter Tail used its monopoly position as a regional supplier of wholesale power to preserve its position as a retail supplier of power in certain towns. Otter Tail refused to deal with certain proposed municipal power systems which needed access to backup wholesale electricity which only Otter Tail could provide. Otter Tail's conduct, however, was unusually predatory. It refused **[**39]** to allow use of its power lines so that the municipalities could not obtain power from other suppliers. Additionally, it invoked restrictive contract clauses for the same reason. Finally, it engaged in a pattern of harassing litigation against any municipality which desired to set up its own retail power system. Notwithstanding the above, Otter Tail had long-standing dealings with municipalities which had always had their own power companies. Only when a municipality which had previously obtained retail power from Otter Tail proposed to establish its own power system would Otter Tail retaliate.

As can be seen, Otter Tail did much more than simply refuse to deal. Its overall conduct made it plain that it was seeking to destroy a potential competitor in the local retail market. Moreover, Otter Tail could advance no evidence showing that its conduct was at all beneficial to the public. If anything, the evidence showed the contrary. [35] The only justification offered was self-preservation, and the court rejected that defense. [36] Although the district court in Otter Tail relied separately on the "intent test" and the "bottleneck" test, See *331 F. Supp. 54, 61 (D.Minn.1971)*, the Supreme **[**40]** Court's discussion incorporated both in a brief overall analysis. See *410 U.S. 366, 377, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*.

B. Refusals to Deal in Different Factual Situations

Whether the analysis of refusals-to-deal by monopolists is **[**41]** premised on the "intent" test or the "bottleneck" test, there is a discernible uniformity of holdings of illegal refusals-to-deal in various factual contexts.

First, there are ***HN14***[] situations where a monopolist uses its monopoly power in one market to distort competition in another market by refusing to deal. This is forbidden, at least absent a valid business justification for the refusal to deal. [37] **[**42]** *Six Twenty-Nine Prods, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966)*; *Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958)*; Cf. *United States v.*

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film programs was done in the exercise of valid business judgment or to eliminate the competitor); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484* (1st Cir.), Cert. denied, ***344 U.S. 817, 73 S. Ct. 11, 97 L. Ed. 636 (1952)*** (Group of defendants had to provide equal access to their commercially unique building. However, denial of access to a competitor would be proper if done for valid business reasons.).

[35] Municipal power systems are preferred customers for cheap Bureau of Reclamation power. If Otter Tail could be made to "wheel" the power, it could be provided more cheaply to consumers than electricity previously obtained from Otter Tail. Indeed, this was the heart of Otter Tail's claim that it properly refused to deal to preserve itself. See *United States v. Otter Tail Power Co., 331 F. Supp. 54, 57, 64 (D.Minn.1971)*.

[36] The Court did not conclude that self-preservation was an invalid consideration. Rather, it accepted the district court's conclusion that Otter Tail's fears were greatly exaggerated. See *United States v. Otter Tail Power Co., 331 F. Supp. 54, 64 (D.Minn.1971)*, Aff'd in relevant part, *410 U.S. 366, 380-82, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*.

[37] On the closely related issue of "price squeezes" by vertically integrated monopolists, See *United States v. Aluminum Co., supra, 148 F.2d at 436-38*; *United States v. Corn Prods. Ref. Co., 234 Fed. 964 (S.D.N.Y.1916)*; *Grand Caillou Packing Co., 65 F.T.C. 799*, Aff'd in part, rev'd in part, sub nom. *La Peyre v. F.T.C., 366 F.2d 117 (5th Cir. 1966)*; Areeda & Turner, *Supra at PP 728-29*.

Griffith, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948) (Invalidating use of monopoly power in one geographic market to acquire monopoly power in another). [38]

[43]** **[*858]** Second, there is the context in which ***HN15***[] a monopolist refuses to deal with customers who deal with its rivals. This behavior is inherently anti-competitive; Lorain Journal, supra, makes it clear that this is illegal, either as monopolization or attempt to monopolize. See also North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), Cert. denied, *382 U.S. 977, 86 S. Ct. 545, 15 L. Ed. 2d 468 (1966)*; Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), Cert. denied, *354 U.S. 923, 77 S. Ct. 1381, 1 L. Ed. 2d 1438 (1957)*.

Third, there is the context in which ***HN16***[] a group of competitors control an indispensable facility which cannot be easily duplicated. This is the classic case where the "bottleneck theory" applies. Absent valid business reasons, equal access is required for all. [39] See United States v. Terminal R.R. Ass'n, Supra; Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir.), Cert. denied, *344 U.S. 817, 73 S. Ct. 11, 97 L. Ed. 636 (1952)*.

[44]** Fourth, there is the most conceptually difficult context of all that in which a monopolist seeks to vertically integrate. These were the circumstances in Eastman Kodak Co. v. Southern Photo Materials Co., supra, where Kodak cut off one of its retail distributors as part of its efforts to vertically integrate into the retail distribution of photography supplies. Likewise, in Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973), Otter Tail, among other things, refused to deal when small towns proposed to replace it with their own retail power systems. In that case, Otter Tail used its monopoly power in the wholesale power market to prevent the displacement of its (natural) monopoly in the local retail power market.

A third case of a refusal to deal as part of a vertical integration plan is Poster Exch., Inc. v. Nat'l Screen Serv. Corp., supra. National Screen had a monopoly in the sale of certain movie posters and other paraphernalia. This monopoly arose because as a matter of independent and legitimate business judgment, movie companies preferred to deal only with it to distribute these materials. [40] For years, Poster Exchange had bought materials **[**45]** from National Screen at wholesale prices for resale. The two companies thus competed with one another in the retail

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[38] Griffith contains a famous dictum which also provides a rationale for halting abuse of monopoly power: "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." 334 U.S. at 107, 68 S. Ct. at 945. Griffith makes it clear that an exclusionary, anti-competitive use of monopoly power is illegal. See Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), Cert. denied, ***425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)*** (defendant, which had monopoly power over the supply of oranges, Inter alia, refused to deal with same firms which competed with it in the distribution of oranges to Hong Kong. "Sunkist's control of supply was employed to extend its monopoly illegally into distribution"); Smith Kline Corp. v. Eli Lilly & Co., 427 F. Supp. 1018 (E.D.Pa.1976) (Higgenbotham, J.), Aff'd 575 F.2d 1056 (3d Cir.), Cert. denied, ***439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978)*** (defendant misused its monopoly power where it linked the purchase of competitive drugs to drugs over which it had a valid monopoly.) See also Berkey Photo, Inc. v. Eastman Kodak Co., supra.

[39] Cases such as Donovan v. Pennsylvania Co., 199 U.S. 279, 26 S. Ct. 91, 50 L. Ed. 192 (1905) and Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970), Cert. denied, ***400 U.S. 1000, 91 S. Ct. 460, 27 L. Ed. 2d 451 (1971)***, are distinguishable. Those cases upheld the right of a tunnel and terminal, respectively, to give out exclusive contracts for the operation of a business on their premises. Since the tunnel and terminal operators were not competitors of the excluded businesses, they had no reason to arbitrarily abuse their monopoly position. See TV Signal Co. of Aberdeen v. AT & T Co., 462 F.2d 1256 (8th Cir. 1972). We must concede, however, that there exists tension between these cases and those cases adopting the "bottleneck" theory.

[40] This was because the national movie companies "have traditionally insisted that licensees to manufacture its accessories have national distribution facilities . . ." Poster Exchange, Inc. v. National Screen Service Corp., 198 F. Supp. 557, 559 (N.D.Ga.1961), Aff'd, 305 F.2d 647 (5th Cir. 1962) (opinion granting preliminary injunction). Of course, Poster Exchange (or any other company) could theoretically have set up nationwide distribution facilities to qualify for a license from the national movie companies, but that would have required a "multimillion dollar investment". Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d at 339. The court held that this was not a reasonable alternative. Id.

distribution market. Subsequently, National Screen refused to deal with Poster Exchange and litigation ensued. **[*859]** The Fifth Circuit affirmed a finding that National Screen had unlawfully used its monopoly power as a supplier to try to eliminate Poster Exchange as a competitor at the distribution level. Although the court's holding of unlawful refusal-to-deal in Poster Exchange was based on a finding of specific intent to exclude, in Dicta, the court indicated that it might have been sufficient to find that an unlawful monopoly would result as a consequence of National Screen's refusal to deal. *431 F.2d at 388 n. 12*.

[46]** Bluff City's position in this case is akin to that of National Screen. See Poster Exch. Inc. v. Nat'l Screen Serv. Corp., Supra. In both cases, industry economics led a group of national companies to deal exclusively with one distributor. Bluff City's refusal to deal as part of a vertical integration scheme is similar to that in Otter Tail, Kodak and Poster Exchange. [41] And as in Otter Tail, there is evidence (albeit so-far uncredited) that Bluff City engaged in other predatory activity. If the district court rules that Bluff City is in fact, a monopolist, application of Otter Tail, Kodak and Poster Exchange would seemingly result in a quick finding of liability. However, such a quick finding of liability here would void consideration of many factors which militate against imposing an absolute duty to deal on a monopolist in the vertical integration context.

[47]** IV. Refusals to Deal An Analytical Framework

We believe that even if Bluff City does possess monopoly power, a finding of liability does not necessarily follow from its conduct here. ***HN17***[] Although a general intent to monopolize is all that is ordinarily required to find a *§ 2* violation, [42] cases discussing a monopolist's duty to deal have effectively required a finding of Specific intent to monopolize. See *Kodak, supra, 273 U.S. at 375, 47 S. Ct. 400*. Indeed, the very basis of the "intent theory" outlined above is specific intent to monopolize. The issue remains what standards should be employed by which to judge Bluff City's behavior. [43]

[48]** The "specific intent" standard, most often seen in attempt to monopolize situations, has itself caused problems. Some courts have given weight to the company's subjective state of mind. See e. g. *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co., 360 F.2d 79 (6th Cir. 1966)*, Cert. denied, *393 U.S. 844, 89 S. Ct. 126, 21 L. Ed. 2d 114 (1968)*. Other courts have adopted a "fairness" approach to evaluate the monopolist's conduct, measured by industry **[*860]** practice, with allowance made for otherwise improper defensive tactics. See *Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D.Mass.1959)*, *Mod'd, 284 F.2d 582 (1st Cir. 1960)*, Cert. denied, *365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)*. Most courts, however, have been content

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[41] Assuming that the district court finds that Bluff City possessed monopoly power, that power extended over wholesale distribution of primary-line periodicals in the Memphis-Shelby County area. Within this market, there existed what can be viewed as a submarket consisting of small retail outlets served by the plaintiff. By refusing to deal with the plaintiff, Bluff City used its power to exclude Byars from the small-store submarket so that it could take over his business thus vertically integrating into the small-store market.

For the relevant factors which are used in defining a submarket under *§ 2*, See *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 283-84 (5th Cir. 1978)*, Cert. denied, ***440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979)***. In this case both sides recognized the existence of the small-store submarket composed of distinct customers served by Byars and arranged their business dealings accordingly.

[42] Further, that intent can readily be found if it is a natural and likely consequence of the monopolist's conduct. See *United States v. Griffith, 334 U.S. 100, 105, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 431-432 (1945)*.

[43] For an interesting approach to allowable conduct in a situation where two newspapers were engaged in a life-and-death struggle for ascendancy in a one-newspaper town, See *Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D.Mass.1959)*, *Mod'd, 284 F.2d 582 (1st Cir. 1960)*, Cert. denied, ***365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)***. See also *Lamb Enterprises Inc. v. Toledo Blade Co., 461 F.2d 506, 514-15* (6th Cir.), Cert. denied, ***409 U.S. 1001, 93 S. Ct. 325, 34 L. Ed. 2d 262 (1972)***.

to adopt standardless language such as "bold, relentless and predatory," Lorain Journal Co. v. United States, supra 342 U.S. at 149, 72 S. Ct. 181, 96 L. Ed. 162, while others have examined legitimate business purpose. See Times-Picayune Publ. Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953). One commentator has characterized judicial approaches in this area as falling into one of three categories: **[**49]** (1) the legitimate business purpose approach, (2) the unfairness approach and (3) the gestalt approach. Hawk, Attempts to Monopolize Specific Intent as Antitrust's Ghost in the Machine, 58 Cornell L.Rev. 1121 (1973).

However one characterizes the approaches used, we think it clear that what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices. ***HN18***[] As preservation of competition is at the heart of the Sherman and Clayton Acts, [44] **[**50]** a practice should be deemed "unfair" or "predatory" only if it is unreasonably anti-competitive. In a § 2 case, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful. See Berkey Photo, Inc. v. Eastman Kodak Co., supra; California Computer Prod. v. IBM, (9th Cir. No. 77-1563, decided June 27, 1979); Greyhound Computer v. I.B.M., 559 F.2d 488 (9th Cir. 1977), Cert. denied, *434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)*; Scott Publ. Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15 (9th Cir. 1961). [45]

Courts which have been confronted with joint refusals to deal have carefully analyzed the fact situation before them to see whether defendants' conduct was anti-competitive. See Neeld v. Nat'l Hockey League, 594 F.2d 1297 (9th Cir. 1979) (citing cases); Oreck Corp. v. Whirlpool, supra; E. A. McQuade Tours, **[**51]** Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), Cert. denied, *409 U.S. 1109, 93 S. Ct. 912, 34 L. Ed. 2d 690 (1973)*. See also *McCourt v. California Sports, Inc., 600 F.2d 1193, 1215 (6th Cir. 1979)* (Edwards C. J., dissenting) and cases cited. Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); Catalano, Inc. v. Target Sales, 605 F.2d 1097, (9th Cir. 1979). We think that similar analysis is required in a case where there is a unilateral refusal-to-deal by a monopolist.

The anti-competitive impact of the first three refusal-to-deal situations outlined above in Part III B., is obvious. [46] However, **[*861]** the case of the monopolist who seeks to vertically integrate is more difficult. In theory, a monopolist will only take over lower level operations if it is at least as efficient as the lower-level firm. In other words, a monopolist will only vertically integrate if it can do the job cheaper than having someone else do it. If the lower level firm, (i. e. a distributor) is more efficient, it should be able to sell more and thus increase the monopolist-manufacturer's sales. Substitution of a **[**52]** more efficient distributor (the monopolist) for a less-efficient one via a refusal to deal would ordinarily enhance competition in the distribution market.

It also should not make any difference if both levels are natural monopolies. The reason for this is that there exists one profit-maximizing monopoly price to the consumer of any given product. Two rational monopolists dealing with each other in a vertical relationship would set the price at this point and then allocate the monopoly profit between themselves. However, if agreement proves impossible because of misperception, as is likely to be the case, then

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[44] ". . . the policy unequivocally laid down by the (Sherman) Act is competition." Northern Pac. R. Co. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). See also National Society of Prof'l Engineers v. United States, 435 U.S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978).

[45] Careful factual analysis is crucial in examining alleged violations under the rule of reason under § 1 of the Sherman Act, See Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918), as well as § 7 of the Clayton Act, See United States v. General Dynamics, 415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974). See also Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) (Vertical restrictions in sale transactions to be judged under a rule of reason standard. Although these restrictions may limit intrabrand competition, in many cases economic benefit may result from interbrand competition); Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964) (valid business reasons justified vertical territorial restraints.)

[46] On the issue of arbitrary refusals to deal, See 3 Areeda & Turner, Supra at P 736. Cf. America's Best Cinema Corp. v. Fort Wayne Newspapers, 347 F. Supp. 328 (N.D.Ind.1972) (monopoly newspaper publisher could refuse to accept advertising for X-rated films).

the probable result will be a price to the consumer higher than the optimal monopoly price. The reason is that the first-level monopolist will **[**53]** charge the second level monopolist a price calculated to maximize its monopoly profit. Faced with this high cost, the second level monopolist will often have no choice but to set its price to the consumer at a correspondingly high level higher than the optimal monopoly price which the two monopolists would have set had they been able to agree. [47]

[54]** In contrast, a single vertically-integrated monopolist has no such problems it will merely set the price to the consumer at the optimum monopoly level. And to the extent that economies of scale result from the vertical integration, then the consumer will benefit. The monopolist will reap more profit, but the optimal monopoly price to the consumer will be lower. Thus, ***HN19***[] in many cases, a refusal to deal designed to accomplish vertical integration, without more, should not be a basis for imposing liability. See Areeda & Turner, *Supra at P 725*; [48] Sullivan, antitrust 129-30 (1976). See also *Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 712 (7th Cir. 1977)*, Cert. denied, *439 U.S. 822, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978)* (monopolist can terminate a dealer on efficiency grounds).

There are ***HN20***[] situations, however, where a refusal to deal as part of a vertical integration scheme is anti-competitive. **[**55]** That is, 1) where integration facilitates price discrimination so that the monopolist can reap the maximum monopoly profit from different consumers; 2) where integration increases first-level entry barriers so that potential competitors are stymied; and 3) where integration facilitates evasion of regulation of monopoly profits. See Areeda & Turner, *Supra at PP 725, 726*; Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv.L.Rev. 1720 (1974). In such cases, a court should not hesitate to find a *§ 2* violation. The problem is identifying the proper situation.

[*862] The situation presented by this case requires careful analysis. There is evidence in the record that Bluff City was not as efficient as Byars and that it imposed a service charge on the small retailers and provided curtailed service to them. [49] This might be viewed as inefficiency-induced price discrimination. It might also be that neither Byars nor Bluff City were rational profit-maximizing monopolists. In addition, although the district court ruled that no competition existed between Byars and Bluff City, that may not be literally true. For an unknown number of retailers, there existed a choice between **[**56]** being served by Byars or Bluff City. [50] At least to this extent, there was always competition between them. It is clear that the national magazine publishers find it in their best interest to deal with only one wholesale distributor. [51] However, some testimony regarding Byars' post-cutoff efforts tends to show that the small retailers benefited greatly when Byars was able to actively compete with Bluff City. The fact that the national distributors found it in their best interest that Bluff City be the only distributor in Memphis does not mean that it is in the public interest. Byars is now competing with Bluff City, is surviving and the market may be benefiting from the competition.

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[47] To illustrate, with an example taken from Areeda and Turner, Supra at P 725c. Assume raw copper ingot costs $ 40.00 and that the cost of making copper pipe is $ 35.00. A vertically integrated monopolist with control over both copper ingot and copper manufacturing would set the price of the copper pipe to the consumer at the optimum monopoly level say $ 100.00. Where there were two separate monopolists, the one with control over the ingot would set the price of the ingot to the second monopolist at $ 65.00 so that the former could reap all of the monopoly profit. The second monopolist would now be facing costs of $ 100.00 $ 65.00 for the ingot and $ 35.00 for manufacturing costs. It would set the ultimate price to the consumer at some level above $ 100.00. Even if the first monopolist were to lower its price to the second monopolist, absent agreement, the ultimate price to the consumer would always be above $ 100.00.

[48] Areeda and Turner would find a vertical integration presumptively lawful and would outlaw it only in rare cases.

[49] See n. 26, Supra.

[50] See n. 29, Supra.

[51] See n. 23, Supra and accompanying text.

We have listed all of the above as possible factors to be weighed. It is for the district judge, as factfinder, to analyze the evidence and make a determination whether Bluff City's cut-off of Byars was justifiable on efficiency **[**57]** grounds. [52]

This does not end the analysis, however. ***HN21***[] A finding of anti-trust liability in a case of a refusal to deal should not be made without examining business reasons which might justify the refusal to deal. [53] The rationale for this is that since we tolerate the existence of some monopolists, we must give them some leeway in making business decisions. See *Sargent-Welch Scientific Co. v. Ventron Corp., supra, 567 F.2d at 711-13* (lawfulness of a monopolist's termination of a dealer depends upon the purpose for which it was done); *Intern'l Railways of Cent. America v. United Brands, 532 F.2d 231, 239-40* (2d Cir.), Cert. denied, *429 U.S. 835, 97 S. Ct. 101, 50 L. Ed. 2d 100 (1976)* (defendant's refusal to deal proper because it "had no reasonable business alternative but to abandon an unprofitable and uncomfortable operation."); *Clark v. United Bank of Denver Nat'l Assoc., 480 F.2d 235, 238* (10th Cir.), Cert. denied, *414 U.S.* ***[**58]*** *1004, 94 S. Ct. 360, 38 L. Ed. 2d 240 (1973)*.

[59]** Bluff City argues forcefully that there were valid business reasons for its desire to terminate its relationship with the plaintiff. Bluff City argues that its termination of Byars was motivated by its desire to minimize returns of unsold periodicals and to **[*863]** have precise data over its sales and returns. It contends that the stricter control which resulted from its termination of dealings with the plaintiff qualified it for the "affidavit return" privilege which entitled the defendant to merely execute an affidavit as to the number of returns rather than return the actual magazines or covers for credit to the national distributors. [54]

[60]** The district court did not address these issues directly although it did state that "exhibit (16) supports the contention of the defendant that one of the reasons the defendant was discontinuing the cash route system with the plaintiff was the failure of the system to produce accurate records which are important to the national distributors in this industry." Exhibit 16 is a letter written by Bluff City to its retail customers announcing that it was terminating its arrangement with Byars and taking over all of his accounts for itself. There is no indication from this exhibit that the reason plaintiff was being terminated was because of inaccurate records or other specific business reasons. It is true that the exhibit states that "during this (changeover), our records may not be entirely accurate and complete." However, there is no indication other than that there would be natural confusion in record-keeping due to the takeover.

A monopolist's self-serving, Ex post facto business justifications must be examined with care. If Bluff City can show that cutting off the plaintiff was essential to its securing of the "Affidavit return" privilege, then its conduct could be justifiable. However, **[**61]** the district court erred in finding support for this explanation in exhibit 16. We will not attempt to outline the parameters of allowable business justifications for a refusal to deal. [55] Each case must

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[52] The district court may find it useful to hear expert testimony on this issue.

[53] Although there exist various policy arguments in support of the "business justification defense" to a monopolist's refusal to deal, See *Sargent-Welch Scientific Co. v. Ventron Corp., supra, 567 F.2d at 712*, it is also allowed by the case law. See *Kodak, supra, 273 U.S. at 375, 47 S. Ct. 400* (by implication); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc., supra, 194 F.2d at 487-88*. The theoretical justification is that valid business purpose can offset a finding of monopolistic intent. See *United States v. Paramount Pictures, 334 U.S. 131, 174, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*; *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting Inc., supra, 365 F.2d at 486*. See also the Fifth Circuit opinion in *Kodak, Eastman Kodak Co. v. Southern Photo Material Co., 295 F. 98 (5th Cir. 1923)*, *Aff'd 264 U.S. 359, 44 S. Ct. 453, 68 L. Ed. 868 (1927)*. See generally the discussion of legitimate business purposes in *Times-Picayune Publ. Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *United States v. Columbia Steel Co., 334 U.S. 495, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)*.

[54] As indicated in n. 4, Supra, credit for unsold publications is allowed to the retailer by the wholesaler and to the wholesaler by the national publishers. Ordinarily, dealers or wholesalers must return some proof that a magazine was indeed unsold such as a torn-off cover. Trusted wholesalers, however, are allowed to simply execute an affidavit certifying that a certain number of periodicals were unsold.

necessarily turn on its own facts. See *Otter Tail, supra, 410 U.S. at 381-82, 93 S. Ct. 1022, 35 L. Ed. 2d 359* (noting that Otter Tail could not be made to deal where that would threaten its ability to serve the public and that the district court retained on-going jurisdiction to give relief should difficulties occur).

[62]** Similarly, we think that the district court should carefully examine the alleged "dirty tricks." [56] ***HN22***[] Predatory conduct on Bluff City's part would go a long way toward establishing a *§ 2* violation. See *Otter Tail, supra.* For this reason, a careful analysis of alleged misconduct is in order. We agree that plaintiff's evidence on this is somewhat thin. However, it should be examined along with the other factors we have mentioned.

One final factor requires examination the feasibility of forming a final decree. An injunction ordering a monopolist to deal might enmesh a court in difficult problems of price regulation. In the "bottleneck theory" cases, Supra, no price regulation problems arose because a court could simply order the owners of a unique facility to treat all customers on equal terms. The **[*864]** same thing is generally true in any setting in which the monopolist deals with some businesses but refuses to deal with others.

In a case such as this, where there is only one cut-off **[**63]** firm, however, judicial regulation problems abound. In *Otter Tail, supra*, the presence of a regulatory agency the Federal Power Commission obviated problems of judicial price setting. See *410 U.S. at 375-377, 93 S. Ct. 1022, 35 L. Ed. 2d 359*. In the ordinary case, however, the difficulty of setting a price at which the monopolist must deal might well justify withholding relief altogether. [57] In this case, we have a history of previous dealing between the parties where they set a price 1 01/2 % below wholesale. *As in Poster Exchange, Inc., supra*, this greatly facilitates the structuring of a decree. [58]

[64]** V. CONCLUSION

Although the record is arguably clear enough for us to rule here, we think that the better course of action is to remand for explicit fact-finding and any supplemental proceedings the district court may wish. In assessing whether Bluff City possessed monopoly power and second, whether an unlawful refusal-to-deal took place, the district court should focus on the following: 1) Whether Bluff City can offset the inference of monopoly which accompanies its massive market share; 2) Whether Bluff City's refusal to deal was justifiable on efficiency grounds; 3) Whether other business reasons justified the refusal to deal; 4) Whether, and to what extent, Bluff City engaged in predatory "dirty tricks", [59] 5) Whether an injunction ordering Bluff City to deal with the plaintiff is feasible.

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[55] A common justification for anti-competitive behavior is self-preservation. That argument has not been made in this case, but it could be since imposing a broad duty to deal on Bluff City could result in its replacement by a competitor to which it was forced to sell periodicals at below-wholesale prices. This would be similar to Otter Tail's argument that if it were forced to sell and "wheel" power to any municipality which requested it to do so, then it would be forced out of business. See the district court and the Supreme Court discussion of Otter Tail's need-to-survive defense. *410 U.S. 366 at 380-82, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *331 F. Supp. 54, 64 (D.Minn.1971)*.

[56] See n. 30, Supra.

[57] Fear of judicial "utility regulation" permeates Areeda & Turner's analysis of monopolists' refusals to deal. We agree that federal judges do not make good regulators of business conduct. However, courts must be careful not to abdicate their responsibilities under the Antitrust laws in the name of expedience. When the adverse effect of allowing a monopolist to maintain certain practices is clear, a court should stay its hand rarely, if ever.

[58] There exists no theoretical distinction between ordering a monopolist to deal with a former customer and ordering the monopolist to deal with anyone who comes along. Yet, as a practical matter, it is far different to order the reestablishment of a ruptured relationship than to order a monopolist to deal with a stranger. The difficulty of setting reasonable terms, especially price, should be a substantial factor when confronted with the latter situation. An alternative analytical view would be that there exist valid business reasons why a monopolist should not have to deal with a stranger.

[59] Findings of fact on this issue would also dispose of Byar's separate claim of unfair competition based on the same alleged "dirty tricks."

Vacated and remanded for further proceedings. Appellant shall recover his **[**65]** costs in this court.

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Open Pantry Food Marts, Inc. v. Falcone

Court of Appeals of Wisconsin

September 13, 1979, Submitted on Briefs ; October 16, 1979, Decided

No. 79-098

Reporter

92 Wis. 2d 807 *; 286 N.W.2d 149 **; 1979 Wisc. App. LEXIS 2759 ***; 1979-2 Trade Cas. (CCH) P62,930

Open Pantry Food Marts of Southeastern Wisconsin, Inc., Plaintiff-Respondent, v. Falcone, Defendant-Appellant

Subsequent History: [*1]** Petition to Review Denied.

Prior History: Appeal from a judgment of the Circuit Court for Kenosha County: Earl D. Morton, Judge.

Disposition: *By the Court*. -- Judgment affirmed in part, reversed in part, and remanded.

Core Terms

statute of limitations, two year, damages, counterclaim, recoupment, franchise agreement, treble damages, injured party, six years, franchise fee, punitive-remedial, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 133.01*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

When an injured party makes a claim by using language within the verbal frame of *Wis. Stat. § 133.01*, he is suing under the punitive-remedial portion of the antitrust statute.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN3[] **Public Enforcement, State Civil Actions**

When a person sues under the punitive-remedial portion of the antitrust statute, he is suing for damages that are exclusively statutory. The injured party, when suing under *Wis. Stat. § 133.01*, is not limited to damages for breach of contract nor is he limited to mere recovery of what he has paid into the contract. The injured party is entitled to receive not only the excess beyond the market price, which is the starting point under the treble damages law, but is also entitled to recoup the amount he would have been obligated to pay had not the contract price been fixed as a result of the illegal collusion.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Types of Statutes

HN4[] **Statute of Limitations, Time Limitations**

If a suit is punitive-remedial in nature and is a statutorily created penalty, *Wis. Stat. § 893.21(1)*, is the applicable statute of limitations for such an action.

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Statute of Limitations, Time Limitations**

See Wis. Stat. § 133.23.

Contracts Law > Defenses > Illegal Bargains

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > Remedies > Damages > General Overview

Governments > Legislation > Types of Statutes

HN6[] **Defenses, Illegal Bargains**

Wis. Stat. § 133.23 is remedial in nature. It is not punitive and, therefore, is not a "statute penalty." A statute which is punitive in nature is designed to encourage private enforcement of the statute. A statute which allows recoupment on a contract, however, is only intended as a cure to the injured party for payments made under an invalid contract. It is not a supplement to the government enforcement apparatus.

Counsel: For the appellant, a brief was submitted by *Mary L. Sfasciotti* of Kenosha.

For the respondent, a brief was submitted by *Robert P. Goodman* of *Goodman & Michelson* of Racine.

Judges: Voss, P.J., Brown and Cannon, J.J.

Opinion by: BROWN

Opinion

[*809] **[**150]** This is an appeal from a judgment dismissing that part of defendant's counterclaim alleging damages resulting from violations of the Wisconsin ***Antitrust Law***. The trial court reasoned the antitrust claim was barred by *sec. 893.21(1)*, Stats., [1] which establishes a period of two years for the commencement of actions for statutory **[**151]** penalties. The sole issue is whether the antitrust claim was subject to the two year statute of limitations or a six year statute of limitations under sec. 133.23, Stats. The answer to the question demands statutory construction of each. That analysis has not been previously made in our state courts.

[*2]** The facts necessary to the determination of the issue show that Open Pantry and Falcone entered into an agreement on December 18, 1967, whereby Falcone agreed to operate a grocery store in premises leased to him by Open Pantry. Falcone was to use the Open Pantry name and pay franchise fees for its use. In February 1970, Falcone moved out of the grocery store and **[*810]** terminated his association with Open Pantry. Open Pantry then sued for franchise fees, rent and other debts allegedly due. Falcone responded with an answer and counterclaim, but it was not until his fourth amended counterclaim of June 4, 1973 that a claim was alleged for damages resulting from the Wisconsin ***Antitrust Law***. Falcone asked for recovery of all payments directly made to Open Pantry, which payments were denominated in the franchise agreement. In addition, Falcone asked for a return of all rent paid to Open Pantry. Further, he demanded that Open Pantry repay him for the transfer of a retail class "A" license to sell fermented malt beverages. Also, he demanded that Open Pantry pay him for the debts he incurred in order to run his business. In 1977, Falcone amended his counterclaims for the fifth **[***3]** time. The damages claimed were the same as that of June 4, 1973 except that Falcone asked for treble damages pursuant to *sec. 133.01*, Stats. We will decide which of his various claims are barred by the two year statute of limitations and which fall under the six year statute of limitations.

SECTION 893.21(1) THE TWO YEAR STATUTE OF LIMITATIONS

Section 133.01, Stats., the Wisconsin ***Antitrust Law***, is intended as a reenactment of the first two sections of the Sherman Antitrust Act but applicable to intrastate transactions. *City of Madison v. Hyland, Hall & Co., 73 Wis.2d 364, 375, 243 N.W.2d 422 (1976)*. *Section 133.01*, Stats., gives any person the right to sue for treble damages. The applicable provision, *sec. 133.01*, Stats., sets out the penalties for those in violation of the act:

HN1[] Any such person, corporation, company, partnership, trustee or association shall also be liable to any person **[*811]** transacting or doing business in this state for threefold the damages he may sustain by reason of the doing of anything forbidden by this section and the cost of suit including a reasonable attorney's fee.

The substantive purpose of *sec. 133.01*, Stats., is to punish the **[***4]** offender by allowing treble damages. Therefore, it is a punitive statute. *State ex rel. Nordell v. Kinney, 62 Wis.2d 558, 562, 215 N.W.2d 405 (1974)*. It is also remedial because it seeks to preserve our free enterprise system. *City of Madison, supra, at 373, 243 N.W.2d at 427*. We find that ***HN2***[] when an injured party makes a claim by using language within the verbal frame of *sec. 133.01*, Stats., he is suing under the punitive-remedial portion of the antitrust statute.

HN3[] When a person sues under the punitive-remedial portion of the antitrust statute, he is suing for damages that are exclusively statutory. *City of Madison, supra, at 388, 243 N.W.2d at 434*. The injured party, when suing under this statute, is not limited to damages for breach of contract nor is he limited to mere recovery of what he has paid into the contract. As was stated in *City of Madison, supra, at 388-89, 243 N.W.2d at 435*, "the injured party is entitled to receive not only the excess beyond the market price, which is the starting point under the treble damages law, but is also entitled to recoup the amount he would **[**152]** have been obligated to pay had not the contract price been fixed as a result **[***5]** of the illegal collusion."

HN4[] Since this is a suit which is punitive-remedial in nature and since it is a statutorily created penalty, we conclude that *sec. 893.21(1)*, Stats., is the applicable statute of limitations for such an action. A similar result was

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[1] 893.21 Within 2 years. Within 2 years:

(1) An action by a private party upon a statute penalty or forfeiture when the action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a different limitation.

reached in *Grengs v. Twentieth Century Fox Film Corporation, 232 F.2d 325, 329 (7th Cir. 1956)*. In *Grengs*, **[*812]** the seventh circuit court of appeals held that suits for treble damages under the Wisconsin ***Antitrust Law*** are subject to the two year limitations because they are suits by private parties upon a statutory penalty.

Therefore, to the extent that the June 4, 1973 counterclaim is a claim for damages multiplied by three, the defendant is asserting the punitive-remedial claim for relief, and the claim is barred by the two year statute of limitations.

SECTION 133.23 THE SIX YEAR STATUTE OF LIMITATIONS

Section 133.23 provides a distinct remedy for recovery of contract payments. *City of Madison, supra, at 387, 243 N.W.2d at 434*. The pertinent provision is as follows:

HN5[] Any payments made upon, under or pursuant to such contract or agreement to or for the benefit of such person, may be recovered in an action **[***6]** by the party making any such payment, his heirs, personal representatives or assigns; provided that suit for such recovery is brought within 6 years after the making of said contract or agreement.

This is a different type of claim than the punitiveremedial claim of *sec. 133.01*, Stats. This claim is limited to the return of what was paid by the injured party upon the illegal contract and that contract alone. The substantive purpose of sec. 133.23 has previously been held to allow recoupment of the contract payment by the injured party. *City of Madison, supra, at 364, 387, 243 N.W.2d at 434*. ***HN6***[] The statute is remedial in nature. It is not punitive and, therefore, is not a "statute penalty." A statute which is punitive in nature is designed to encourage private enforcement of the statute. *John Mohr & Sons, Inc. v. Jahnke, 55 Wis.2d 402, 411, 198 N.W.2d 363, 368 (1972)*. A statute which allows recoupment on **[*813]** a contract, however, is only intended as a cure to the injured party for payments made under an invalid contract. It is not a supplement to the government enforcement apparatus. Section 133.23, Stats., cannot be used, in this case, to award damages for lost rent, **[***7]** repayment for funds paid as a result of debts to financial institutions, repayment for salaries paid to employees, or repayment of fees paid for a license to sell fermented malt beverages. These are matters which are outside the instant contract. To the extent that the pleadings request only recovery of monies paid on a contract said to be in restraint of trade, the six year statute of limitations applies.

THE PLEADINGS IN THIS LAWSUIT

The June 4, 1973 amended counterclaim asks not only for recoupment of the franchise fees but also for other damages. For instance, Falcone asks for recoupment of rental payments, but the lease agreement is in no way connected with the franchise agreement. The franchise agreement makes no demand that Falcone sign a lease with Open Pantry for rental property. The lease payments, therefore, cannot be said to have been made "upon, under or pursuant" to the franchise agreement. Additionally, Falcone seeks damages for debts incurred to financial institutions. The franchise agreement does not dictate that Falcone enter into debt obligations with financial institutions. As such, the obligations cannot be considered as claims for recovery under the **[***8]** franchise agreement. These claims come under the more far reaching statute allowing for relief of "actual damages multiplied by three" under *sec. 133.01*, Stats. *Section 133.01* claims, as we stated above, are barred by the two year statute of limitations. Payments made for a class "A" **[*814]** license to sell fermented malt beverages **[**153]** and claims made by Falcone for repayment of the time he spent in conducting the business of the franchise also fall under the "actual damages multiplied by three" claim.

We, therefore, hold that Falcone's counterclaim for his initial franchise fee, his building service fee, his inventory deposit and his monthly franchise fee of 4% of the gross sales are not barred by the two year statute of limitations because they seek recovery for payments made under the franchise agreement itself and are subject to the six year statute of limitations. Since the June 4, 1973 counterclaim is within the six year statute of limitations, that part of the judgment which would bar those claims is reversed. All other claims made by Falcone including the treble damages are barred by the two year statute of limitations, and the trial court's judgment is affirmed **[***9]** as to the other claims.

Our decision does not hold that if a party begins an action well within the two year statute of limitations, he can ask for recoupment as part of the treble damages to be awarded under *sec. 133.01*, Stats., and then in a separate claim ask for recoupment on the contract under sec. 133.23, Stats. Such a holding would impose a double recovery for recoupment. As such, the question of whether the legislature intended that there be a double penalty would have to be decided. This question is not before us under the facts of the case, and we decline to resolve it for that reason. We point out, however, that it has been discussed in *dicta* by the supreme court in *City of Madison v. Hyland, Hall & Co., supra, at 388-89, 243 N.W.2d at 434-35*.

By the Court. -- Judgment affirmed in part, reversed in part, and remanded.

Wilson P. Abraham Constr. Corp. v. Texas Industries, Inc.

United States Court of Appeals for the Fifth Circuit

October 16, 1979

No. 78-1788

Reporter

604 F.2d 897 *; 1979 U.S. App. LEXIS 11171 **; 1979-2 Trade Cas. (CCH) P62,929

WILSON P. ABRAHAM CONSTRUCTION CORPORATION, Plaintiff, v. TEXAS INDUSTRIES, INC. and Frank T. Dooley, Defendants. TEXAS INDUSTRIES, INC., Third-Party Plaintiff-Appellant, v. RADCLIFF MATERIALS et al., Third-Party Defendants-Appellees, Jahncke Service, Third Party Defendant.

Subsequent History: **[**1]** Rehearing and Rehearing En Banc Denied November 29, 1979.

Prior History: Appeal from the United States District Court for the Eastern District of Louisiana.

Core Terms

antitrust, anti trust law, unintentional, violators, cases, right of contribution, deterrent effect, treble damages, district court, coconspirators, third-party, courts, deterrence, wrongdoers, diminish, pari delicto, due process, no-contribution, effects, common law, anticompetitive, lawsuit

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

There is no statutory right of contribution provided for under either the Sherman Act, *15 U.S.C.S. § 1 et seq.*, or the Clayton Act, *15 U.S.C.S. § 12 et seq.*

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Courts > Common Law

Torts > ... > Multiple Defendants > Contribution > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN2[] **Federal & State Interrelationships, Federal Common Law**

At common law no right of contribution exists among intentional tortfeasors. This no-contribution rule is subsequently extended to cases involving unintentional conduct and is adopted by the federal common law. This rule, however, has been modified in some cases, at least among unintentional tortfeasors, and the Eighth Circuit has rejected the rule in its entirety in the antitrust context.

Torts > ... > Multiple Defendants > Contribution > General Overview

HN3[] **Multiple Defendants, Contribution**

Allowance of contribution in effect ensures that the burden upon a particular defendant would be ameliorated by a division of liability. Even assuming, however, that the arguments concerning the relative deterrent effects are inconclusive, this inconclusiveness would hardly be a compelling reason upon which to base a rule allowing contribution.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] **Private Actions, Standing**

Court has emphasized its belief that some aspects of the In pari delicto doctrine should be retained under the antitrust laws. Plaintiff is barred where he and defendant bear substantially equal responsibility for injury. Plaintiff is barred where the fault of the parties is reasonably within the same scale. Plaintiff is barred where he actively participated in the formation and implementation of an illegal scheme. Plaintiff is barred who violated the law in cooperation with defendant. Subsequent lower court opinions have concluded that an In pari delicto defense should be refused only to those plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement.

Securities Law > ... > Express Liabilities > Misleading Statements > General Overview

Securities Law > Civil Liability Considerations > Right to Contribution

HN5[] **Express Liabilities, Misleading Statements**

A number of cases have recognized a right of contribution under certain provisions of the federal securities laws that do not expressly provide for such a right. As these cases have recognized, however, both the Securities Act of 1933 and the Exchange Act of 1934 make express statutory provision for contribution, and the allowance of contribution in these cases can be explained under the general principle that the securities laws are to be administered In pari materia. *15 U.S.C.S. § 77k(f)*, and *§§ 9(e)* and *18(b) of the 1934* Act, *15 U.S.C.S. §§ 78i(e)*, *78r(b)*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN6[] **Private Actions, Remedies**

Antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. A private plaintiff need not sue all co-conspirators but may choose to proceed against any one or more of them.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > Substantive Due Process > Scope

HN7[] **Fundamental Rights, Eminent Domain & Takings**

U.S. Const. amend. V, commands that the federal government refrain from depriving a person of his property without due process of law. Due process has both a procedural and a substantive aspect. Procedural due process ensures the observance of certain procedural safeguards designed to afford protection against arbitrary governmental deprivation. Under this analysis, property may not be taken without providing the minimal protections of notice and an opportunity to be heard. Substantive due process requires that all legislation be rationally related to the furtherance of a legitimate governmental objective.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Constitutional Law > Equal Protection > General Overview

HN8[] **Judicial Review, Standards of Review**

In applying the equal protection rationality requirement, the courts have utilized various standards of review depending on the type of legislation being scrutinized. In reviewing economic regulation the courts have exhibited the same deference to legislative judgment accorded under a due process analysis. The test generally applied in such cases is whether there is any conceivable basis justifying the governmental classification.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN9[] **Fundamental Rights, Procedural Due Process**

Although the *Fifth Amendment*, *U.S. Const. amend. V*, does not contain an *equal protection clause*, the protections guaranteed under that concept have, to a large degree, been implied under the amendment's due process clause.

Counsel: Benjamin R. Slater, Jr., William J. Hamlin, New Orleans, La., for third-party plaintiff-appellant.

Stone, Pigman, Walther, Whittmann & Hutchinson, Stephen H. Kupperman, Ewell P. Walther, Jr., New Orleans, La., Lemle, Kelleher, Kohlmeyer & Matthews, Dando B. Cellini, New Orleans, La., Chaffe, McCall, Phillips, Toler & Sarpy, James A. Babst, New Orleans, La., for third-party defendants-appellees.

Bell, Boyd, Lloyd, Haddad & Burns by R. Clifford Potter, Chicago, Ill., for amicus curiae Boise Cascade Corp.

Mandell & Wright, Houston, Tx.; McGovern, Opperman & Paquin, Minneapolis Mn.; Kohn, Millstein, & Cohen, Washington, D. C.; and Sachnoff, Schrager, Jones, Weaver & Rubenstein, Ltd., by Lowell E. Sachnoff, Chicago, Ill., for amici curiae plaintiffs in M.D.L.-310.

Eckert, Seamans, Cherin & Mellott, Pittsburgh, Pa.; Mills, Shirley, McMicken & Ecketl, Galveston, Tx.; Skadden, Arps, Slate, Meager & Flom, by Leslie H. Arps, New York City, for amici curiae Georgia-Pacific Corp., Westvaco Corp., and Packaging Corp. of America.

[2]** Kirkland & Ellis, by John H. Morrison, Chicago, Ill., for amici curiae Weyerhaeuser Co., and by Hammond E. Chaffetz, Chicago, Ill., for amici curiae Williamette Industries, Inc.

Judges: Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

Opinion by: THORNBERRY

Opinion

[*899] Texas Industries, Inc., the defendant in a civil antitrust action, appeals the dismissal of its third-party complaint impleading its alleged coconspirators and seeking contribution. The sole issue is whether a right of contribution is available to an antitrust defendant under the federal antitrust laws. We hold that there is no such right of contribution.

I.

This action was instituted on September 8, 1975, by Wilson P. Abraham Construction Corp., not a party to this appeal, against Texas Industries, Inc. [1.] **[**3]** for damages arising out of an alleged price-fixing scheme. Abraham's complaint asserts that Texas Industries and certain unnamed coconspirators engaged in an unlawful combination and conspiracy to raise and stabilize the price of ready-mix concrete in the New Orleans area in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. [2.] Abraham seeks to recover treble damages under *15 U.S.C. § 15*.

Discovery instituted by Texas Industries revealed that the unnamed alleged coconspirators were Radcliff Materials, Inc., Jimco, Inc., and OKC Dredging, Inc. Texas Industries then filed a third-party complaint against these parties seeking contribution from them should it be found liable to Abraham in the main demand. The third-party defendants filed motions to dismiss the third-party complaint pursuant **[**4]** to Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

On October 4, 1977, the district court entered a Minute Entry granting the motions to dismiss the third-party complaint with prejudice on the ground that no right of contribution exists among antitrust coconspirators under federal law. Although persuaded by Texas Industries' arguments in favor of allowing contribution, the court deferred to what it considered the "weight of authority" [3.] denying such a right to an antitrust defendant. On March 29, 1978,

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[1.] A former employee of Texas Industries, Frank T. Dooley, was also named as a defendant but has never been served.

[2.] On January 26, 1973, a grand jury handed down criminal indictments charging Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. (later changed to OKC Dredging, Inc.) and one of its employees, and Jimco, Inc. with violations of *15 U.S.C. § 1*. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade and, in particular, accused the defendants of entering into an agreement to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry of Nolo contendere pleas by each of the defendants.

[3.] The court cited four cases as holding that there is no right to contribution among coconspirators in a federal antitrust case. *American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975)*; *Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1* (9 Cir. 1963); *Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y.1969)*; *Wainwright v. Kraftco Corp., 58 F.R.D. 9 (N.D.Ga.1973)*. However, only the decisions in Sabre Shipping, which confronted the issue of contribution, and Kraftco, which arguably implies a no-contribution rule, are in point. The decisions in American Motor the court determined that there was no just reason for delay and directed that the Minute Entry be entered as a final judgment. Texas Industries appealed.

[5]** In their briefs and at oral argument the third-party defendants correctly asserted **[*900]** that no federal court had ever recognized a right of contribution among antitrust coconspirators. See Olson Farms, Inc. v. Safeway Stores, Inc., (1977-2)Trade Reg.Rep. (CCH) P 61,698 (D.Utah 1977), Argued and submitted, No. 77-2068 (10 Cir. March 16, 1979); El Camino Glass v. Sunglo Glass Co., (1977-1)Trade Reg.Rep. (CCH) P 61,533 (N.D.Cal.1976); *Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y.1969)*. [4.] Unfortunately for the third-party defendants, however, the most recent, and only appellate, court to specifically consider this issue abruptly jettisoned the limited precedent and adopted the very position previously rejected by the district courts. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179* (8 Cir. 1979), an Eighth Circuit panel, with one judge dissenting, held that an antitrust defendant should, at least under certain circumstances, be entitled to contribution from those "joint tortfeasors" [5.] not sued by the plaintiff in the main demand. Although we have carefully considered the arguments set forth in the majority's **[**6]** opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

[7]** II.

HN1[] There is no statutory right of contribution provided for under either the Sherman Act, *15 U.S.C. § 1 et seq.*, or the Clayton Act, *15 U.S.C. § 12 et seq.* We do not, however, interpret this omission as evidence that Congress necessarily intended to deny contribution under the antitrust laws. But see *Sabre Shipping, supra, 298 F. Supp. at*

Inns and Walker Distributing only state the general rule that an antitrust plaintiff need not sue all coconspirators but may choose to proceed against any one or combination of them.

[4.] See also *Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960)* (dictum); *Baughman v. Cooper Jarrett, Inc., 391 F. Supp. 671, 678 n. 3 (W.D.Pa.1975)*, Aff'd and modified on other grounds, *530 F.2d 529* (3d Cir.), Cert. denied, ***429 U.S. 825, 97 S. Ct. 78, 50 L. Ed. 2d 87 (1976)*** (dictum); *Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163 (D.Del.1974)* (dictum); *Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D.Ga.1973)* (arguably by implication); *Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804-05 (S.D.Cal.1968)* (arguably by implication). But see *Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 145 n. 6 (E.D.Pa.1978)* (dictum).

[5.] The case law has uniformly characterized a private antitrust suit as a tort action. See, e. g., *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n. 4* (5 Cir. 1976); *Simpson v. Union Oil Co., 311 F.2d 764, 768* (9 Cir.), Rev'd on other grounds, *377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1963)*; *Williamson v. Columbia Gas & Electric Corp., 110 F.2d 15 (3d Cir. 1939)*, Cert. denied, ***310 U.S. 639, 60 S. Ct. 1087, 84 L. Ed. 1407 (1940)***; *Tondas v. Amateur Hockey Ass'n, 438 F. Supp. 310, 315 (W.D.N.Y.1977)*; *Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (Colo.1952)*.

One commentator, however, has questioned the assumption that private antitrust actions sound in tort or that antitrust violators are necessarily "tortfeasors." Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 692-97 (1978). As that writer notes, a large percentage of antitrust actions do not involve activity considered tortious under the common law. Since the no-contribution rule has traditionally applied only to joint tortfeasors, the writer suggests that the courts should carefully examine the nature of the particular antitrust violation to see what common law form of action most closely resembles the plaintiff's statutory claim. Because he concludes that price-fixing arrangements more closely resemble quasi-contract than tort, he apparently would award contribution in this case.

We cannot subscribe to this analysis. First, the focus of the antitrust laws is not so much on the defendant's unjust enrichment as on the injuries the plaintiff has suffered. In fact, the plaintiff's right to damages is totally independent of whether the defendant has profited at the plaintiff's expense. Thus, we cannot agree that price-fixing "more closely resembles quasi-contract than tort." Second, the anti-competitive activity which escaped liability at common law has, because of altered social and economic conditions, become unacceptable behavior in modern society. Indeed, conduct once non-tortious has become criminal under the antitrust statutes. It is difficult to believe that the law of torts, which has always been in constant flux, would not have eventually encompassed such conduct if legislation had not preempted the field. We believe that the same rationale justifying a no-contribution rule among "tortfeasors" applies to intentional antitrust violators. See Corbett, Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damages Actions, 31 Fordham L.Rev. 111, 114 (1962).

1345. It is more likely that this narrow question, although a matter of some importance, never occurred to the drafters of the legislation. Our task, therefore, is to guess what Congress "would have intended on a **[*901]** point not present to its mind, if the point had been present." [6.] We agree with the case law that this issue must be resolved by reference to federal common law. [7.]

[8]** Texas Industries advances a number of arguments for implication of a right of contribution. First, it argues that the deterrent effect of treble damages is dissipated by the possibility that only one of a number of conspirators would actually be liable for the injury. We conclude, consistent with prevailing economic theory, [8.] however, that that very possibility of imposition of sole liability has an enhanced deterrent effect. The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share. ***HN3***[] Allowance of contribution in effect ensures that the burden upon a particular defendant would be ameliorated by a division of liability. See *Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y.1969)*; El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cases P 61,533 (N.D.Cal.1976). Even assuming, however, that the arguments concerning the relative deterrent effects are inconclusive, See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179* (8 Cir. 1979) (Hanson, J., dissenting in part), this inconclusiveness would hardly **[**9]** be a compelling reason upon which to base a rule allowing contribution. *Id. at 1189*.

[10]** Second, Texas Industries suggests that a rule prohibiting contribution would encourage collusion by the plaintiff with one or more of the potential defendants to the action. Similarly, the Eighth Circuit expressed concern that under a no-contribution rule a large or powerful wrongdoer would have sufficient economic influence to coerce a plaintiff into excluding it as a defendant. Although the possibility of collusion or coercion has always existed under a no-contribution rule, the courts and legislatures have not deemed this threat sufficient to counterbalance the advantages derived from denying contribution to wrongdoers. Texas Industries has not suggested that there has been collusion or coercion in **[*902]** this case, and we are unwilling to assume that the plaintiff engaged in or

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[6.] B. Cardozo, The Nature of the Judicial Process 15 (1949).

[7.] *Professional Beauty Supply, Inc., supra, 594 F.2d at 1182*; El Camino Glass, supra at 72, 111 n. 1; ***Sabre Shipping Corp., supra, 298 F. Supp. at 1343***. See generally *Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165 (1942)*.

HN2[] At common law no right of contribution existed among intentional tortfeasors. Merryweather v. Nixan, 8 Durn. & East 186, 101 Eng. Rep. 1337 (K.B.1799). This no-contribution rule was subsequently extended to cases involving unintentional conduct, See W. Prosser, Law of Torts § 50 at 305-06 (4th ed. 1971), and was adopted by the federal common law. *Union Stock Yards Co. v. Chicago, B. & Q. R. R., 196 U.S. 217, 25 S. Ct. 226, 49 L. Ed. 453 (1905)*. This rule, however, had been modified in some cases, at least among unintentional tortfeasors, See, e. g., *Kohr v. Allegheny Airlines, Inc., 504 F.2d 400* (7 Cir. 1974), Cert. denied, *421 U.S. 978, 44 L. Ed. 2d 470, 95 S. Ct. 1980 (1975)*, and the Eighth Circuit has rejected the rule in its entirety in the antitrust context. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179* (8 Cir. 1979). The Professional Beauty Supply court relied upon *Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S. Ct. 2174, 40 L. Ed. 2d 694 (1974)*, as indicative of the erosion of the no-contribution rule. Even assuming that Cooper Stevedoring, an admiralty case, is apposite, it would not be dispositive of the present case since the implication of a cause of action under the federal common law is a discrete inquiry focused upon the circumstances of a particular case.

[8.] Economists have argued that business managers, particularly in larger organizations, are generally "risk averse" that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss. If this hypothesis is correct, application of the rule denying contribution should inhibit those managers who are aware of the rule from participating in unlawful group activity: Although the rule decreases the likelihood that an individual participant will be held liable, it increases the size of the potential liability.

Note, Supra, 63 Cornell L.Rev. at 702. The author of the note suggests that the participant's unfamiliarity with the no-contribution rule may limit its deterrent effect. We are convinced, however, that, as a class, antitrust defendants are more likely to be familiar with the no-contribution rule than tortfeasors in general. Furthermore, the percentage of participants unaware of the rule will certainly decrease as the rule is applied.

yielded to these tactics. Should a defendant establish that it is the victim of such maneuvering, it may well have an independent cause of action, at least as against its coconspirators.

Third, Texas Industries contends that a rule denying contribution is inconsistent with the Supreme Court's rejection of In pari delicto as a defense to an antitrust action in *Perma Life Mufflers, Inc. v. International **[**11]** Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*. Texas Industries reasons that if a participant in an unlawful scheme is not precluded from recovering treble damages from the other participants, no possible rationale can justify the denial of his right to seek contribution from his fellow wrongdoers.

As an initial matter, we are unable to agree with Texas Industries' assessment of the Court's decision in Perma Life. Notwithstanding the language in Justice Black's principal opinion, [9] the decision does not endorse a wholesale rejection of the In pari delicto doctrine in an antitrust treble damages action. First, the Court made clear that the culpable plaintiff in that case was economically less powerful than the defendant and was not in any meaningful sense a voluntary participant in the illegal scheme. *Id. at 139, 88 S. Ct. 1981*. Consequently, the Court had no opportunity to decide whether a plaintiff might, wholly apart from In pari delicto, be precluded from recovery because of his "complete involvement" in the illegal scheme. *Id. at 140, 88 S. Ct. 1981*.

[12]** More important, five members of the Perma Life ***HN4***[] court emphasized their belief that some aspects of the In pari delicto doctrine should be retained under the antitrust laws. *Id. at 146, 88 S. Ct. 1981* (White, J., concurring) (plaintiff barred where he and defendant bear "substantially equal responsibility" for injury); *Id. at 147, 88 S. Ct. 1981, 1989* (Fortas, J., concurring in the result) (plaintiff barred where "the fault of the parties is reasonably within the same scale"); *Id. at 149, 88 S. Ct. at 1989* (Marshall, J., concurring in the result) (plaintiff barred where he "actively participated in the formation and implementation of an illegal scheme"); *Id. at 154, 88 S. Ct. 1981* (Harland, J., and Stewart, J., concurring in part and dissenting in part) (plaintiff barred who violated the law "in cooperation with defendant"). Subsequent lower court opinions have concluded that Perma Life refuses an In pari delicto defense only to those "plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement." *Premier Electrical Constr. Co. v. Miller Davis Co., 422 F.2d 1132, 1138* (7 Cir.), **[**13]** Cert. denied, *400 U.S. 828, 91 S. Ct. 56, 27 L. Ed. 2d 58 (1970)*. See *Bernstein v. Universal Pictures, Inc., 517 F.2d 976 (2d Cir. 1975)*; *Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 15-16* (4 Cir. 1971); See also *Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 278-79* (9 Cir. 1976); *Dreibus v. Wilson, 529 F.2d 170, 174* (9 Cir. 1975); ABA ***Antitrust Law*** Developments 297-99 (2d ed. 1975). [10]

Furthermore, the partial rejection of the In pari delicto defense in Perma Life does not require that we recognize a right of contribution among antitrust coconspirators. There is an obvious and fundamental difference between a rule that bars suit by a plaintiff who in any way participated **[**14]** in the antitrust violation and a rule that forbids a defendant from obtaining contribution from his fellow wrongdoers. A rule barring any culpable plaintiff diminishes the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys **[*903]** general who can instigate costly and uncertain antitrust litigation. However, as we previously noted, a rule prohibiting contribution among antitrust coconspirators not only does not frustrate deterrence but may very well enhance the statutes' deterrent effect by preventing a defendant from cutting its losses. [11]

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[9] We therefore hold that the doctrine of In pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

392 U.S. at 140, 88 S. Ct. at 1985.

[10] In *Greene v. General Foods, 517 F.2d 635, 646-47* (5 Cir. 1975), a panel of this court indicated that it "seriously question(ed)" the argument that In pari delicto retained vitality after Perma Life. That court, however, expressly did not rule on this point. See also *Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690* (5 Cir. 1975).

[11] In a contribution action there is necessarily an antitrust defendant who is faced with potential liability to an injured plaintiff; deterrence does not suffer if contribution is denied since a real threat of liability exists for all participants in the illegal scheme any one of them could have been selected as the defendant in the plaintiff's action. On the other hand, a rule that bars suit by

[15]** Fourth, Texas Industries asserts that the denial of contribution in an antitrust context is inconsistent with the allowance of contribution under other federal statutes. ***HN5***[] A number of cases have recognized a right of contribution under certain provisions of the federal securities laws that do not expressly provide for such a right. *Gould v. American Hawaiian Steamship Co., 387 F. Supp. 163 (D.Del.1974)*, Vacated on other grounds, *535 F.2d 761 (3d Cir. 1976)*; *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230 (S.D.N.Y.1970)*, Aff'd per curiam, *442 F.2d 1376 (2d Cir. 1971)*; *De Haas v. Empire Petroleum Co., 286 F. Supp. 809 (D.Colo.1968)*, Modified on other grounds, *435 F.2d 1223* (10 Cir. 1970). As these cases have recognized, however, both the Securities Act of 1933 and the Exchange Act of 1934 make express statutory provision for contribution, [12.] and the allowance of contribution in these cases can be explained under the general principle that the securities laws are to be administered In pari materia. *Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955, 958 (S.D.N.Y.1970)*, Aff'd per curiam, *442 F.2d 1376 (2d Cir. 1971)*; Fisher, Contribution in 10b-5 **[**16]** Actions, 33 Bus.Lawyer 1821, 1826 (1973); Note, Supra, 63 Cornell L.Rev. at 698 n. 85. Since there is no express provision for contribution under the antitrust laws, we are unable to use cases decided under the securities laws as authority for implying such a right in this case.

As further evidence of a judicial trend toward contribution in other areas of federal law, Texas Industries cites both FELA cases [13.] and sex discrimination cases decided under the Civil Rights Act. [14.] The FELA cases were negligence actions in which contribution was allowed on the basis of state law and, therefore, do not support Texas Industries' argument that a federal right of contribution should be extended to an antitrust defendant. The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases **[**17]** that offer no reasons.

Finally, Texas Industries proffers that denying contribution amounts to a taking of property without due process and equal protection of the laws as guaranteed by the *Fifth Amendment*. This constitutional violation is premised on the supposed unfairness which results when an antitrust defendant is forced to bear a disproportionate share of the damages caused by the conspiracy to which he was a party. Although **[**18]** we realize that the denial of contribution among wrongdoers, together with a plaintiff's right to sue and collect from only **[*904]** one defendant, [15.] can saddle a defendant with a substantial financial burden, we do not think the imposition of this burden offends constitutional principles.

HN7[] The *Fifth Amendment* commands that the federal **[**19]** government refrain from depriving a person of his property "without due process of law." Due process has both a procedural and a substantive aspect. Procedural due process ensures the observance of certain procedural safeguards designed to afford protection against arbitrary governmental deprivation. Under this analysis, property may not be taken without providing the minimal

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any plaintiff who participated in the wrong will, in many instances, mean that no defendant will face liability since there is no plaintiff willing to bring the action a result that clearly undermines the deterrence objectives of the antitrust laws.

12. Section 11(f) of the 1933 Act, *15 U.S.C. § 77k(f)*, and *§§ 9(e)* and *18(b) of the 1934* Act, *15 U.S.C. §§ 78i(e)*, *78r(b)*.

13. *Chicago & N. W. Ry. v. Minnesota Transfer Ry., 371 F.2d 129* (8 Cir. 1967); *Zontelli Bros. v. Northern P. Ry., 263 F.2d 194* (8 Cir. 1959); *Blair v. Cleveland Twist Drill Co., 197 F.2d 842* (7 Cir. 1952); *Patterson v. Pennsylvania Ry., 197 F.2d 252 (2d Cir. 1952)*.

14. *Stevenson v. International Paper Co., 432 F. Supp. 390 (W.D.La.1977)*; *International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp., 73 F.R.D. 57 (W.D.N.Y.1976)*; *Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y.1973)*; *Gilbert v. General Electric Corp., 59 F.R.D. 267 (E.D.Va.1973)*.

15. ***HN6***[] Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n.4* (5 Cir. 1976); *Wainwright v. Kraftco, 58 F.R.D. 9, 11-12 (N.D.Ga.1973)*; *Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804 (S.D.Cal.1968)*. A private plaintiff need not sue all coconspirators but may choose to proceed against any one or more of them. *Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136* (5 Cir. 1977); *American Motor Inns, Inc. v. Holiday Homes, Inc., 521 F.2d 1230 (3d Cir. 1975)*; *Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1* (9 Cir. 1963).

protections of notice and an opportunity to be heard. Texas Industries does not, and cannot, claim a procedural due process infringement. The judicial proceeding required before the treble damages penalty can be imposed goes far beyond the threshold requirement of procedural due process.

Substantive due process requires that all legislation be rationally related to the furtherance of a legitimate governmental objective. Since the close of "the Lochner era" [16.] in the late 1930's judicial scrutiny of economic or social legislation has been virtually nonexistent. Instead, especially in the realm of economic regulation, the courts have exhibited great deference to legislative judgment and have upheld legislation if there is Any rational basis for enacting a particular economic measure. See, e. g., *United States **[**20]** v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)*. Indeed, the courts have even been willing to hypothesize legislative objectives and possible reasons for the law's enactment. See, e. g., *Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)*.

Texas Industries' substantive due process argument cannot survive in such a harsh climate. We have no difficulty in concluding that a rule denying contribution to antitrust coconspirators comports with the "mere rationality" test utilized by the courts to scrutinize economic legislation. Although denying contribution **[**21]** may create a more severe penalty under the treble damages provision of the antitrust laws than exists at common law, the powerful deterrent effect provided by such a penalty is certainly a rational basis for a no-contribution rule.

Texas Industries' equal protection argument is equally unacceptable. The equal protection guarantee of the *Fifth Amendment's due process clause* [17.] requires that all governmental classifications rationally relate to a legitimate governmental purpose. The essence of the requirement is that the government treat all those similarly situated similarly. See Tussman & tenBroech, The Equal Protection of the Laws, 37 Calif.L.Rev. 341 (1949). ***HN8***[] In applying the **[*905]** equal protection rationality requirement, the courts have utilized various standards of review depending on the type of legislation being scrutinized. In reviewing economic regulation the courts have exhibited the same deference to legislative judgment accorded under a due process analysis. The test generally applied in such cases is whether there is any "conceivable basis" justifying the governmental classification. [18.] Under this analysis, denying contribution does not deprive Texas Industries **[**22]** of equal protection of the law. The purpose of the antitrust laws is to preserve and promote the public interest in competition by ensuring the existence of an open and free market. We cannot say that a no-contribution rule, because of its deterrent effect, is not rationally related to the achievement of this purpose.

[23]** III.

Throughout this opinion we have treated all antitrust defendants as equally culpable, and, therefore, equally undeserving of contribution. An argument could be made, however, that a distinction should be drawn between intentional and unintentional violators. The crux of this argument rests upon the conclusion that an antitrust

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16. This phrase takes its name from the Supreme Court's opinion in *Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905)*, and refers to the period between 1897 and 1937 when the Court invalidated must state and federal legislation on substantive due process grounds. See L. Tribe, American Constitutional Law §§ 8-2 to 8-7 (1978); J. Nowak, R. Rotunda, & J. Young, Constitutional Law 397-410 (1978).

17. ***HN9***[] Although the *Fifth Amendment* does not contain an *equal protection clause*, the protections guaranteed under that concept have, to a large degree, been implied under the amendment's due process clause. See *Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975)*. ("This Court's approach to *Fifth Amendment* equal protection claims has always been precisely the same as to equal protection claims under the *Fourteenth Amendment*."); *Schneider v. Rusk, 377 U.S. 163, 168, 84 S. Ct. 1187, 12 L. Ed. 2d 218 (1954)*; *Shapiro v. Thompson, 394 U.S. 618, 641-42, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969)*; *Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)*.

18. See, e. g., *McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961)*; *Williamson v. Lee Optical, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)*; L. Tribe, Supra § 16-3.

defendant whose liability is premised solely upon the illegal effects of its actions should not be treated as harshly as a defendant whose culpability arises from a determination of an illegal purpose. Even assuming that inequity may occur in a particular case, however, we believe that creating a contribution right for an unintentional violator may inimically affect the implementation of the antitrust laws. The possible detriments that can be envisioned make this an inappropriate case for the exercise of our power to shape the federal common law even to this limited extent.

First, allowing a right of contribution for an unintentional violator may diminish the deterrent function of trebled damages. As an initial matter, deterrence in reference to an unwitting price-fixer may appear to be irrelevant. We believe it reasonable to assume, however, that even **[**24]** businesses of the purest motives necessarily steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression. Allowing contribution may diminish this prophylactic, chilling effect by reducing the threatening specter of sole liability. Businesses may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated.

Second, the overall effects upon plaintiff's case of allowing contribution even for an unintentional violation are problematic. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179* (8 Cir. 1979), the court, in allowing contribution for all antitrust defendants, dismissed this concern by pointing out that district courts have considerable discretion in managing complex cases to diminish any adverse effects upon plaintiffs. However, as Judge Hanson, a district judge sitting by designation, noted in his partial dissent, private plaintiffs may derive cold comfort from "the mere possibility of the favorable uses of district court discretion." **[**25]** *Id. at 1190*.

> Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will decide to forego a legitimate cause of action. Though district courts have the power to superintend complex litigation, the multiplication of issues and parties remains to be grappled with, and the chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion.

Id. at 1190. (Hanson, Jr., dissenting in part).

Similarly, a district judge in this circuit has rejected implication of third-party **[*906]** claims based upon his determination that such claim would be unmanageable. See In re Corrugated Container Antitrust Litigation, -- - F. Supp. -- (S.D.Tex.1979). These concerns expressed by district judges buttress our conclusion that allowance of third-party claims may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation.

Third, there appears to be no reason for drawing a distinction between intentional and unintentional violators other than to ensure equity in a particular case. There may well be **[**26]** antitrust violators who are entirely unwitting, but we refuse to distort the antitrust laws in order to remedy a problematic inequity. Moreover, any contribution may well amount to a windfall of sorts for a defendant because of the fortuity of plaintiff's proof.

IV.

Our decision in this case is certainly subject to reasonable contrary arguments. In this area of interstitial lawmaking, however, to forge a new rule with questionable benefits and such possible detriments is a bad practice. Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. In the absence of more compelling arguments in favor of contribution, this court is reluctant to create such a right as a matter of federal common law.

Affirmed.

Dissent by: MORGAN(In part)

Dissent

LEWIS R. MORGAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion insofar as it denies a right of contribution to defendants who have intentionally violated the antitrust laws. I dissent, however, from the determination that an unintentional violator [1.] should be absolutely barred from seeking contribution from his **[**27]** fellow wrongdoers.

Historically, no right of contribution has been available among intentional tortfeasors. The courts have reasoned that limited judicial resources should not be wasted on a party whose cause of action is founded upon his own deliberate wrong. Restatement (Second) of Torts § 836A, Comment a (1979); Restatement of Restitution, Introductory Note to Ch. 3, Title C at 386 (1937). As noted in the majority opinion, Texas Industries **[**28]** has offered no convincing reason for departing from the common law no-contribution rule in the context of an intentional violation of the antitrust laws. What the majority fails to note is the modern trend toward recognizing a right of contribution among unintentional tortfeasors. Three fourths of the American jurisdictions [2.] now agree with Dean Prosser's observation that

> (t)here is obvious lack of sense and justice in a rule which permits the entire burden of **[**29]** a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone.

Prosser, Law of Torts § 50 at 307. Absent proof that the purposes of the antitrust laws would be frustrated under a limited contribution rule, I would, in the interest of fairness, award contribution to a defendant **[*907]** whose liability is based solely on an unintentional violation of the antitrust laws.

The majority suggests that awarding contribution to unintentional violators could undermine the ***antitrust law***'s effectiveness in discouraging anticompetitive behavior. According to the court's analysis, two problems arise even under a limited contribution rule: (1) the deterrent effect of the private damage action may be diminished if defendants are allowed to distribute the financial burden of a treble damages judgment and (2) the lawsuit will be made more complex and difficult to manage, thereby dissuading plaintiffs from bringing such actions. Neither argument is persuasive.

The deterrence argument has been relied on by courts as a reason both for denying and for awarding contribution in an antitrust case. Compare El Camino Glass v. Sunglo Glass Co. with **[**30]** *Professional Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979)*. The majority opinion favors the position adopted by the district court in El Camino Glass that denying contribution Enhances the deterrent effect of the antitrust laws by preventing defendants from distributing the financial burden of a treble damages judgment. However, as the Professional Beauty Supply court noted, the argument can also be made that denying contribution Diminishes the law's deterrent effect by allowing some participants to avoid all responsibility for their wrongdoing. I agree with Judge Hanson's assessment that the arguments on either side of the deterrence question are at best inconclusive. *Professional Beauty Supply, Inc., supra, 594 F.2d at 1189* (Hanson, J., dissenting in part). The deterrence argument, therefore, is an inadequate reason for rejecting a rule designed to achieve fairness among parties guilty of no conscious wrongdoing.

[1.] Although intent is a necessary element of a criminal antitrust offense, a defendant may incur Civil liability for an unintentional violation of the antitrust laws. *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854, 869 n.13 (1978)*. There is nothing new in this principle, for the courts have long recognized that "the Per se rule against price fixing applies to any arrangement among competitors which, In purpose or effect, directly or indirectly inhibits price competition." L. Sullivan, Antitrust § 74 at 198 (1977) (emphasis added).

[2.] Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 698 (1978). A number of courts have allowed contribution among unintentional wrongdoers under federal common law. See, e. g., *Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974)*, Cert. denied, ***421 U.S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470 (1975)***; *Gomes v. Brodhurst, 394 F.2d 465 (3rd Cir. 1967)*; *Knell v. Feltman, 85 U.S. App. D.C. 22, 174 F.2d 662 (1949)*. The *Restatement (Second) of Torts § 886A* (1979) recognizes a right of contribution among unintentional tortfeasors.

Furthermore, even if one accepts the premise that a no-contribution rule has an increased deterrent effect on those contemplating anticompetitive activity, this is no reason for denying contribution to unintentional violators. As Assistant Attorney General Shenefield **[**31]** recently observed in testimony before a Senate subcommittee considering a proposed bill allowing contribution in price-fixing cases, [3.] "contribution is most compelling where the tortious conduct is unintentional; In such situations a lack of contribution would have no deterrent effect." [4.] This position makes more sense than the court's conclusion that businesses will somehow "steer wide" of illegal activity which they never realized was illegal in the first place. Clearly, deterrence is a valid reason for denying contribution only among those who Intentionally violate the antitrust laws.

[32]** The court is also concerned that some businesses "may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated." Majority opinion at 905. The assumption that intentional violators will be able to pass themselves off as unwitting transgressors is inconsistent with the realities of the proposed contribution action. Any party seeking contribution will invariably be opposed by contribution defendants who have a vested interest in establishing that the contribution plaintiff was an intentional violator of the antitrust laws. Moreover, these contribution defendants, unlike many antitrust plaintiffs, will be in an excellent position to know whether the party was, in fact, an intentional wrongdoer. Under these circumstances few, if any, intentional tortfeasors will succeed in presenting themselves as unwitting transgressors.

In its second argument the court expresses concern that allowing contribution will **[*908]** make the lawsuit more complex and difficult to manage, thereby dissuading some plaintiffs from pursuing a legitimate cause of action. Although the authorities **[**33]** considering the question unanimously agree that permitting contribution does threaten the plaintiff's ability to control the size and scope of his lawsuit, [5.] they disagree as to the trial court's ability to recognize and eliminate that threat. It is clear the *Fed.R.Civ.P. 42(b)* authorizes trial judges to order separate trials whenever a plaintiff is inconvenienced or prejudiced by a defendant's expansion of his suit. Relying on language from Judge Hanson's dissent in Professional Beauty Supply, the majority warns that the discretionary nature of the separation remedy may nevertheless dampen some plaintiff's enthusiasm about initiating an antitrust action.

I simply cannot believe that the discretionary **[**34]** nature of the *Rule 42(b)* separate trials provision would discourage an antitrust plaintiff from seeking treble damages should the court recognize a right of contribution among unintentional violators. The district courts are certainly aware of the antitrust plaintiff's status as a private attorney general and of the important role played by the private damage action in enforcing the objectives of the antitrust laws. The special solicitude accorded these plaintiffs necessarily requires a liberal exercise of the separate trials provision. Realizing his favored position, the antitrust plaintiff is not likely to assume that the trial judge would deny separation and allow defendant to complicate the lawsuit or otherwise add to the private litigant's burden. Hence, the incentive to sue provided by the treble damages action is not jeopardized if contribution is allowed.

Although some unfairness to unintentional violators must be tolerated if ***antitrust law*** policy is thwarted by allowing contribution, I do not believe that the dangers envisioned by the majority withstand close scrutiny. Absent more convincing proof that a limited contribution rule would compromise the effectiveness of the **[**35]** antitrust laws, I would not force a defendant guilty of no conscious wrongdoing to bear total responsibility for the sins of many.

[3.] S. 1468, 96th Cong., 1st Sess. (July 9, 1979).

[4.] Testimony of Assistant Attorney General John Shenefield before Senate Subcommittee on Antitrust, Monopoly and Business Rights, June 8, 1979. Other writers agree that "denying contribution can consistently deter only willful lawbreakers; it will not inhibit many violations committed unintentionally or in response to economic coercion. Thus, the deterrence rationale provides at best a weak justification for blanket denial of contribution." Note, Supra, 63 Cornell L.Rev. at 702-03; Restatement of Restitution, Supra, at 386.

[5.] *Professional Beauty Supply, supra, 594 F.2d 1184*; *Id at 1190* (Hanson, J., dissenting in part); El Camino Glass, supra at 72,112; ***Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y.1969)***; Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 700-01 (1978).

In re IBM Peripheral EDP Devices Antitrust Litigation

United States District Court for the Northern District of California

October 18, 1979

No. C-73-1832 RHS, MDL No. 163-RM

Reporter

481 F. Supp. 965 *; 1979 U.S. Dist. LEXIS 9071 **; 1979-2 Trade Cas. (CCH) P62,989

TRANSAMERICA COMPUTER COMPANY, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

Subsequent History: **[**1]** As Amended December 20, 1979.

Core Terms

prices, disk, tape, peripherals, monopolist, percent, manufacturers, profits, lease, products, announced, drives, average cost, competitors, monopoly power, interface, users, customers, control unit, marginal cost, rental, markets, costs, machines, channel, attach, lives, installed, plug-compatible, calculated

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Claims**

In order to establish that defendant company monopolized in violation of the Sherman Act, *15 U.S.C.S. § 2*, plaintiff has to prove: 1) that the defendant was in possession of monopoly power in a relevant market; and either 2) that the defendant has willfully acquired or maintained that power; or 3) that the defendant used its monopoly power, whether lawfully or unlawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

Two types of evidence are relevant to an appraisal of defendant's ability to control price or exclude competition. The first category can be broadly labelled "market structure," and encompasses evidence that is relevant to an estimation of the nature and significance of constraints on defendant's power. The second category, "market performance" relates to a comparison between the actual past functioning of the market and the manner in which monopolized or competitive markets are predicted to function.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

The greater the barriers faced by a new entrant, the more probable it is that control of a particular market share enables defendant to exercise monopoly power.

Counsel: Richard J. Lucas, Orrick, Herrington, Rowley & Sutcliffe, San Francisco, Cal., for plaintiff.

William W. Vaughn, O'Melveny & Myers, Los Angeles, Cal., for defendant.

Opinion by: SCHNACKE

Opinion

[*971] OPINION

I.

Plaintiff, Transamerica Computer Company, Inc. ("Transamerica"), has alleged that certain activities of Defendant, International Business Machines Corporation ("IBM"), violated *Section 2* of the Sherman Act which forbids the monopolization or attempted monopolization of any part of trade or commerce. [1]

An appreciation of the nature of the computer industry **[**2]** and the parties' respective roles is helpful to an understanding of, and indispensable to an evaluation of, that conduct.

Computers, like the punched card accounting equipment that preceded them, depend upon the capabilities of the electronic circuits. Because of the laws of physics involved, an electronic circuit, if properly designed, is capable of performing both arithmetic and logical functions. For instance, it is possible to design a circuit that will add two numbers together (an arithmetic function), and another circuit that will compare the result of the addition to a third number and choose between various alternatives on the basis of that comparison (a logical function). The sequence **[*972]** of arithmetic and logical functions that are to be performed is known as a program. With punched card accounting equipment, programs were "hard-wired", that is, the sequence of functions to be performed by the arithmetic and logical circuits was predetermined, and could only be altered by actually switching wires around within the machine.

In 1951, in response to the needs of the Bureau of the Census, Sperry Rand Corporation introduced the first stored-program computer, the Univac **[**3]** 1. This first computer differed from its predecessors in that it was possible easily to alter the program that determined the sequence of functions to be performed. No longer was it necessary to "hard-wire" the program; the sequence of functions desired could now be indicated to the computer through "softer" and more flexible means. A program could be punched into a series of cards and the content of those cards could then be read into the computer. The computer would turn to this data read in from the cards for instructions as to what arithmetic and logical functions it was to perform, and in what sequence. A program could be altered simply by altering a punched card, and new programs could be carried out merely by causing the machine to read in a different set of punched cards.

IBM offered its first electronic computer in 1953. That machine, like those offered by competitors, utilized vacuum tubes to perform the electronic circuit functions. Before long, this first generation of computers was outmoded by a

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1 *15 U.S.C. Section 2*.

second-generation whose transistorized circuits performed more economically and more reliably. In 1964, IBM announced a series of machines, the System/360; these were the first **[**4]** of the third generation computers. The 360s not only employed improved components (integrated circuits replace transistors), they also relied upon a single general design or architecture for a broad spectrum of machines. That meant that one computer was capable of efficiently performing both scientific and commercial tasks, and, perhaps most important, it meant that customers who outgrew their smaller machines could "migrate" to larger machines without the need to change their existing programs; the whole 360 family of computers was program-compatible to an unprecedented degree. As a result, System/360 was a tremendous commercial success.

In 1970 IBM announced its 370 system, a further significant improvement, and superior to the 360 system.

The new 370 system involved improved central processing units as well as new and improved peripherals. All of the acts Transamerica claims caused it damage were related to the introduction of the 370 system.

IBM is a supplier of computer systems, supplying all, or nearly all of the user's computing needs. It offers a wide range of services and products, both software and hardware. [2]

[5]** The hardware of a computing system consists of a central processing unit ("CPU"), which houses the arithmetic and logical electronic circuits, and a variety of peripheral gear.

The functions of peripherals include: storing data for later access by the CPU; feeding data into the CPU (input); and accepting data from the CPU (output). A machine capable of reading data on punched cards and transferring that data to the CPU is considered an input peripheral, while a printer attached to the CPU functions as an output peripheral. Some peripherals perform all three functions. Disk drives and tape drives are examples of peripherals capable of storing data, inputting data, and outputting data. Data is stored on disks and is "randomly" accessed very rapidly by an access arm with the capability of reading or writing data. The access arm can be made to move to a particular track on the disk where the data is to be read or written. Tape drives are used for reading and writing data sequentially. Random access **[*973]** of data on tape reels is impractical because it is so time consuming.

The tape and disk drives which attached to System/360 CPUs were a lucrative part of IBM's business, so lucrative **[**6]** in fact, that they attracted competition. In the late 1960's, several companies began marketing copies of IBM's tapes, disks and printers, which were "plug-compatible" with IBM CPUs. A user could simply unplug the IBM peripheral, substitute the cheaper copy, and plug it into the IBM CPU. The companies providing this new competition became known in the industry as plug-compatible manufacturers ("PCMs").

The PCMs enjoyed a tremendous success. They were offering equivalent or better performance at a substantial discount. But in order to sustain their growth the PCMs needed funds. Most computer systems were leased rather than sold. This meant that the PCMs were unable to realize a quick return on their capital investment; much of their capital was tied up in ownership of leased machines, an investment that would not be recouped for years. The PCMs needed money to finance the manufacture of machines to meet a growing demand as well as to pay for the engineering costs of developing new products. They sought financing from a variety of sources: the sale of equity and debt securities; bank loans; the use of leasing companies; and more complex arrangements.

Transamerica Computer Company, **[**7]** Inc., was incorporated in late 1967 as a wholly-owned subsidiary of Transamerica Corporation, a large non-bank financial conglomerate with wholly-owned subsidiaries in the insurance, auto rental, motion picture and other businesses. The parent was well financed, with nearly unlimited credit, and desired a "window to the computer industry." Transamerica made a number of ventures into computer related financing. The transactions central to this case are Transamerica's purchase of millions of dollars worth of on-lease tapes and disks from two PCMs, Marshall Industries ("Marshall") and Telex Corporation ("Telex").

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[2] Programs have come to be known as "software" while the term "hardware" has been reserved to refer to the physical machinery associated with the computer.

These manufacturers leased their equipment to end users. After it was on lease, the equipment was "sold" to Transamerica under an arrangement by which the manufacturers were obligated to collect the rents, to service and maintain the equipment, and to remarket it as leases expired. Unlike some leasing companies which buy equipment, find users, collect rentals, etc., Transamerica had no function except to supply capital. In many cases the end users were unaware of Transamerica's ownership of their equipment, and, indeed, at various times there was considerable doubt as to whether **[**8]** specific equipment was owned by Transamerica or the manufacturer. The arrangements also contemplated that, after Transamerica had been reimbursed some agreed amount, further rental revenues would be shared between it and the manufacturer. There were two important reasons for this structuring of what was basically a financing arrangement. First, Transamerica expected that, as "owner" of the equipment, it would be permitted to take, for the substantial benefit of its parent, the investment tax credit then available under the tax laws. And, second, the manufacturers hoped to treat the transfers of title to Transamerica as sales, thus increasing their current profit picture, and aiding them in sales of their corporate stock. Neither of these benefits would have resulted if Transamerica had simply lent money to the manufacturer.

Telex and Marshall were but two of the companies which were successful in displacing IBM peripheral equipment by offering it at prices well below those IBM was charging. IBM responded to the PCM competition by offering certain of its own products at substantially reduced prices, and by offering its peripherals for lease on longer and better terms than it had previously. **[**9]** In addition, new CPUs were introduced that were incompatible with the PCMs' existing peripherals. These actions, and others described herein, are those that Transamerica contends were the means by which IBM monopolized and attempted to monopolize in violation of *Section 2*.

[*974] Following a seven month trial, a jury was unable to reach a unanimous verdict on any of the issues presented. The parties, before commencement of the trial, foresaw that possibility, and, stipulated that the case would be submitted to the Court for decision in the event of jury disagreement. (It might be well for the courts or Congress to consider whether such an arrangement might be Compelled by the trial judge in advance of trial. No one case should be allowed to monopolize the court's time indefinitely to the exclusion of the rights of other litigants. If, after one long jury trial, it becomes apparent that further jury trials would be inordinately time consuming, without any realistic expectation that the issues would be resolved, the matter should be resolved otherwise. The best method would seem to be by decision of the trial judge on the evidence presented at the jury trial.)

This Court, having **[**10]** heard and fully reviewed all of the evidence, has made the findings of fact and come to the conclusions of law that are incorporated in this opinion.

II.

HN1[] In order to establish that IBM monopolized in violation of *Section 2* of the Sherman Act, [3] plaintiff must prove:

1) that the defendant was in possession of monopoly power in a relevant market;

and either

2) that the defendant has willfully acquired or maintained that power; [4]

or

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[3] *15 U.S.C. Section 2*.

[4] *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* ("Grinnell "); *California Computer Products, Inc., et al. v. International Business Machines Corporation, 613 F.2d 727 (9th Cir. 1979)* ("CalComp "); *Greyhound Computer Corp. v. International Business Machines Corporation, 559 F.2d 488, 492 (9th Cir. 1977)*, Cert. denied, ***434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)*** ("Greyhound").

3) that the defendant used its monopoly power, whether lawfully or unlawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor. [5]

[11]** The first essential inquiry must be whether IBM possessed monopoly power; whether it had the power to control prices in, or to exclude competition from some relevant market [6] during the years here in question, 1969 to 1973.

III.

In general, ***HN2***[] two types of evidence are relevant to an appraisal of defendant's ability to control price or exclude competition. The first category can be broadly labelled "market structure," and encompasses evidence that is relevant to an estimation of the nature and significance of constraints on defendant's power. The second category, "market performance" relates to a comparison between the actual past functioning of the market and the manner in which monopolized or competitive markets are predicted to function.

A. Market Structure

Economic theory teaches that a monopolist, because it is in **[**12]** a position to control price by varying the quantity of goods it produces and sells, will be able to sell its goods at a price higher than would prevail were the market competitive. [7] **[**13]** As a result it will earn supra-normal profits. In competitive markets, two forces are at work which inhibit the ability of a firm to charge more than the competitive price level **[*975]** and earn more than a normal profit. First, if a producer raises its price above the price for competing goods, then customer demand for the higher-priced article will fall off in favor of cheaper alternatives, and the producer will be forced to lower its price again. Second, even if the producer were able to charge relatively more for its product for a time, the resultant supra-normal profits would lure new competitors into the market, and the additional supply of competing goods that they offer to customers would cause prices and profits to return to competitive levels. [8] If that first force ("demand substitutability") and that second force ("supply substitutability") are sufficient checks upon defendant's power to control price, then the market is effectively competitive. If not, defendant is a monopolist.

An inquiry into demand substitutability calls for a definition of the relevant market and measurement of defendant's share of that market. [9] The relevant market is comprised of defendant's product, products that are fungible, and of those products which the customer would consider to be reasonable alternatives. [10] If a small increase in the price of product A will cause customers to shift their allegiance to product B, then the cross-elasticity of demand is high, the products are reasonable alternatives, and they belong in the same relevant market.

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[5] *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*; *Berkey Photo, Inc. v. Eastman Kodak Company, 603 F.2d 263 (2nd Cir. 1979)* ("Berkey"); *Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 926-928 (10th Cir. 1975)*, Cert. dismissed, ***423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)*** ("Telex").

[6] *United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* ("DuPont "); CalComp, supra n. 4, at 734; *Greyhound, supra n. 4, 559 F.2d at 496*.

[7] See P. Areeda, Antitrust Analysis, 13 n. 33 (1974).

[8] Id.

[9] *Walker Inc. v. Food Machinery, 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*; *Twin City Sportservice Inc. v. Charles O. Finley and Co., 512 F.2d 1264, 1270 (9th Cir. 1975)*; Case- *Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454 (9th Cir. 1966)*, Rev'd on other grounds, *389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*.

[10] *DuPont, supra n. 6, 351 U.S. at 395, 76 S. Ct. 994*. Note that in some circumstances services or a combination of services and products may provide reasonable alternatives to the selection of a product. *Grinnell, supra n. 4, 384 U.S. at 572, 86 S. Ct. 1698*. The use of the term "product" here does not indicate that this possibility has not been considered.

[14]** The geographic aspects of the relevant market must also be considered. [11] Thus, if small changes in the price of a product in one location will cause customers to turn to alternatives available in another location, then the quantity of reasonably alternative products supplied at both locations should be considered as part of the relevant market. The relevant geographic market is the area of effective competition within which the seller operates and to which the purchaser can practically turn for supplies. [12]

With the relevant market defined, the defendant's share of that market can be measured. A relatively small market share would lead to **[**15]** the inference that monopoly power was not present since the ready availability of substitutes would defeat attempts to use that power. The larger defendant's market share, the stronger is the inference that competitors would be unable to effectively check exercises of monopoly power. [13]

The distribution of the share of the market not supplied by defendant is also telling. Defendant's share is more likely to indicate monopoly power if the rest of the market is widely distributed among many small competing suppliers than it would be if the size of competitors and the market share held by them approached defendant's size and share. [14]

[16]** **[*976]** Under some circumstances it may be proper to apply the concept of supply substitutability to the definition and measurement of the relevant market and to include within the market any suppliers which might readily and easily enter by producing a reasonably acceptable alternative product.

HN3[] The greater the barriers faced by a new entrant, the more probable it is that control of a particular market share would enable defendant to exercise monopoly power. [15]

Anything that tends to inhibit firms from readily and easily entering the marketplace can be analyzed as an entry barrier. Thus, the capital an entrant would have to invest is a factor, as are the employee skill levels required for a firm to be successful. Product differentiation, product loyalty, or any customer disinclination to accept the product from different suppliers **[**17]** are hurdles the new entrant may have to overcome. And, the existence of economies of scale or a dwindling market demand would make entry difficult.

Within a market, as defined by demand cross-elasticity considerations, economically significant submarkets may exist. [16] Submarkets are zones of actual or potential competition [17] that are sufficiently distinct from the larger market that one firm could exercise the power to control price or the power to exclude competition within them. [18]

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[11] Case- *Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454 (9th Cir. 1966)*, Rev'd on other grounds, *389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*.

[12] *Otter Tail Power Co. v. United States, 410 U.S. 366, 369 n. 1, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

[13] See *Grinnell, supra n. 4, 384 U.S. at 571, 86 S. Ct. 1698*; *Greyhound, supra n. 4, at 496*; *Twin City Sportservice Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975)*; *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343 (D.Mass.1953)*, Aff'd per curiam, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)* ("United Shoe").

[14] See *Greyhound, supra n. 4, at 496-97*; *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975)*, Cert. denied, ***425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)***.

[15] See generally, L. Sullivan, Antitrust, Section 23 at 77 ("Sullivan"); Von Kalinowski, Antitrust Laws and Trade Regulations, Vol. I, Section 8.02(3), p. 8-36 ("Von Kalinowski").

[16] *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; ("Brown Shoe ") *International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913, 932 (9th Cir. 1975)*.

[17] *International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913, 932 (9th Cir. 1975)*.

[18]** Practical aids in identification of such zones of competition include industry or public recognition of the submarket as a separate economic entity the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. [19] If these indicia indicate a submarket exists, market structure and market performance should be examined to determine whether defendant is in possession of monopoly power. [20]

B. Market Performance

Evidence of the actual operation of the market or submarket can also provide valuable clues as to the existence of monopoly power. If defendant has, in the past, successfully controlled price or excluded **[**19]** competition, that is direct and convincing evidence that it had the power to do so. [21]

Less direct evidence can also be persuasive. Many courts have examined defendant's profit record on the theory that persistent excess profits are inconsistent with the competitive model and attributable to the possession of monopoly power. [22] **[**20]** Monopoly **[*977]** is also expected to result in technological stagnation. Without a competitive spur, the monopolist is thought not to have any incentive to innovate. Thus, the rate of technological progress in the industry is relevant. [23]

In a competitive industry firms are expected to be "price takers." That is, they will be unable to affect price by variations in the quantity of goods they offer for sale. Where it appears defendant was a "price maker," able to choose among a range of price options in order to achieve its profit goals, or able to disregard cost and set price according to utility to the consumer (functional pricing), it may indicate monopoly power. [24], [25]

[21]** Market history, in terms of entry and growth of new firms or exit of failed firms, and whether concentration is increasing or decreasing are additional factors that can indicate whether the competitive process is functioning properly or not. [26]

Transamerica asserts that IBM had monopoly power in three markets:

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18 Cf. *Grinnell, supra n. 4, 384 U.S. at 573, 86 S. Ct. 1698*. Note that existence of a submarket does not necessarily negate the relevancy of the larger market. *U. S. v. Phillipsburg National Bank, 399 U.S. 350, 360, 90 S. Ct. 2035, 26 L. Ed. 2d 658 (1970)*.

19 *Brown Shoe, supra n. 16, 370 U.S. at 325, 82 S. Ct. 1502*; Case- *Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 454-55 (9th Cir. 1966)*, Rev'd on other grounds, *389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*.

20 See Von Kalinowski, Supra n. 15, Vol. I, Section 8.02(2), p. 8-23.

21 *Moore v. James H. Matthews & Co., 550 F.2d 1207, 1219 (9th Cir. 1977)*; *Power Replacements Corp. v. Air Preheater Co., Inc., 356 F. Supp. 872, 896-97 (E.D.Pa.1973)*.

22 *DuPont, supra n. 6, 351 U.S. at 404, 76 S. Ct. 994*; *United States v. Aluminum Co. of America, 148 F.2d 416, 426-27 (2d Cir. 1945)* ("Alcoa "); *Banana Distributors v. United Fruit Company, 162 F. Supp. 32, 39 (S.D.N.Y.1958)*; ***United States v. General Electric Co., 82 F. Supp. 753, 894-95 (D.N.J.1949)***. But profit evidence can mislead and should not be too heavily relied on. 2 P. Areeda and D. Turner, ***Antitrust Law***, Section 512c, pp. 336-37 (1978); Sullivan, Supra n. 15, at 84-86.

23 *Greyhound, supra n. 4, at 497*; *United Shoe, supra n. 13, at 331*. But see F. Scherer, Industrial Market Structure and Economic Performance 363-78 (1970) advancing the thesis that a dominated market with low entry barriers is the setting that is most conducive to innovation.

24 See 2 P. Areeda and D. Turner, ***Antitrust Law***, Section 507, p. 331 (1978); Sullivan, Supra n. 15, at 80.

25 See 2 P. Areeda and D. Turner, ***Antitrust Law***, Section 514a, pp. 341-42 (1978); Sullivan, Supra n. 15, at 88-89.

26 *Hudson Val. Asbestos Corp. v. Tougher H. & P. Co., Inc., 510 F.2d 1140, 1144 (2d Cir. 1975)*; *Cole v. Hughes Tool Co., 215 F.2d 924, 938 (10th Cir. 1954)*; *ILC Peripherals v. International Business Machines, 458 F. Supp. 423, 431 (N.D.Cal.1978)*.

1. The manufacture and placement of general purpose electronic digital computer systems ("systems market");

2. The manufacture and placement of tape drives and their controllers plug-compatible to IBM CPUs ("tape market"); and

3. The manufacture and placement of disk drives and their controllers plug-compatible to IBM CPUs ("disk market").

C. The General Purpose Systems Market

Computer systems are the functioning combination of hardware (CPUs and peripherals) **[**22]** and software that a user may employ to satisfy data processing requirements. Transamerica draws a distinction between general purpose systems and special purpose systems. Special purpose systems are those that are designed for and dedicated to specialized applications. For instance, a special purpose computer system might be utilized to control a manufacturing or a chemical process. General purpose systems, on the other hand, are those that are capable of easily and economically being adapted to a variety of data processing applications. A general purpose computer system might be used to process a company's payroll, to update its books of account, or to allow its engineers to solve complex mathematical problems while sitting at a remote terminal. Some (but not all) general purpose systems are capable of performing all these tasks concurrently. By definition, all general purpose systems allow the user to switch easily from one task to another.

This Court accepts the view that the market for general purpose computer systems should be analyzed separately from the market for special purpose computer systems. The systems sold to satisfy these different needs are not readily interchangeable **[**23]** and different suppliers specialize in each of the markets.

Transamerica's definition of the systems market is, however, too narrow. Only suppliers of complete systems are included, suppliers of parts of systems are ignored. Firms which offer the user parts of systems have become a major competitive force in the computer industry, and, because they significantly constrain IBM's power to control the price of the systems it sells, a **[*978]** market definition that ignores them is incorrect.

At one time the only option a general purpose systems user had was to choose between suppliers of complete systems. If an IBM user was dissatisfied with IBM's peripheral equipment or with IBM's software, the only recourse was to remove the entire IBM system as a unit, and replace it with an entire system from another manufacturer. Since that time, literally thousands of companies have entered the systems market, not as suppliers of entire systems, but rather as specialists providing users with replacements for parts of their computer systems. IBM did not charge the user one price for an entire computer system, rather they priced each component of their systems individually. That meant that companies **[**24]** which focused on replacing parts of a system could offer the user a better price on that part and the user was still free to acquire the rest of the system from IBM.

The PCMs are perhaps the best example of such specialists. Some PCMs got their start by copying IBM's tape drives and offering them to IBM's systems customers. Other PCMs specialized in replacing IBM's disk subsystems with their own versions. Still others recognized a competitive opportunity in supplying printers for use on IBM's systems, and some PCMs competed with IBM for sales of the electronic memories attached to IBM CPUs.

Entry barriers proved remarkably low, and the PCMs proliferated. Today, a user could replace practically every part of an IBM system with hardware from a PCM. The same is true for software. Software firms offer programs to users of IBM systems that are reasonable alternatives to the programs available from IBM. And the entry barriers faced by an entrepreneur with a software package to sell are truly insignificant.

A market definition should "recognize competition where, in fact, competition exists" [27], and should include all significant competition even though that competition differs in form **[**25]** or nature. [28] **[**26]** Transamerica's

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[27] *Brown Shoe, supra n. 16, 370 U.S. at 326, 82 S. Ct. at 1524*.

[28] *United States v. Continental Can Co., 378 U.S. 441, 449-50, 84 S. Ct. 1733, 12 L. Ed. 2d 953 (1964)*.

systems market definition fails this fundamental test. By assuming that only manufacturers offering complete systems compete with IBM, Transamerica ignores the fact that IBM systems users had other reasonable alternatives; they could replace parts of their IBM systems. In many ways, partial replacement was a more significant constraining force than total replacement. Customers found partial replacement attractive because it did not involve a scrapping of the user's investment in programming and personnel skills, and it allowed users to reduce data processing costs without abandoning entirely the security of the IBM fold. Partial replacement of parts of IBM systems was a significant constraining force on IBM's market power during the 1969-1973 time period. [29] Billions of dollars worth of equipment was being replaced piecemeal by IBM systems users. A market definition that ignores this cannot be accepted.

Some minicomputers (minis), small, relatively inexpensive computer systems should also have been included in Transamerica's general purpose systems market definition. Transamerica included the smaller IBM systems, but excluded the thousands of minis that were directly competitive with those small IBM systems. That exclusion would have had more validity in the past. When they were first introduced minis were limited, or at least thought to be limited to special purpose applications. But things changed. By May, 1970, Computerworld, a widely read industry newspaper, recognized that the ". . . new minicomputers and microcomputers showed drastic changes in design that make them truly general purpose **[*979]** . . . . For the first time, they offer a reasonable alternative to "full-sized' systems." Advertisements by minicomputer manufacturers emphasized that theme, and apparently users got the message. In August of 1972, Computerworld reported:

> "They (minis) are being used **[**27]** as true general purpose computers, running a range of applications such as order entry, sales analysis, payables, receivables, general ledger, inventory control, payroll, price ticket printing and credit authorization . . . ."

During the relevant time period minis were being sold as reasonable alternatives to the smaller general purpose systems offered by IBM. When connected together, several minis were a reasonable alternative to the acquisition of larger systems. And minis, whether used as data collection devices, intelligent terminals, pre-processors, or stand-alone systems, could ease the workload of larger general purpose systems, thereby providing the user with a viable alternative to the acquisition of a more powerful system. The competition minis provided was significant, and their exclusion from the systems market definition was incorrect.

IBM also faced other constraints not contemplated by Transamerica's systems market definition. Service bureaus buy computing systems and make them available to others by renting out time on them or doing work on them for the benefit of end-users. Time-sharing companies make their computers available to many users who access them concurrently **[**28]** via remote terminals. In both cases, users may turn to such companies during peak periods, or for the specialized services they offer. Leasing companies are financial intermediaries; they buy computer systems, or parts of computer systems, from manufacturers and lease them to users. Service bureaus, time-sharing companies and leasing companies all provide significant competition for IBM. However, their exclusion from the market definition is analytically correct. These companies all buy computers from systems manufacturers, add some financial or technical services, then turn around and offer the computers to the end user. Their basic product is computing power. Their basic raw material is a computer system. Since they all must buy equipment from manufacturers, if one manufacturer has the power to control price at the time of the initial sale, it has the power to indirectly control the price at which the computer re-enters the market with the added services. Where it is possible that a defendant might indirectly control the price at which goods re-enter the market, that alternative source of goods should be excluded from the market definition. [30] But the nature and the volume of the **[**29]** business done by service bureaus, time-sharing companies, and leasing companies need not be totally ignored. Although exclusion from market definition is called for, the constraints these companies provide decrease the likelihood that defendant's market share reflects monopoly power.

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[29] The IBM actions of which Transamerica complains all took place within a ten month period, September 1970 to July 1971.

[30] Alcoa, supra n. 44, at 425.

This Court agrees with Transamerica's contention that the concept of supply substitutability does not affect the systems market definition since there has been no evidence that any firms are in a position to readily shift their production facilities into the manufacture of general purpose systems, and also agrees that the United States constitutes the relevant geographic market.

Transamerica has made no effort to measure IBM's share of the market as this Court would define it, i. e., including minicomputer manufacturers, software suppliers, and PCMs as competitors. Nonetheless, the evidence of IBM's market share, in the market as defined by Transamerica, will be examined for whatever light it might **[**30]** shed on the issue of IBM's market power.

The most common measurement of market shares is a comparison of the competitors' annual sales. [31] Here, Transamerica, **[*980]** however, has used what is called the "installed base" method.

Included in each company's installed base for any year are all computer systems ever leased or sold by that company which are still in use in that year. Those systems, no matter how old they are, are valued at their original purchase price or their current purchase price, whichever is higher. Transamerica insists that this method is appropriate because the general purpose computer systems market is predominantly a lease market. Any measurement that failed to recognize past activity, they argue, would ignore the substantial revenues IBM enjoys from machines leased and shipped in **[**31]** the past and ignore the substantial hold IBM has on those customers due to software lock-in. [32]

The computer industry is characterized by cyclical development or "generations" of computer equipment. These cycles can be expected to produce sharp fluctuations in one company's share of annual shipments, and the tendency of the installed base method to smooth out these swings is another advantage claimed for it.

Installed base is a method traditionally employed by the computer industry, including at one time IBM itself, and this too is a reason advanced for its adoption here.

[32]** IBM counters that installed base reflects more history than current market power. IBM is right. IBM has been successful in the computer field almost since the industry's inception. Thus, inclusion of all IBM machines still in use distorts their share. The successes of newer companies (such as the PCMs) are camouflaged by the large installed bases of more established manufacturers.

The installed base method credits IBM with purchased machines from which it no longer enjoys any revenue, and even with machines that have come back into the market to compete against it. Machines sold in an earlier year to leasing companies, time-sharing companies, service bureaus, and used machines are all attributed to IBM's market share in later years. Transamerica insists this is proper because IBM, as the original manufacturer, indirectly controls the prices at which such machines and services can be offered. While such reasoning supports an exclusion of this competition from market definition, it does not warrant an attribution of the value of their capital equipment to the manufacturer's market share except in the year of the initial sale. [33]

[33]** The lease nature of the business is an insufficient reason for abandoning an annualized approach. By 1973, less than half of IBM's general purpose systems were leased. And if software lock-in, or any other factor, persuades users not to switch vendors, then the future successes that installed base would predict will ultimately be reflected

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[31] See *United States v. Pabst Brewing Company, 384 U.S. 546, 550, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)*; *United States v. Von's Grocery Co., 384 U.S. 270, 272, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966)*.

[32] Software lock-in is a term used to describe the disinclination of users to switch from one computer manufacturer's line of equipment to another's. If a user were to switch allegiance, it would incur substantial costs in converting its existing programs to the formats required by the other manufacturer's machine. As a result, over 80 percent of all users remain with the same manufacturer when they replace their general purpose systems.

[33] Transamerica's reliance on Alcoa, supra n. 44, at 424-25, is misplaced. The Court there excluded secondary ingot from the market definition. It did not include the secondary ingot in defendant's market share.

in annual shipment data. One of Transamerica's industry market share experts, recognizing the infirmities of installed base, recently discontinued his use of that method.

It is not necessary to discard all of Transamerica's data because the installed base measurement method is unacceptable. Annual shipments can be approximated from the installed base figures in evidence by subtracting one year's installed base from the following year's. This will yield a figure for net shipments. Net shipments appear to be a more desirable indicator then gross shipments because many computers are shipped to users who return their older machines to the manufacturer. Cyclical **[*981]** fluctuations can be accounted for by averaging the share figures for several years.

In some of its data Transamerica has included the value of equipment placed by the PCMs as part **[**34]** of IBM's share. This is clearly incorrect, and Transamerica has offered no convincing rationale for it. It would be possible to rehabilitate this data by extracting from IBM's share the value of disks and tapes supplied by PCMs. However, the value of PCM supplied printers, electronic memories, and other gear cannot be separated out, providing still another reason for viewing the resulting figures cautiously.

IBM's share of net shipments (less all PCM products) has been calculated to be: 65.4 percent; 67.9 percent; 51.4 percent; 56.4 percent; 56.5 percent; 30.6 percent; and 64.4 percent, for the years 1969 through 1975 respectively. Over the entire seven-year period IBM shipped 57.4 percent of all general purpose systems (net). The next largest share was shipped by the PCMs as a group with 14 percent over the seven years. Burroughs was the second largest manufacturer of systems with 7.7 percent, followed by Univac with 4.9 percent, and Honeywell with 4.6 percent. [34]

[35]** Even in a properly defined market these market share statistics would not be overwhelming. Other courts have doubted whether sixty percent of a market would be enough. [35] But while a finding of monopoly power is not foreclosed by IBM's share if the setting is conducive to the exercise of such power and if other indicators confirm its presence, [36] such a finding is certainly not compelled by these market shares.

The distribution of the remainder of the market serves to enhance IBM's power. No single manufacturer approaches the success IBM enjoys. However, their shares are growing while IBM's is shrinking. IBM's share tends generally downward, indicating that monopoly power is not present, **[**36]** or, if present, that the monopolist's grip is weakening.

Consistent supra-normal profits may be attributable to an ability to control price. Here IBM's profits have been very substantial. Its after-tax return on equity during the 1964 to 1973 period was consistently 30 to 70 percent above the Fortune 500 median, while its after-tax return on sales doubled and sometimes tripled the industrial giants' median. But the inference that a defendant that enjoys healthy profits only does so because of an unhealthy market structure is not a strong one. Good management, superior efficiency and differences in accounting provide explanations that are just as plausible, and none of those explanations is inconsistent with an effectively competitive market.

One thing excessive profits can be expected to result in is increased entry by firms hungry to participate in the rich rewards. Transamerica says that this has not occurred because the entry barriers faced by potential entrants are insurmountable. It is true that enormous barriers are faced by firms wishing to enter this market as suppliers of complete computer systems. Between $ 500 million and $ 1 billion in capital would be required; a national **[**37]** network of sales and maintenance offices staffed with highly skilled personnel is imperative; the entrant would have

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[34] See defendant's exhibits 6183 and 6515A.

[35] Alcoa, supra n. 44, at 424.

[36] The Ninth Circuit has expressly affirmed findings of monopoly power where defendant's share was 45-70 percent. *Pacific Coast Agr. Export Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1204 (9th Cir. 1975)*, Cert. denied, ***425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976)***.

to fund research and development projects; a broad product line must be offered; and customer loyalty due to software lock-in would have to be overcome. Because such a large commitment would be involved for entry as a systems supplier, it is not surprising to find that there has been no new entry on that basis since the early 1960's.

The flaw in Transamerica's entry barrier analysis is a consequence of its market definition error. Competition and entry in this market does not occur on only a full-system **[*982]** basis. Entry could, and did occur where companies recognized profitable opportunities in less inclusive offerings. Storage Technology Corporation, one of the most successful PCMs, was started by a bright engineer with $ 225,000 in equity capital, and experienced phenomenal growth. It was not alone. In 1970, International Data Corporation, (IDC) a company specializing in statistical studies of the computer industry, reported:

> "Just 15 years ago, the number of companies in the infant industry could be counted on the fingers of one hand; today well over **[**38]** 4,000 companies produce computers, related equipment and supplies, or offer data processing and programming services."

IDC thought there had been "an explosive proliferation of options for the computer user." In 1971, Transamerica, in a presentation to its parent Board of Directors, agreed, saying:

> "The frequency of entry into the data processing industry is quite high compared with any other industry, and there are usually at any one time, more competitors than anyone would really like to have."

The new entrants were growing. From 1967 to 1975 the value of PCM equipment attached to IBM systems increased from $ 15.8 million to $ 2.6 billion. In the same period, leasing companies jumped from holding 8.3 percent of the IBM CPUs to 26.7 percent. And the market as a whole was growing; most of IBM's full-systems competitors participated in that growth. Digital Equipment Corporation, (DEC) for example, was founded in 1957 with DEC initial capitalization of $ 70,000. By 1977 it had computer related revenues of $ 1.1 billion. One commentator has referred to IBM's systems competitors as the "billion dollar dwarfs."

This is not the story of a stagnant, dominated industry. There **[**39]** is no doubt that the pace of technological progress in the computer industry is extraordinary. Commentators are fond of saying that had the auto industry kept the same pace over the last 30 years, a Rolls-Royce would cost $ 2.50 today and would have an EPA gas rating of 2,000,000 miles per gallon.

There is some evidence that IBM sought to maximize profits by choosing a price for its products from a range of alternative prices. But that is not necessarily inconsistent with an effectively competitive market. The range of price options available to IBM was never so broad that it could set a price without regard to competitors' prices. And, in most cases, the range was only theoretical, because competitive pressures, not IBM preference, dictated which price had to be adopted.

This market was not monopolized. IBM did not control prices, it reacted to the prices set by others. IBM's market share (if the market had been properly defined) was below 57 percent and falling. Entry was easy for anyone with a good idea and the courage to exploit it, and new entrants, along with the old, grew and prospered. This Court finds that Transamerica has failed to prove that IBM had monopoly power in the **[**40]** general purpose systems market.

Nonetheless, Transamerica's other contentions will be considered on the assumption that IBM Did have such monopoly power.

D. Tape and Disk Markets

The hardware of a computing system was previously described as consisting of a CPU and peripherals. Further refinement of that over-simplification is necessary for an understanding of the peripherals markets alleged to be relevant.

Certain control functions must be performed if peripheral gear is to function properly. The access arm of a disk drive, for example, must be positioned over the proper track before data can be read from, or written onto that track. These control functions can be performed by the arithmetic and logical circuits of the CPU, in which case the control function is said to be "integrated" into the CPU. But when the CPU is tied up with control functions, it is not free to perform more sophisticated tasks, **[*983]** and so an alternative design was incorporated into the architecture of System/360. Most of the peripherals attachable to System/360 CPUs were not integrated. The control functions were performed by two independent "boxes" or machines with arithmetic and logical circuits: **[**41]** channels and control units.

A limited number of channels could be attached to most System/360 CPUs. Channels funnel data into the CPUs' main electronic memory, and take from the memory data that is to be written onto any of the peripheral devices that may attach to the channel, and send it to its destination. Channels perform control functions common to a variety of peripheral gear.

It is possible to attach a number of control units to each channel on the system, and the peripheral devices attach to the control unit. Control units perform the control functions that are required by the specific type of peripheral that attaches to it. Thus, one type of tape drive, expecting specific control functions to be performed, only attaches to a specific type of control unit. Other types of tape drives require a different control unit, and the same is true of disks. But various types of control units can be attached to the same channel.

PCMs typically supplied a combined package of disks and disk control units attachable to, or "plug-compatible" with, IBM channels. This meant that the user could remove the IBM control unit and disk combination (known as a "subsystem"), plug in the PCMs' replacements **[**42]** and the computing system would continue to function with very little inconvenience. That was so because the PCMs had duplicated the "interface" between the IBM channel and the IBM disk control units. An interface has both physical aspects (in terms of the number of wires involved and their arrangement in a connector), and protocol aspects (what a given pulse sequence on a particular wire is understood to indicate by the machine receiving the pulse).

Unlike PCM disk suppliers who provide subsystems, PCM tape suppliers concentrated initially on tape drives and generally did not sell tape control units. Thus, the interface that they duplicated was the interface between IBM tapes and IBM control units.

Although many computer manufacturers designed their systems with this CPU-channel-control unit-peripheral hierarchy of control functions, no other systems were designed so that the interface between the channel and control unit (disks) or the interface between the control unit and peripheral device (tapes) was precisely the same as the corresponding IBM interface. Thus, tape drives and disk drive-control unit combinations developed for use on IBM's System/360 could not, without some interface **[**43]** modifications, be plugged into another computer manufacturer's system, and vice versa.

The two peripherals markets alleged by Transamerica consist of tape drives and tape control units, and disk drives and disk control units that can be plugged into IBM CPUs without any modifications, i.e., that are plug-compatible.

These peripherals markets will be examined together. Both markets, if they can be so described, became economically significant in the late 1960's, when PCMs began duplicating the peripherals that would attach to IBM's computers. Prior to that time some of the PCMs supplied peripherals to IBM's general purpose systems competitors, who then incorporated them into the systems they offered. When the systems competitors took to manufacturing their own peripherals, the PCMs turned their attention to marketing peripheral replacements to IBM users.

Having already accepted a definition of a systems market that encompasses all the economic activity on the peripherals front, perhaps "submarket" would be the proper term to apply here. In any event, the Brown Shoe submarket indicia can provide valuable clues as to whether plug-compatible tapes and control units and plug-compatible **[**44]** disks and control units are sufficiently distinct that they could be monopolized.

[*984] Industry recognition of the peripherals markets as separate economic entities could hardly be more evident. IBM studied the "tape market" and "disk market" separately and referred to them repeatedly by those or similar appellations. Others in the industry, including witnesses called by both sides, referred to and treated the tape and disk markets as separate economic entities.

The peculiar uses and characteristics of the products involved have already been spoken of. Because the interfaces between IBM CPUs and control units and between IBM control units and peripherals were unique, the tapes or disks described as plug-compatible to IBM CPUs could only be used with those CPUs. Users with systems provided by other manufacturers could not use them at all, and IBM users could use nothing else. Thus, customers for plug-compatible tapes and disks were readily identifiable and distinct.

The production facilities for tapes were different from the production facilities for disks, and both were different from the production facilities for other components of the system. IBM's main disk facilities **[**45]** were in California; its main tape facilities in Colorado; and its CPUs were manufactured elsewhere. However, the production facilities of independents and systems manufacturers producing non-IBM-plug-compatible tapes and disks were probably not so different from the facilities for the corresponding plug-compatible peripherals. This is so because the tapes and disks were similar in almost all respects save for the unique interface electronics.

Prices were distinct. In setting its prices IBM was less influenced by the prices of non-plug-compatible tapes and disks than by the PCMs' prices. Users were price sensitive. Lower prices for equivalent or superior performance was the PCMs' selling point. With it they managed to attract millions of dollars worth of business away from IBM.

Finally, the PCMs were specialized. Peripherals were their major activity. Many supplied only plug-compatible tapes or only plug-compatible disks. Those that supplied both, made the combination only after experiencing an initial success with the one device or the other. The Brown Shoe submarket criteria indicate that the peripherals markets are capable of being dominated, and the markets should be examined **[**46]** further.

IBM attacks these markets as narrow for three reasons: (1) they ignore the interchangeability between tapes and disks; (2) they fail to include as potential suppliers either the systems manufacturers who make their own peripherals, or the independents who manufacture peripherals for them; and (3) they fail to account for the constraint of systems competition on peripheral price discretion.

IBM's first argument, that tapes and disks are interchangeable, is without merit. In configuring a system, users have several alternatives. Various types of media are available to store and access data. Principal among these are tapes, disks and electronic memory. In that order, data is accessed by the CPU with increasing rapidity, but also with increasing cost. Electronic memory is so expensive that it is only used as a temporary storage area for data. Data is read into the electronic memory (from a tape or disk perhaps) where the CPU can readily access and work with it, then written from electronic memory onto another medium for more permanent storage. Electronic memory is not really a peripheral, rather more a part of the CPU itself, and is not a reasonable alternative to either tape **[**47]** or disk.

For some applications a disk must be used. Where the CPU must access data frequently, but not necessarily in a serial fashion, a disk is indispensable; tapes are not an alternative regardless of the price differential. Applications where many users access a central computer through remote terminals (such as an airline reservations system) are only feasible if the data for them is kept on disk (or other direct access device). This is so because every data record on a disk pack can be reached within a fraction of a second by a lightning-quick access arm.

[*985] To reach a particular record on a tape, the tape reel must be spun until the proper spot is reached. It might take as long as one minute to reach a particular data record, ages by comparison with disk speeds. However, if the records on a tape reel are sorted so that the CPU can access them seriatim, then the time required to access records in a tape file is quite acceptable. So, tapes are typically used only for data which can be accessed serially, and only disks are used when data must be accessed randomly. Still, there is some overlap.

For some serial data files either a tape or disk can be used. Because the **[**48]** cost of storing data on disks is much greater than the cost of tape storage, only with relatively short files would the user consider tape and disk to be alternatives. Most system users employ both disks and tapes.

Indications are that the incidence of actual substitution between tape and disk is not high. Neither IBM nor the PCMs considered tape prices when pricing disks or vice versa. IBM's Financial Procedures Manual calls for calculation of the impact on existing products' profits caused by introduction of a new product. If tapes and disks were reasonable alternatives, one would expect that a new tape would impact the profitability of old disk products and that new disk devices would impact the profits of existing tape products. Yet only rarely were such impact calculations made. The manual also calls for competing products to be identified. Tapes were not so identified when disks were introduced, nor were disks, when tapes were introduced.

The head of IBM's Computer Division testified that slight variations in the price of disks would not affect the demand for tapes; that variations of 40, 50 or 100 percent in price would be required. That is not the high degree of price cross-elasticity **[**49]** that is required if two products are to be considered reasonable substitutes and placed in the same market.

IBM's second argument for a broader market definition, supply substitutability, calls for the inclusion of firms with a high cross-elasticity of production. This contention would require a finding that producers are capable of quickly and easily entering the market to produce alternatives. That finding cannot be made. Producers of non-plug-compatible peripherals would have to change the interfaces in their devices to cope with IBM's CPUs. Interface changes would cost hundreds of thousands, if not millions of dollars, and might require a year to carry out. Under these circumstances it would be improper to include this potential competition in the peripherals market definition.

IBM's third attack, emphasizing the influence of systems competition, has merit. The cost of peripherals accounts for 50 to 70 percent of the total cost of a typically configured general purpose computer system. Efforts made at controlling price in the peripherals submarkets would be felt by systems market competitors because control of peripheral prices translates indirectly into control of systems prices. **[**50]** If the systems market were effectively competitive, one would expect that the pressures exerted by that competition would be sufficient to defeat attempts to wield monopoly power in a peripheral submarket. Thus, the existence of monopoly power in a peripherals market must be predicated upon a finding of monopoly power in the systems market.

Transamerica's expert economist agreed. He testified that by definition IBM could not have monopoly power in the peripherals market if it did not have monopoly power in the systems market. This Court's conclusion that IBM lacked systems market monopoly power is thus fatal to Transamerica's peripheral markets claims. Nonetheless, this inquiry will proceed under the assumption that IBM had a systems monopoly.

As with the systems market, Transamerica combined a narrow definition of the peripherals market with a distorting share measurement technique, the installed base. Installed base measurement makes even less sense here than it did in the systems market. For many years, IBM faced absolutely no competition for the tapes and disks that attached to its CPUs. As a result, **[*986]** it built a tremendous installed base of those peripherals. Even **[**51]** if the PCMs had won every sale from 1968 onward, many years would have to pass before the installed base figures would show PCM competition was significant. And the software lock-in argument rings hollow here. By definition, every product in these markets is plug-compatible; none of the competitors enjoys any advantages traceable to software lock-in.

Transamerica's mistaken failure to recognize systems competition in its market definition invalidates its share measurement data. However, the net shipments of peripherals in the market, as Transamerica has defined it, can be calculated in the same manner as net shipments were calculated for the systems market. The installed base at the end of one year is subtracted from the installed base at the end of the following year to indicate net shipments over that year. Thus, the 1969 net shipment figures were calculated by subtracting the 1968 year end installed base from the 1969 year end installed base. Years prior to 1969 are ignored. Before that time PCM competition was insignificant and IBM's net shipments were almost 100 percent of all net shipments of tapes and disks that hooked onto its CPUs.

The following two tables show the total **[**52]** net shipments of peripherals (drives and control units) for the years 1969 through 1975 as derived from the installed base data. [37] IBM's share appears both in dollars and as a percentage of total. That portion not attributable to IBM was divided amongst the PCMs. Dollar figures are shown in terms of thousands of dollars of monthly rental value.

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[37] See defendant's exhibits 6528 and 6533.

TABLE

It would be difficult to conclude that a company possessed monopoly power in a market where its net shipments were negative at the very time it allegedly used or maintained that power. That is the case here. In 1971, IBM was losing ground to its PCM competitors. That was a relatively lean year for everyone, but more so for IBM than for its competitors. The PCMs were increasing their customer base at IBM's expense.

Even the aggregate numbers are unconvincing. IBM's mere 53.8 percent of the tape market suggests monopoly power is not present. The 77.1 percent figure in the disk market would support a monopoly finding, **[**53]** but the significance of this market share is diminished by the realization that IBM had 100 percent of the market only a few years before, and the failure of the market definition to account for systems competition means these numbers must be viewed circumspectly. These share figures are also inflated by Transamerica's inclusion into the market of products which the PCMs never duplicated, and areas of the country where PCMs chose not to compete.

[*987] Entry barriers around these markets are extraordinarily low. The market definition excluded potential suppliers (such as systems competitors and their independent peripherals sources) because they were incapable of quickly and easily supplying substitute products. But the hurdles those potential suppliers must clear are far lower than those new systems market entrants face. Firms already producing peripherals have the production facilities, the trained staffs, and the research and development expertise needed; all that remains for them is to study the IBM interface and duplicate it. Two of the most prominent systems competitors, Univac and CDC, have done just that. Both manufacture peripherals for their own computer systems, and **[**54]** also manufacture IBM plug-compatible peripherals that compete in the markets at issue here. And many PCMs market their wares to other systems manufacturers as well as to IBM end-users. While the cost, in time and money, of developing an interface is sufficient to exclude systems manufacturers and independents from the market definition, it does not provide a formidable entry barrier around the market as defined.

The entry barriers faced by completely new entrants into the peripherals market have already been discussed in relation to the systems market. Those barriers are low, as is demonstrated by the history of entry into peripherals manufacture. PCMs, attracted by IBM's high profits on its peripherals, stormed these markets and flooded them with cheaper copies of the IBM gear. IBM, unable to maintain its relatively high price, was forced to react with lower prices and improved products. This picture is consistent with the dynamics of an effectively competitive market, not a monopolized one.

This Court will not be misled by the share figures propounded by Transamerica. Those calculations ignore the significant constraint of systems competition, and measure the markets as an aggregation **[**55]** of all peripherals in use, when there is no reason for doing so. Accurate share figures cannot be determined from this record, but the data which can be rescued indicates that IBM did not have market control, and that its share was not dominant. Entry barriers are low, and entry has been easy, frequent, and successful. Even if a systems monopoly were not a prerequisite to peripheral market control, or even if IBM had a systems monopoly, this Court would find, as it does here, that Transamerica has failed to prove that IBM had monopoly power in either the tape or the disk market.

IV.

PRICING CONDUCT

A defendant not in possession of monopoly power may nonetheless incur antitrust liability by attempting to monopolize. Transamerica alleged that IBM attempted to monopolize by its pricing conduct, by its design conduct, and by its long-term leases. IBM's conduct will be examined first under the assumption that IBM did possess monopoly power. Following that, the conduct that would have violated the monopolization provision of *Section 2* will be re-examined to determine whether, in light of the absence of monopoly power, an attempt to monopolize has been proved.

IBM responded to the lower **[**56]** prices and increased successes of the PCMs by offering some of its own products at substantially reduced prices. Transamerica claims that those prices were predatory and violated the antitrust laws.

The concept that prices can be used as a means of acquiring or maintaining monopoly power is not new; it has long been recognized that financially powerful firms might coerce or destroy their rivals by pricing at unremunerative levels. Attempts to distinguish between predatory pricing and legal price behavior, by comparing defendant's costs with its prices, are new. In an article published in 1975, Professors Areeda and Turner suggested that pricing conduct should be conclusively presumed legal if price levels exceeded either defendant's average variable cost or defendant's short-run **[*988]** marginal cost. [38] Reaction to the Areeda and Turner proposal has been mixed. Courts have embraced it; academicians have criticized and rejected it.

[57]** An understanding of the relationship between these cost measures is critical to an appreciation of the effect that imposition of the Areeda and Turner rule would have. All three kinds of cost (average cost, average variable cost, and marginal cost) will at first decline, then later increase as a firm's output is expanded. Average cost (which includes both fixed and variable costs) will always be greater than average variable cost (which only includes variable costs). At low output levels, marginal cost will be less than both of the other cost measures. As output is increased, marginal cost will rise until at some point it will be greater than average variable cost (but less than average cost). If output is increased still further, marginal cost will increase to the point that it exceeds both average cost and average variable cost. [39]

A monopolist has the power to control **[**58]** market price by varying the quantity of goods it offers for sale. As that quantity is varied, the monopolists' marginal, average variable, and average cost will also vary. If market demand would permit it, [40] the monopolist would have the following options: 1) setting a market price in excess of both average cost and marginal cost; 2) setting a market price below average cost but greater than marginal cost; or 3) setting a market price below both average cost and marginal cost. Areeda and Turner would conclusively presume the monopolist's conduct legal if it exercised option 1) or option 2), and would conclusively presume conduct illegal only if option 3) was chosen.

IBM argues that the Areeda and Turner rule is the law of the Ninth Circuit and is binding upon this Court. Transamerica maintains that prior cases are distinguishable, and that a monopolists' pricing is illegal **[**59]** if it sets a market price below the point at which it would maximize profits if the purpose and effects of that action are to unnecessarily exclude competition. Neither standard is appropriate in this case. If a monopolist, in response to actual or threatened entry into a previously controlled market, reduces prices below its full cost, there are strong implications of conduct that unreasonably restricts competition. Therefore, and for reasons hereinafter stated, the IBM conduct will be judged against a "full cost" standard.

A. Predatory Pricing Case Law.

In 1976, the Ninth Circuit Court of Appeals, in Hanson v. Shell Oil Co. [41] ("Hanson "), held that a plaintiff's failure to show that a defendant's prices were below its marginal or average variable costs was a failure as a matter of law to present a Prima facie predatory pricing case under *Section 2*. One year later, in Janich Bros., Inc. v. American Distilling Co. [42] ("Janich "), the Ninth Circuit, relying heavily on Areeda and Turner, upheld a directed verdict against a plaintiff whose proof suffered from the same insufficiency. If those cases are binding upon this Court, in this case,

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[38] Areeda and Turner, Predatory Pricing and Related Practices Under *Section 2* of the Sherman Act, 88 Harv.L.Rev. 697 (1975) ("Areeda and Turner"). Areeda and Turner recognized that marginal cost data are typically unavailable, and suggested that average variable cost could be used as a surrogate. Id., at 716-18. The terminology and definitions employed here are the same as used by Areeda and Turner. See id., at 700-03.

[39] For a diagrammatic representation of the relationship between these cost measures and the quantity of output, See id., at 701 n. 14.

[40] The monopolist would only have these options if the demand curve intersected the average cost curve to the left of minimum average cost.

[41] *541 F.2d 1352 (9th Cir. 1976)*, Cert. denied, ***429 U.S. 1074, 97 S. Ct. 813, 50 L. Ed. 2d 792 (1977)***.

[42] *570 F.2d 848 (9th Cir. 1977)*, Cert. denied, ***439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122 (1978)***.

then, as IBM suggests, Transamerica's predatory **[**60]** pricing allegations must fall as a matter of law, for there was no evidence of **[*989]** any IBM price below marginal or average variable costs.

Both Hanson and Janich involved non-monopolists, charged with attempting to monopolize. In attempt cases, a plaintiff must establish specific intent to control prices or destroy competition, predatory or anticompetitive conduct, and dangerous probability of success. But it may be misleading to list those three as separate and independent elements. In fact, there is a great deal of interrelation between them. Specific intent may be established by direct evidence, such as memos or statements made by corporate officers, or alternatively, specific intent can be inferred from the defendant's conduct. [43] Dangerous probability can be shown by proof of substantial **[**61]** power in a relevant market, or it can be inferred from conduct which independently violates Section 1 and is of a kind "clearly threatening to competition or clearly exclusionary", or it can be inferred from specific intent. [44] In extreme cases only conduct need be proven directly; specific intent can be inferred from the conduct and dangerous probability can be inferred from the specific intent. [45]

A firm that prices its product at levels above marginal or average variable cost is not necessarily engaged in clearly exclusionary conduct. A firm that prices its products below those levels is. These standards then, are appropriate for judging the pricing conduct of a firm charged with attempting to monopolize where no independent evidence of specific intent and no independent evidence of dangerous probability (relevant market proof) is admitted. Hanson and Janich **[**62]** were such cases, and the application of very strict standards to plaintiff's proof was proper in those circumstances.

However, less egregious conduct may violate *Section 2* if engaged in by a monopolist [46] or by one attempting to monopolize if there is also direct proof of specific intent or direct proof of a dangerous probability of success. [47] Hanson and Janich are deemed therefore to leave open the appropriate standards to apply to cases with different facts.

The same is true of CalComp. [48] IBM thinks CalComp Foreclosed any further inquiry by adopting the Areeda and Turner marginal cost standard. CalComp dealt with the pricing conduct of a monopolist and decided that if prices were reasonable they did not violate the law, and that price reductions which responded to lower prices of competitors, but still left defendant's products "substantially profitable", were reasonable. [49] However, CalComp carefully limited its pronouncements to the **[**63]** facts of the case before it. The court recognized that on a different showing, even profitable prices might violate *Section 2* if set by the monopolist to discourage new entrants (limit pricing), and also held out the possibility that other aspects of a defendant's conduct might make prices in excess of marginal cost predatory. [50] Those "refinements" are at odds with the fundamentals of the Areeda and Turner analysis, where it was argued that the prices should be conclusively presumed to be legal if they exceeded marginal or average variable cost. [51]

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[43] ***Id., at 853***.

[44] Id.; *Hallmark Industry v. Reynolds Metals Co., 489 F.2d 8, 12 (9th Cir. 1973)*.

[45] Janich, supra n. 42, at 854 n. 4.

[46] *Alcoa, supra n. 44*.

[47] *Greyhound, supra n. 4, at 504-05*.

[48] Supra n. 4.

[49] *Id., at 741*.

[50] *Id., at 737*.

[51] Areeda and Turner, Supra n. 38, at 732-33.

It does not seem warranted to conclude that the CalComp opinion mandates adoption of a conclusion it flatly contradicts.

B. Prices Above Average Cost Should be Conclusively Presumed Legal.

Theoretical "perfect" competition does not contemplate stasis. Economists realize **[*990]** that the prospects of supra-normal profits will induce entrepreneurs **[**64]** and innovators to supply new markets or invent new products. For a time, the innovator will be the market's sole supplier, in possession of monopoly power, and able to charge a profit maximizing price, with returns well in excess of "normal" profits. This is the reward that accrues to those whose ventures into new fields are successful.

Charging a monopoly price and earning monopoly profits is in no way anticompetitive. To the contrary, it can provide the competitive incentive that keeps an economy dynamic and innovative. But the monopoly power that accrues to the innovator is not expected to be permanent. High profits will attract imitators. Initially, the imitators will price their products incrementally below the innovators', sufficiently low to attract customers for the goods they can produce, sufficiently high to preserve as much profit to themselves as possible. Eventually the market's supra-normal profits will attract enough new entrants so that the price will be driven down to the point where all suppliers are covering their costs and enjoying no more than a normal profit on their investment (price will equal average cost). This state of perfect competition will continue until **[**65]** another innovator starts the innovation-monopoly-imitator-competition cycle over again.

However, the monopolist may seek to disrupt that competitive process in order to preserve to itself the benefits of monopoly. For instance, when faced with competition, the monopolist might choose to price so low that the new entrant, no matter how efficient, is driven out of business. Once that is accomplished, the monopolist can return to profit maximization and supra-normal profits. Extinguishing the competitive threat in that fashion also serves to raise entry barriers. Potential entrants will be on notice that even if they have a good product, efficiently produced and marketed, the monopolist will not allow them to sell at a price which returns a profit.

The great problem in fixing a legal standard by which pricing conduct should be measured is that it is extremely difficult to distinguish between a monopolist's price reduction that is a normal, expected component of the dynamic competitive process, and the predatory, undesirable conduct just described. If the law is overzealous in guarding against predatory pricing, it may well inhibit the competitive dynamics it seeks to promote.

It is **[**66]** tempting to consider the monopolist's intent in order to distinguish between pro and anticompetitive price reductions. But where is the line between illegal, undesirable, "predatory intent" and the legal, desirable intent to prevail in the competitive struggle? Appropriately low prices are to be encouraged, not discouraged. The punitive impact of the antitrust laws must not be permitted to compel high prices. Unless some objective, understandable standard is established for the guidance of businessmen, they must either forego competitive price decreases or risk punitive damages that might turn on some careless word once spoken in a board room. [52] Businessmen must have notice of what is violative of the law. A test based strictly on intent would not serve that goal.

The first **[**67]** issue to be addressed in adopting a cost-based test is whether any range of pricing conduct should be beyond the reach of the law. A "free zone" of price activity would preserve competitive incentives, but could also sanction undesirable conduct. If monopolists are allowed with impunity to lower price to a level equal to their average cost, then the monopolist might lower its price from the profit maximizing level to a level competitors cannot meet in order to discourage entry and preserve the monopoly (limit pricing). Or, entry could be defeated and discouraged by temporary reductions to average cost levels, followed by a return to monopoly pricing once the threat had been vanquished. In **[*991]** either case, the competitive process would be thwarted, and the monopolist could preserve its status without risking antitrust liability.

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[52] See Areeda and Turner, Supra n. 38, at 699; R. Posner, ***Antitrust Law***: An Economic Perspective 189-90 (1976) ("Posner"); Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L.J. 284, 287-288 (1977) ("Williamson").

Areeda and Turner considered these possibilities, but concluded, as this Court does, that preservation of incentives is more important than the minimal threat to competition presented by a free zone above average cost. Only less efficient competitors would be eliminated by price manipulations above the average cost level. Competitors who are as efficient **[**68]** as the monopolist will continue to make at least normal profits, while the more efficient will profit more. [53]

It would be all but impossible to distinguish between above cost limit pricing conduct and a monopolist's pro-competitive reaction to lower priced competitors. [54] One external characteristic is common to both cases, a lowered price. Any attempt to attach liability to the one will surely inhibit the indistinguishable other.

Even a monopolist is permitted to compete in the battle for trade. [55] And the preservation of competitive incentives, even for that monopolist, is deemed such an important consideration that monopolization is condoned where condemnation would provide a disincentive to compete. [56] Protection of relatively inefficient competitors **[**69]** is a lesser consideration. [57] Monopolists can compete by being more efficient than their rivals, [58] and the most significant manifestation of that efficiency is a lower price. If the monopoly is attained or preserved because the monopolist is profitable at price levels where others are not, so be it. Lower prices and increased efficiency are to be fostered. This Court agrees with Areeda and Turner that price reductions which result in prices that exceed defendant's average cost should be conclusively presumed legal. [59]

[70]** C. Prices Below Average Cost Should not be Conclusively Presumed Legal.

Efficiency is no longer the sole determinant of survival once price is permitted to drop below the monopolists' average cost; cash reserves become paramount. If price is insufficient to cover average cost, the monopolist will be losing money, less efficient rivals will be losing money, equally efficient rivals will be losing money, and quite possibly, even More efficient rivals will be losing money. Average cost is the breakeven price level. Competitors with average costs equal to the monopolist's, break even when the monopolist does. Competitors with average costs lower than the monopolist's are more efficient and are making a profit when the monopolist is just breaking even. If a monopolist is permitted to set price as low as marginal cost with impunity, it can drive from the market all competitors whose average costs exceed the monopolist's marginal costs unless their staying power is as great as the monopolist's.

The difference between these cost levels can be quite significant. Evidence in the case at bar suggests IBM's marginal costs or average variable costs might be as little as 50 percent of their average **[**71]** costs. If that is so, then IBM could destroy rivals who are twice as efficient (their average costs are one-half of IBM's) simply because IBM had a bigger bankroll, and fear no antitrust liability under the Areeda and Turner rule.

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53 Areeda and Turner, Supra n. 38, at 704-709.

54 Posner, Supra n. 52, at 195 n. 39.

55 *Greyhound, supra n. 4, at 498-99*; *Telex, supra n. 5, at 927*.

56 *Berkey, supra n. 5, at 273-274*.

57 Hanson, supra n. 41, at 1358-59.

58 *Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *United Shoe, supra n. 13, at 342*.

59 See also *International Air Ind., Inc. 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)***; *Weber v. Wynne, 431 F. Supp. 1048, 1059 (D.N.J.1977)*.

Courts which have adopted the Areeda and Turner rule have not always considered **[*992]** its potential for abuse. In Int'l Air Ind., Inc. v. American Excelsior Co., [60] the court recognized that equally efficient rivals could be driven out but incorrectly assumed that more efficient competitors were safe. [61] The court in Weber v. Wynne [62] acknowledged the threat to equally efficient firms, but said nothing of the fate of the more efficient. [63] The Court in Hanson thought only the less efficient were endangered:

> "If its prices were above its (marginal or average variable) costs, and nevertheless Shell's did drive Hanson out of business, this can only be because Hanson was so inefficient that at prices at which Shell could make a reasonable profit he could not." ([64])

And finally, CalComp perpetuated that misconception in this Circuit:

> "The thrust of this analysis is that price reductions up to the point of marginal cost are consistent with competition on the merits, since in this case only less efficient firms will be disadvantaged, while a firm pricing below marginal cost by definition incurs losses, so that competition on the basis of efficiency in this situation is frustrated." ([65])

[73]** Average cost is the point to which the normal forces of competition will tend to lower price. To repeat what is self-evident, if a firm sells below its average cost it is incurring a loss, equally efficient firms are incurring a loss, and more efficient firms (if their average cost is lower than the monopolist's average cost but greater than the price) will also be incurring a loss. Only firms able to withstand losses for as long as the monopolist decides to inflict them will survive, others will perish. If a monopolist is permitted to set a price below its average cost, competition on the basis of efficiency is frustrated, and competition on the basis of wealth replaces it.

Areeda and Turner have opted to place a potent weapon in the hands of the monopolist. Their reasons for doing so should be carefully examined. They have identified four major reasons supporting their position: [66]

(1) it will deter frivolous suits;

[74]** (2) a price floor above marginal cost will tend to preserve inefficient rivals;

(3) short-run welfare is maximized by pricing at marginal cost; and

(4) even if long-run welfare is not maximized, long-run consequences are too speculative to incorporate into a legal rule.

The first justification smacks of overkill. Surely it is not necessary to go so far as to allow a monopolist to destroy its competitors in order to protect that monopolist's incentive to price competitively. A prophylactic rule is required in order to preserve incentives, but sanctioning all price levels above average cost serves this purpose as well. [67]

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[60] *517 F.2d 714 (5th Cir. 1975)*, Cert. denied, ***424 U.S. 943, 96 S. Ct. 1411, 47 L. Ed. 2d 349 (1976)***.

[61] **[**72]** *Id., at 724*.

[62] *431 F. Supp. 1048 (D.N.J.1977)*.

[63] *Id., at 1060 n. 16*.

[64] Hanson, supra n. 41, at 1358.

[65] CalComp, supra n. 4, at 734. Note that the court in *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N.D.Cal.1978)* also appeared confused by the cost terminology: " . . . price above full costs, i. e., above the level of average variable costs to which legitimate competition would tend to lower it." *Id., at 852*. Full cost (average cost) is the level to which legitimate competition would tend to lower price. Average variable costs are always lower.

[66] Areeda and Turner, Williamson on Predatory Pricing, 87 Yale L.J. 1337; 1339 (1978).

Areeda and Turner's second reason is interesting, but highly questionable. Apparently, they feel it is the monopolist's function to destroy less efficient competition, [68] and that survival of inefficient firms is **[*993]** undesirable. Even if there is some **[**75]** value in the elimination of competitors who are less efficient than the monopolist, this reasoning overlooks the tendency of a price floor at marginal cost to destroy equally efficient and more efficient rivals unless they have pockets as deep as the monopolist's.

The welfare maximization argument is really the most significant. What is meant is simply that a monopolist with excess capacity, i. e., average cost exceeds marginal cost, will be making more goods available to the consumer at lower prices if allowed to price as low as marginal cost than the monopolist would if forced to utilize less of its capacity by producing less and pricing in excess of average cost. Social resources are wasted because there is a divergence between the cost of the incremental output (marginal cost) and the value of that output **[**76]** to consumers. And, since excess capacity exists, it would be a waste of social resources to attract new entrants who would construct even more facilities. [69]

That short-run welfare maximization argument is short-sighted. While it is true that resources are most efficiently utilized and that consumers benefit when the monopolist prices at marginal cost, such beneficence cannot be expected to continue. Once the competitive threat has been extinguished, the monopolist will return to higher prices and profits. When that happens, society will suffer a greater welfare loss. Fewer goods will be produced, efficient capacity will be idled, and consumers will be paying much more than incremental production costs. Professor Scherer recognized that the inclination of monopolies to maximize their profits at the consumers' expense would mean that welfare would be maximized if the monopolist's price reduction was checked at some point above marginal cost. But he was unable **[**77]** to quantify precisely a limitation on price that would maximize long run welfare, i. e., a price rule that would insure that the discounted welfare loss from the anticipated future price gouge would be most offset by the temporary benefits of lower prices. [70] Professor Williamson is also suspicious of Areeda and Turner's approach. In his opinion negligible benefits would flow from temporary price cuts to the marginal cost level, if followed by a return to monopoly pricing. [71]

Areeda and Turner do not argue with Scherer's long-run welfare analysis. They acknowledge that the net long-run consequences of marginal cost pricing might be adverse because of its exclusionary effect, but reject consideration of long-run effects because they are difficult to determine (their fourth reason for adopting a marginal cost standard). [72] Indeed, the welfare maximization **[**78]** problem is complex. In addition to the return to monopoly prices scenario, Scherer described several other cases, some of which would find welfare maximized with price limitations above marginal cost, and some with price limitations below that point. [73] However, ease of application is a poor argument for adopting a rule that admittedly ignores important considerations of economic efficiency, especially when the main justification for that rule is economic efficiency. [74]

In any event, the marginal cost test is not easy to apply either. In fact it is frequently impossible to apply.

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[67] Schmalensee, On the Use of Economic Models in Antitrust: The Realemon Case, 127 U.Pa.L.Review 994, 1029 (1979) ("Schmalensee").

[68] See 3 P. Areeda and D. Turner, ***Antitrust Law***, Section 715a, at 165 (1978). Areeda and Turner would also sanction the destruction of equally efficient competition if there is chronic excess capacity.

[69] See Areeda and Turner, Supra n. 38, at 710-11.

[70] See Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv.L.Rev. 868, 883-900 (1976) ("Scherer").

[71] Williamson, Supra n. 52, at 291.

[72] Areeda and Turner, Scherer on Predatory Pricing: A Reply, 89 Harv.L.Rev. 891, 896-97 (1976).

[73] Scherer, Supra n. 70, at 887-89.

[74] See Schmalensee, Supra n. 67, at 903.

It is almost too easy to criticize rule proposals in this area as administratively complex. The initial Areeda and Turner article has engendered much academic discussion and several counter-proposals. It seems that every attempt to formulate rules **[**79]** has been criticized by proponents of other rules as an unworkable solution. Areeda and Turner fare no better. Marginal cost is not **[*994]** a cost recognized by accountants. It is a figment of the economist's imagination. It is not recognized in the books of account, and thus, it is unlikely that any evidence of marginal cost could be easily developed. Areeda and Turner recognized that in their initial article, and suggested average variable cost could be used as a proxy, [75] and that in situations of strained capacity an average cost test could be applied. [76] But they seem to have retreated from that position of late, perhaps as a result of pointed criticism of the logic and feasibility of average cost and average variable cost tests. [77] They now emphasize that theirs is a short-run marginal cost standard, and that the other measures are simply approximations of marginal cost. If plaintiff can show that marginal cost is significantly higher than average cost, or if defendant fails to show that average variable cost is not significantly below marginal cost, then prices in excess of the surrogate standard are not safe under their rule. [78] The burden is always on someone to offer **[**80]** marginal cost evidence, but the data is not there.

Areeda and Turner's justifications are not convincing. They argue that a marginal cost test will optimize social welfare. Then they admit that it will not. They argue that a marginal cost test is easier to apply then a long-run welfare maximizing test, then they suggest surrogates because marginal cost data is impossible to come by. But even if their theory had merit, if all the world's economists were of one voice, and like Areeda and Turner, placed their faith in the monopolist to maximize social welfare by eliminating competitors from crowded industries through temporary provision of more and lower priced goods, the Congress and the courts **[**81]** have already placed their faith elsewhere. The goal of welfare maximization through proper resource allocation is to be accomplished by a system of effective competition, not by reliance on the presumed beneficence of a monopolist. [79] In the words of Justice Black, the Sherman Act " . . . 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 . . ." [80] The economic rationale behind the act cannot be overcome by arguments that the monopolist has provided economic benefits. [81]

More than just economic considerations impelled the Congress to adopt competition as the Acts' unequivocal policy. **[**82]** Chief Justice Warren said:

> ". . . we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." ([82])

Economic considerations aside, justifiable apprehension of excessive economic power concentrations underlie the law's aversion to monopolies. [83]

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[75] Areeda and Turner, Supra n. 38, at 716-18, 733.

[76] Areeda and Turner, Supra n. 38, at 709-10, 732-733.

[77] See Williamson, Supra n. 52, at 310-12, 333 n. 122, 337 and n. 129; Scherer, Supra n. 70, at 869-83.

[78] Areeda and Turner, Williamson on Predatory Pricing, 87 Yale L.J. 1337, 1338-39 (1978).

[79] Sullivan, Supra n. 15, at 20-21.

[80] *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 517, 2 L. Ed. 2d 545 (1958)*.

[81] See Von Kalinowski, Antitrust Laws and Trade Regulations, Vol. II, Section 903(3), p. 954 and cases cited therein.

[82] *Brown Shoe, supra n. 16, 370 U.S. at 344, 82 S. Ct. at 1534*.

[83] *Standard Oil of New Jersey v. United States, 221 U.S. 1, 50, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*; *Berkey, supra n. 5, at 272*; Alcoa, supra n. 44, at 427; See generally Pitofsky, The Political Content of Antitrust, 127 U.Pa.L.Review 1051 (1979).

[*995] Areeda and Turner have made a policy judgment. The economic analysis **[**83]** used to justify that judgment is incomplete, and the judgment itself stands contradicted by the economic, political, and social policies of the Sherman Act.

A conclusive presumption of the legality of an unprofitable low price, merely because it is above marginal cost, a cost which is all but incapable of proof, would truly be a "defendant's paradise." [84] This Court rejects it.

D. Prices Below Average Cost are Illegal if They are Unreasonable.

There are no simple bright line tests that are universally applicable. Williamson proposes a complex set of "Per-se " rules, a different rule to be applied depending upon whether the dominant firm is reacting to new entrants or already established firms, whether a short, long or intermediate-run is involved, and whether the demand function is normal or conditions of chronic excess supply are found. [85] Scherer calls for evaluation of the many criteria that would affect long-run welfare maximization, examined in the light of the monopolist's **[**84]** intent and the structural consequences of its pricing behavior. [86]

Professor Schmalensee recently attempted to apply the Williamson rules to the facts of a monopolization case heard before the Federal Trade Commission, but found them imprecise, difficult to apply, and based on an economic model probably at variance with real world conditions and certainly at variance with the facts of the case he discussed. [87] Having already rejected Areeda and Turner's approach as incapable of being "defensibly applied to all, or even most, cases," Schmalensee concluded that Scherer's rule of reason analysis was the only economically defensible policy choice and that an average cost test could be employed to dismiss patently groundless charges of predation. [88]

[85]** This approach is not wholly without precedent. In a thoughtful concurring opinion to the case discussed by Schmalensee, Commissioner Pitofsky distinguished Ninth Circuit cases and applied the same rule. [89] The average cost standard adopted here also finds support in several trade rules promulgated by the Federal Trade Commission, [90] in state statutes prohibiting below cost sales, [91] **[**86]** in a predatory pricing rule propounded by Professor Posner, [92] in a recommendation by the National Commission for the Review of Antitrust Laws and Procedures that the marginal cost standard be abandoned in favor of a more flexible analytical approach, [93] and

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84 Williamson, supra n. 52, at 305.

85 *Id., at 331-37*.

86 Scherer, Supra n. 70, at 890.

87 Schmalensee, Supra n. 67, at 1024-28.

88 Id., at 1028-29.

89 Borden Inc., 1978 Trade Reg.Rep., Case No. 21,490, at 21,517-24 (FTC 1978) (Pitofsky concurring).

90 See e.g., *16 C.F.R. Section 23.20* (Jewelry Industry) and 16 C.F.R. Section 26.9 (refrigeration and/or air conditioning contracting industries).

91 Arkansas Stats. Title 70, Section 303; *California: Business and Professional Code, Sections 17026* and *17029*; Colorado Revised Code, Section 6-2-105; Hawaii Revised Stats. Title 26, Section 481-3; *Kentucky Revised Stats., Section 365.030*; *Montana Code Ann., Section 30-14-202*; Washington Revised Code, Section 19.90.010; Wyoming, official cite unavailable, CCH Trade Reg. Reports, paragraph 35,530.

92 Posner, Supra n. 52, at 190.

93 National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, 170-71 (advance text January 22, 1979).

finally by the Supreme Court's holding in Utah Pie Co. v. Continental Baking [94] that a jury could infer price cuts were predatory if price was below average cost. [95]

[*996] If the monopolist chooses to price below average cost, something unusual is taking place. A decision has been made to sell goods at a loss, and such activity is worthy of investigation. It may be a predatory act with the design and effect of starving out competitors, or it may in some way be justified.

Prices below average cost would be reasonable if the monopolist was merely liquidating excess, **[**87]** perishable, or obsolete merchandise. [96] Prices below average cost would be warranted if shrinking demand forced the monopolist to minimize its losses by selling at the best price-cost relationship available to it, [97] or where the industry suffers from chronic excess capacity. [98] And the same might be true of promotional pricing, meeting competitors' prices, or even occasional price wars, if carried out under appropriate circumstances. [99] Intent evidence can prove helpful here. The monopolist's own evaluation of the situation, whether it thought it was cutting losses or cutting throats, can help to clarify the nature of the acts undertaken.

[88]** A monopolist's prices should be judged according to whether or not they are reasonable, and prices above the monopolist's average cost should be Per se reasonable. That standard will be applied to the facts of this case.

E. IBM's Pricing Conduct.

IBM did not simply reduce the prices of its existing products, instead it responded to PCM competition by introducing several "new" products, all of which were, to some degree, repackaged versions of prior offerings. By offering the new products at lower prices, while maintaining higher prices on the older versions, IBM managed to avoid the disastrous effect an across-the-board price reduction would have had on revenues from installed machines, and yet still had a vehicle with which to challenge the PCMs. It is the prices of these new products that Transamerica claims were predatory.

In 1964 IBM introduced a disk drive known as the 2311. In 1965 an improved version, the 2314, was announced. At first, 2314-type disks were only available in a package of eight disks or "spindles" (plus one spindle as a spare). Later, IBM offered a one spindle version (the 2312), a two spindle version (the 2318), and a four spindle version (the 2313), all **[**89]** of which could be connected to the CPU through a control unit (the 2314). The functional characteristics (access time, capacity, and data transfer rate) of all versions were practically identical, and all are known as "2314-type disks. The PCMs also marketed 2314-type disks. Most PCMs offered some functional improvements (principally a reduced access time), all offered only single spindle versions, and all offered lower prices than IBM.

In September of 1970, IBM announced a new computer system, the System/370, Model 3 70/145 . At the same time, a three-spindle version of the 2314-type disks was announced for use on that new system. This new version

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[94] *386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 (1967)*.

[95] *Id., at 696-98, 87 S. Ct. 1326*. Note that this case involved discriminatory pricing under *Section 2(a)* of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, *15 U.S.C. Section 13(a)*, but that the substantive issues are the same as those when predatory pricing is charged under *Section 2* of the Sherman Act, *15 U.S.C. Section 2*. See 3 P. Areeda and D. Turner, ***Antitrust Law***, Section 720c, at 189-90 (1978).

[96] Williamson, Supra n. 52, at 317-18.

[97] Posner, Supra n. 52, at 193.

[98] See *Pacific Engineering and Prod. Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir. 1977)*, Cert. denied, ***434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977)***.

[99] *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 623, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Knuth v. Erie-Crawford Dairy Cooperative Association, 326 F. Supp. 48, 52-53 (W.D.Pa.1971)*, Aff'd in pert. part, *463 F.2d 470 (3rd Cir. 1972)*.

was known as the 2319A and was code-named "Mallard." It connected directly to the System/370 Model 145 CPU (and later to the System/370-135) by means of an integrated file adapter ("IFA") which eliminated the need for a control unit. The 2319A was available at a monthly rental of $ 1,000, a price substantially less than IBM's one, two and four **[*997]** spindle versions (if comparison is made on a per spindle basis, i. e., monthly rental divided by number of spindles), and a price Transamerica claims was predatory.

Three months after **[**90]** the 2319 announcement, in December of 1970, IBM announced a three-spindle version 2314 for use on the older System/360 CPUs. This was known as the 2319B. It attached to the 360 CPU through a control unit (2314B), and a channel. At the same time IBM announced the 2319A2, a second set of three spindles for attachment on the 3 70/145 CPU behind the first set (the 2319A). The 2319B and the 2319A2 were both priced at $ 1,000 (monthly rental). Transamerica claims that price was predatory.

In July of 1971, still another three-spindle 2314-type was announced: the 2319A3. Unlike the other versions, the 2319A3 (code named "Zoom") had its own power supply. It was to be used exclusively on the 3 70/135 CPU, where power constraints had previously limited configurations to a maximum of five spindles. Zoom extended that maximum to eight. Because of the extra power equipment, the 2319A3 was priced at $ 1050 monthly rental, slightly higher than the other 2319s. Transamerica also claims this price was predatory.

In 1964 and 1965, IMB announced various models of the 2401-type tape drives and 2803 control units. Improved tape drives, the 2320s, were announced in 1968. In November of 1970, IBM announced **[**91]** an improved control unit, the 3803, and three new tape drives to go with it, the 3420 Models 3, 5 and 7. The functional characteristics of the new tapes (data transfer rate, tape speed, and tape density) were practically identical with those of the 2420. The combined tape program was code-named "Aspen." Transamerica claims that the Aspen prices were predatory.

At the same time as the Aspen announcement, November of 1970, IBM announced a new model 2401 tape drive, the 2401 Model 8. Two control units for that model, the 2803 Model 3 and the 2804 Model 3, were also announced. This program was code-named "Mandan." The 2401 Model 8 was almost identical to the seven-track version of the 2401 Model 2, but the price was substantially lower. Transamerica claims that the Mandan prices were predatory.

IBM analyzed the financial aspects of each of these programs (the 2319A, the 2319B/A2, the 2319A3, Aspen, and Mandan) prior to announcement in order to predict the costs, revenues, and profits that could be expected. A common procedure was followed in all pre-announcement financial analyses. The Product Manager, an employee of the engineering division, identified the forecast assumptions. These **[**92]** included a description of the product, competing products, follow-on products, delivery schedules, etc. The forecast assumptions were then used to project the number of units that would be sold and leased at various price levels (the demand function), and from this the program revenue at those prices could be calculated. Direct costs (those that could be readily identified with the product in question) were estimated by the manufacturing division. Indirect costs were assigned to the products through three apportionment methods. By allocating a portion of the indirect costs (such as corporate overhead) to each product, as well as the direct costs, IBM followed a full-cost philosophy of financial analysis and hoped thereby to be able to predict a program's profitability. Full costs, direct plus indirect, were subtracted from revenues, to give predicted program profits.

Each of the product programs at issue here was expected at announcement to return substantial profits to IBM. Zoom (the 2319A3), by far the smallest program, was projected to return a $ 900,000 profit, or 4.5 percent of revenue; Mandan was expected to produce $ 29.2 million in profits, or 33.6 percent of revenue; Aspen **[**93]** was projected to bring in $ 473.3 million in profits, or 26 percent of revenue; the 2319B/A2 program was predicted to bring in a $ 71.6 million profit, or 31.5 percent of revenue; and finally, the 2319A was projected to bring in $ 55.2 million in profits, 31 percent of its revenues. It is only through the application of several "adjustments" to the IBM announcement **[*998]** financial analyses that Transamerica is able to claim that any of the prices at issue here were below average cost. Each of the adjustments Transamerica suggested is discussed below.

1. The Revenue Apportionment Adjustment.

As mentioned above, IBM uses three apportionment techniques for determining what indirect costs a particular product or program should bear. The indirect costs that are most closely associated with engineering are apportioned among products according to the relationship between that product's direct engineering costs, and total direct engineering cost. Similarly, indirect costs that are associated with production are allocated to the ratio between the product's direct production costs and total direct production costs. Finally, indirect costs that are not otherwise apportionable, such as **[**94]** marketing, general and administrative expenses, are apportioned to products according to the relationship between that product's revenues and total revenues.

IBM allocates over 50 percent of a product's costs through the revenue apportionment method. Transamerica complains that this method provides a monopolist with too much flexibility. They say that where a price cut is involved it permits the monopolist to drastically reduce price and still not be pricing below cost because reduction in price means a reduction in revenue and thus a reduction in revenue-apportioned costs. When revenue is reduced on one product, some of the costs previously associated with it are automatically transferred to other products. Transamerica characterizes all the products at issue here as disguised price cuts: The 2319s as disguised price cut versions of the 2314; Mandan as a disguised price cut on 2401 Model 2; and Aspen as a disguised price cut on the 2420.

Through its expert accountant Peterson, Transamerica invokes "generally accepted cost accounting principles," and adjusts the revenue-apportioned costs assigned to each of the products at issue. Assuming that he was in fact dealing with price cuts, **[**95]** Peterson increased each new program's revenue-apportioned costs by multiplying the costs assigned at its announcement by the ratio between the "old" price and the lower "new" price.

The basis for Mr. Peterson's adjustment is suspect. The phrase "generally accepted cost accounting principles" does not appear in accounting literature. It, like the adjustment it supposedly requires, appears to have been invented for purposes of this lawsuit.

The adjustment is predicated on the existence of a price cut when, at least in some circumstances, different products are clearly involved. And, it assumes that the cost allocated to the product at the old price was somehow "correct" and should be maintained, when in fact it is precisely the inability to associate these expenses with any particular product that makes an apportionment method necessary. It would be equally logical (or illogical) to assume the previously assigned costs were too large and the new ones are "correct."

Revenue apportionment is a generally accepted and commonly used method of indirect cost allocation. IBM used it consistently long before making the cost analyses at issue here. Peterson's adjustment would abandon that consistency, **[**96]** and with it any assurance that full costs are recovered. Increasing the costs assigned to one product without somehow decreasing the costs that other products must bear would lead to an over-recovery of costs, and make the full-cost recovery rationale and program profit predictions meaningless.

All methods of indirect cost recovery are arbitrary and flawed in some respects. The flexibility of revenue apportionment is apparent, yet this Court will not attempt to "correct" that characteristic by mandating the use of a patch work system based on one accountant's views of the facts of this particular case. To do so would not only be bad accounting, it would be bad law. Businessmen would have no notice of what was required to be done if arbitrary adjustments were allowed to be applied after the fact to their reasonable and consistent cost accounting.

[*999] This is not to suggest that under other circumstances cost accounting adjustments might not be warranted. Where a defendant itself abandons consistency in attempts to circumvent the law, adjustments might be appropriate. That, however, is not the case here. The revenue apportionment adjustment is rejected.

2. The Manufacturing **[**97]** Cost Adjustments.

All the 2319 programs were reuse programs. For instance, 80 percent of the 2319As were not newly built, but were built by reconditioning and slightly altering used 2313s that had come off rent. Mandan was a total reuse program; all the units involved were reused, off rent, tape drives and control units. In the announced financial analyses for these products, IBM assigned a full manufacturing cost to those units that were to be newly built, but the reused units were costed at the cost of conversion efforts plus their remaining undepreciated net book value. Since IBM uses an accelerated depreciation technique (sum of the years' digits), and since the 2313s had already been depreciated for three years (of a total four year depreciation life), the net book value used to represent the manufacturing cost of the 2319s was only 10 percent of the cost of building them new. With Mandan, the reused units were even older, and, since their net book value was insignificant, the only manufacturing cost reflected was the minor expense involved in reworking the units.

Peterson testified that this was in conflict with the "benefit principle", which he termed the single most important **[**98]** "generally accepted cost accounting principle." He suggested two alternative adjustments. The first would simply account for all machines at the cost of building them new, whether that was in fact done or whether they were "retreads." The second, more complex, adjustment would require the reworked product's cost accounting to bear a manufacturing cost equal to the new cost multiplied by the ratio between the expected rental life of the new product and the total lives of the old and the new products. In effect, the second adjustment would be the same as using net book value, had IBM depreciated over the total life of both products using a straight-line method.

IBM's Financial Procedures Manual calls for using new cost in some situations, scrap value in others, and permits net book value to be used in yet other cases. IBM argues that the manual would have permitted the use of scrap value and so their use of net book value was conservative. Transamerica interprets the manual differently, claiming it mandates the use of new cost. Mr. Peterson contradicted that. He testified that IBM complied with the manual in its handling of reused products. This Court agrees with Mr. Peterson, and finds **[**99]** that IBM followed its cost accounting procedures consistently. Until some cost accounting principles become generally accepted (and others generally rejected), it seems that a reasonable procedure, consistently followed, should not be vulnerable to subsequent manipulations. IBM's depreciation method is reasonable and generally accepted. The cost accounting for the original product reflected its full cost, and use of net book value is a reasonable means of apportioning some of the cost to the new product. Deviations from consistent procedures in this area would cause the same inconsistencies as would be created by the revenue apportionment adjustment. Accordingly, this Court rejects the manufacturing cost adjustments.

3. Shorter Rental Lives.

The programs at issue here were predominantly leasing programs. Few units were expected to be sold. Consequently, the length of time forecasters predict units to be producing rental revenues, the average rental life, is a critical factor in determining a program's profit. IBM predicted a 48 month life for the 2319A, 50 months for the 2319B/A2, and 58 months for Mandan. No witness ever opined that IBM should have chosen shorter lives, but Peterson **[**100]** produced alternative profit calculations based upon much shorter (and therefore less profitable) **[*1000]** lives for these products. The apparent inference was that the lives chosen at announcement were unreasonably long, and that the shorter lives should have been substituted.

This Court refuses to make that inference. Although the alternative lives presented were found in IBM documents, Transamerica has invariably chosen the shortest lives reflected in any IBM document while ignoring longer lives for other products in the same document, and ignoring longer lives for the same product in other documents. The shorter lives all appear in documents dated well after announcement and can be explained in part by the intervention of unexpected increased PCM successes, in part by the intervening funding of impacting IBM programs, and in part by the unreliable nature of the documents themselves, at least as far as the reliability of the lives contained therein is concerned. There is no evidence that anyone in IBM contemplated shorter lives at any time prior to the announcement dates. One of Transamerica's witnesses, a man experienced in the financial aspects of computer leasing, testified **[**101]** that he thought the most reliable estimate of life would be that made by IBM, and that he didn't know how he could go back in hindsight and assign a different life. Absent some evidence that shorter lives were, in fact, required, this Court must decline to substitute shorter rental lives.

4. Cost of Capital Adjustment.

As already indicated, this Court would consider prices to be Per-se reasonable only if they exceeded average cost, where average cost is defined to include a reasonable return on capital invested. If a company is thinly capitalized, most of these capital costs will be reflected as interest on the books of account. Conversely, if a company depends upon equity capital to fund its programs, no interest expense will appear, and the opportunity cost of the capital invested in the program will have to be estimated and imputed. Unless all capital costs are in some way included in the cost-price equations, a Per-se sanctioning of price in excess of average cost would favor strong firms, able to use equity capital over weaker firms depending on borrowings.

Estimating capital cost is not an impossible task. It requires some estimate of the amount of capital invested in a program **[**102]** and of the duration of that investment, and some basis for finding a "normal" rate of return on such an investment. Transamerica proved none of these. No evidence of invested capital has been introduced and no witness has ventured an opinion as to what the cost of capital ascribable to any program might be. Reliance instead is placed on a "Program Evaluation Technique" ("PET"), a method of estimating cost of capital described in IBM's Financial Procedures Manual.

Transamerica first revealed it was relying on PET to indicate IBM's program revenues were insufficient to cover its cost of capital during counsel's closing argument. As a result, no witness has had an opportunity to be examined or cross-examined as to the propriety of such an approach. Some flaws are apparent, however.

The method applied by Transamerica is the least sophisticated of several PET options. It employs a matrix with which one can determine a current value of profits (as a percent of revenue) if one knows the rental life of the program, and the program's expected (undiscounted) profits percentage. For instance, if a program with a 36 month rental life were expected to yield a 20 percent profit, then the matrix **[**103]** would indicate that when discounted to present value the profit returned would be only 8.8 percent. The PET explanation describes the cost of capital as a cutoff rate established by management, and sets that rate at 7 percent. Assuming that a 7 percent return is a normal return, then the hypothetical program's profits exceed the cost of capital invested (8.8 percent exceeds 7 percent).

But there is a caveat that concludes the description of the PET matrix which warns against its use if the program being analyzed deviates from the pattern the matrix **[*1001]** developers assumed was typical. Clearly they have made some assumptions as to the level of investment, and the annualized cash flow of the program. There was no showing here as to what those assumptions were, or that the investments in any of the programs at issue are similar. Moreover, even if that evidentiary gap could be bridged, the matrix shows that programs with profits in excess of 25 percent more than cover capital costs at all rental lives. The programs at issue here, once the specious adjustments rejected above are ignored, were all expected to earn profits in excess of 25 percent and thus in excess of capital costs. **[**104]** [100]

Transamerica's cost of capital adjustment suffers from a failure of proof. It was plaintiff's burden to establish this element of its case. This Court will not attempt to estimate that which plaintiff has failed to quantify.

5. FTP Adjustment.

FTP (Fixed Term Plan) was a long-term lease plan offered by IBM on peripheral equipment. FTP was announced in May of 1971. Prior to that time customers could either buy peripheral equipment, or lease it on a month to month basis. With FTP, IBM offered customers a one year lease at an 8 percent **[**105]** discount from the monthly rental price, or a two year lease at a 16 percent discount. Transamerica offered no evidence that FTP caused a decrease in the profits of any product. Indeed, all the evidence indicates that IBM projected that FTP would increase revenues and profits over the levels expected if FTP were not announced.

Transamerica's argument for an FTP adjustment to the profits of the programs at issue here, did not surface until after the close of evidence. They compare an IBM projection of program profits at one time (before and without application of FTP) with another and later profit projection which included the application of FTP. They conclude

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[100] The only exception to this was the 2319A3. It should be emphasized that this Court does not accept the PET matrix as proof of capital costs, but even if it had, it would find the price of the 2319A3 reasonable, and not to have damaged Transamerica in any way. The 2319A3 was a specialized program, a disk drive with a power supply, and there is no evidence that Transamerica or any other competitor even considered supplying the very limited market this product addressed.

from the comparison that FTP caused revenues and profits to decline, and seek to apply the computed decline pro-rata to the revenues and profits of the products in issue. This method is unacceptable. It fails to give effect to other circumstances which changed between the two projections, and, more importantly, it ignores the fact that the second projection, specifically designed to compute the effect of FTP under the circumstances existing at that time, showed that FTP could be expected to increase both revenues and profits. **[**106]** Unrelated forecasts cannot be so manipulated.

FTP undoubtedly created a new price-cost relationship, one not reflected in the announcement financial analyses, and one probably unanticipated at that time. But there is evidence to indicate that FTP reduced costs and increased revenues; there is no convincing evidence to the contrary. Accordingly, this Court refuses to decrease projected profits as a result of FTP.

6. Additional Evidence that Prices were Reasonable.

This Court has concluded that the IBM announcement financial forecasts for the 2319s, Aspen and Mandan were reasonable, and that IBM reasonably anticipated that those prices, even after FTP discounts were applied, would exceed average costs. [101] **[**107]** Although profit expectations at the product's **[*1002]** introduction may be the primary consideration in analyzing a firm's pricing behavior, [102] evidence of actual profitability is also relevant.

IBM's financial analyses are updated at various times after a product's announcement. These updates reflect the realities of marketplace experience with the product, and thus more accurately reflect its profit picture. Financial analyses of the 2319A and 2319B done one year after announcement showed those products to be expected to produce profits (as a percent of revenue) of 40.2 percent and 34.5 respectively. One year after announcement, Mandan was expected to bring in 25.8 percent in profits, and Aspen 17.4 percent. A little over a year after that, Aspen's profits had improved to 20.5 percent. A financial analysis of all the 2319s combined and updated through 1978 indicated that the combined programs yielded 28.4 percent in profits. This evidence confirms the findings that IBM reasonably expected substantial profits on all the peripherals at issue; that the prices (including FTP) were above cost, and reasonable; and that the prices were legal.

Even if those prices had been slightly below cost, and their reasonableness thus open to inquiry, **[**108]** this Court would not hesitate to find them reasonable. The 2319s and Mandan were programs which reused third generation equipment at a time when fourth computer generation had already been announced. That older equipment was soon to become obsolete, and it is reasonable for a manufacturer in such circumstances to reduce price and squeeze as much revenue as possible from equipment before demand dwindles.

Reasonableness is also indicated by comparisons between the PCMs' prices and IBM's. Such comparisons indicate that IBM's prices did not undercut the PCMs' prices, they did not even equal them, they merely closed the gap; the PCMs' prices were still lower.

Shortly after the announcement of FTP, IBM announced price increases on some of its CPUs. Transamerica suggests that this was done to offset profits lost on peripherals as a result of FTP, and was a use of monopoly power in one market to gain a competitive advantage in another. The evidence indicates otherwise. First, FTP was expected to increase long term profits. Second, if a competitive advantage is gained by lowering price to a level in excess of average cost, the competitive advantage is efficiency related, not monopoly related, **[**109]** and equally efficient competitors will continue to make at least a normal profit. If the monopolist foregoes some excessive profits but still prices above average cost, it is immaterial how, or whether, the foregone profits are recouped. Conversely, if price is set below average cost, recouping losses by monopoly pricing in another market would be a strong

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[101] This conclusion is reinforced by the fact that IBM included estimates of cost contingencies, allowances for unexpected cost increases, in its announcement financial analyses that ranged from 5.2 percent of expected revenue (for the 2319B) to 7.8 percent (for Aspen). This Court would be inclined to diminish defendant's costs by the amounts included as contingencies if the price-cost relationship were a closer question.

[102] CalComp, supra n. 4, at *613 F.2d at 740 n. 19*.

indication that the lowered price was unreasonable. The critical issue is whether price exceeded average cost. If, as here, it did, the price is reasonable, will eliminate only the less efficient, and does not violate the antitrust laws.

This Court finds that all the prices at issue here exceeded average cost, were reasonable, and were legal.

V.

DESIGN CONDUCT

It is not difficult to imagine situations where a monopolist could utilize the design of its own product to maintain market control or to gain a competitive advantage. For instance, the PCMs were only able to offer IBM's customers an alternative because they had duplicated the interface, the electrical connection between the IBM System/360 CPU and the IBM peripheral (or peripheral subsystem). Had IBM responded to the PCMs' inroads on its assumed monopoly by changing the **[**110]** System/360 interfaces with such frequency that PCMs would have been unable to attach and unable to economically adapt their peripherals to the ever-changing interface designs, and, if those interface changes had no purpose and effect other than the preclusion **[*1003]** of PCM competition, this Court would not hesitate to find that such conduct was predatory. Or, if a monopolist frequently changed the teleprocessing interface by which its computers communicate with remote terminals in such a way that its terminals would continue to function while others would fail, and, if the only purpose and effect of the change was to gain a competitive advantage in the terminal market (where the monopolist lacked monopoly power), that use of monopoly power would be condemned.

It is more difficult to formulate a legal standard for design conduct than it is to imagine clearly illegal situations. Any such standard must properly balance a concern for the preservation of desirable incentives with the need to prevent monopolization by technology. Like pricing, equipment design can have pro-competitive as well as anticompetitive aspects. Truly new and innovative products are to be encouraged, and are **[**111]** an important part of the competitive process. For this reason, the acquisition or maintenance of monopoly power as a result of a superior product does not violate the Sherman Act. One court has even suggested that where there is a valid engineering dispute over a product's superiority the inquiry should end; the product is innovative and the design is legal. [103] That view, probably the result of a concern for the creativity that has characterized the history of computers, is overprotective. It ignores the possibility that a superior product might be used as a vehicle for tying sales of other products, and would pronounce products superior even where the predominant evidence indicated they were not.

Another approach would be to examine the designers' intent. If a technological design were chosen for an illegal purpose (such as to effectuate a tie) and if that purpose was fulfilled, it would be illegal. [104] If that **[**112]** standard were to apply only where the intent was solely an illegal one, creativity would not be stifled. But usually many results are intended, and if only one, even the predominating, intent is illegal, and thus punished, legitimate incentives will be imperiled. Discerning corporate intent is seldom easy, and, in any event, the law against monopolization is much more concerned with the effect of conduct rather than with its purpose.

A more generalized standard, one applicable to all types of otherwise legal conduct by a monopolist, and one recently adopted by the Ninth Circuit, must be applied to the technological design activity at issue here. If the design choice is unreasonably restrictive of competition, the monopolist's conduct violates the Sherman Act. [105] This standard will allow the factfinder to consider the effects of the design on competitors; the effects of the design on consumers; the degree to which **[**113]** the design was the product of desirable technological creativity; and the monopolist's intent, since a contemporaneous evaluation by the actor should be helpful to the factfinder in determining the effects of a technological change.

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[103] *ILC Peripherals v. International Business Machines, 458 F. Supp. 423, 439 (N.D.Cal.1978)*.

[104] See *Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976)*.

[105] *Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, at 452 n. 46 (9th Cir. 1979)*; CalComp, supra n. 4, at 734; *Gough v. Rossmoor Corp., 487 F.2d 373, 376 (9th Cir. 1973)*.

A. Interface Changes.

The PCMs were engaged primarily in replacing only peripherals attached to IBM systems. To the extent that IBM could prevent (or make inordinately expensive) the physical attachment of such gear, it had the power to eliminate competition. Transamerica complains that this was what was done by interface changes made when the new products at issue here were designed.

The interface between the Aspen tape drives (3420 Models 3, 5 and 7) and the Aspen control unit (3803) differed significantly from the interface utilized by the immediate predecessor tapes (2420s) and **[*1004]** control **[**114]** units (2803s). PCMs wishing to attach their 2420 copies to the new and improved control unit were effectively precluded from doing so. The cost of adapting a 2420 to the new interface format were prohibitive. Transamerica charges that the interface change was unnecessary, and that its only purpose and effect was to preclude PCM competition for tapes attachable to the 3803.

The evidence is to the contrary. Not only was the 3803 a superior product (as Transamerica concedes), the interface itself was a superior product. It had fewer wires and connectors. This meant switching between tapes and control units could be done more simply (fewer switch points), enabling IBM to integrate the switching mechanism into the control unit and thereby eliminate the need for a costly and bulky separate switching device. The pulses on the wires were multiplexed. That meant more sense information could be transmitted and diagnostics and maintenance were improved. Signals were converted from analog to digital at the tape head (rather than in the control unit), meaning information could be transmitted more reliably (with less noise interference). And, tape drives were attached to the 3803 radially (rather **[**115]** than serially), making maintenance and computer room layout easier. All of these changes required interface changes, and all were undeniably improvements.

Transamerica (which never owned any 2420s anyway) will not be heard to complain that it was somehow injured by an improved product. The Aspen interface was just that. It was adopted by IBM because it was a product improvement, and even if its effect was to injure competitors, the antitrust laws do not contemplate relief in such situations.

The Mandan interface was also changed. It was different from the interface between the predecessor 2401 Model 2 tape drive and its control unit, the 2803 Model 1. But this interface change was truly minimal. Five wires were added, and two wires were removed. The evidence was uncontradicted that: the change was purposeful, to identify the model to the control unit; the change was ordinary, all 2401 models were so identified; and the impact on PCMs was insignificant, the technical information was made public and with it a qualified engineer could adapt a 2401 Model 2 interface in one hour. There was no evidence that any PCMs wished to hook onto the Mandan control unit, but had they so desired, **[**116]** this interface change would certainly not have precluded it.

A more complex problem is presented by the interface between the 2319A and the IFA. The IFA represented a different mode of peripheral attachment than had been utilized on most System/360 CPUs. Instead of a CPU to channel to control unit to peripheral attachment, the IFA resided in the CPU itself and attached directly to the peripheral device. That eliminated the need for control units and channels, saving the user space and money. The IFA, unquestionably a superior product, was an optional feature for sale or lease on the 145 and 135 System/370 CPUs.

From approximately 1969 until mid-1970, IBM's Endicott laboratory, responsible for the design of the 145, planned to design the IFA so that IBM 2314-type disks would attach with minor modifications. This was known as the Apricot plan. IBM's Hursley laboratory in England, responsible for the development of the 135, the sister to the 145 CPU, opposed this plan and, as early as 1968, and again in 1969, had proposed specifications for disk drives that were ultimately adopted by IBM in the summer of 1970 and announced as the 2319, code named Mallard. Under Apricot, a user could **[**117]** have attached IBM 2312s (one spindle), IBM 2318s (two spindles), or IBM 2313s (four spindles) in any combination. IBM 2314-type spindles would attach because the planned Apricot interface duplicated the interface between the 2314 control unit and the drives. PCM 2314-type drives would not have attached without modification to the Apricot IFA, but because the 2314 interface was well known, the PCMs could have quickly and easily duplicated that interface and made their drives available for **[*1005]** attachment to the IFA.

Primarily because of this exposure to PCM competition, IBM dropped Apricot and adopted the Mallard (2319A) plan.

With Mallard, one of the spindles was removed from the frame of a 2313. Into that vacant space IBM moved some of the control electronics that would have resided in the CPU under Apricot. The result was that the interface into the IFA was different under Mallard than under Apricot. And because it was different, and unknown to the PCMs, their efforts at copying the interface had to be delayed until they could examine the device IBM had produced.

With Mallard IBM bought itself some time. The interface change meant that PCM copies would not be available **[**118]** as quickly as if a known interface had been used. In a lease oriented market, where product obsolescence limits rental lives, time is money. If the PCMs could be sufficiently delayed, their market might even be limited to the point that the expense and trouble of duplicating the 2319A interface would no longer be worth it.

IBM's predominant intent in adopting the Mallard design was undoubtedly to preclude or delay PCM competition and gain a competitive advantage. However, other considerations also played a role. Mallard alleviated some difficult technical problems. It saved some space in the space-critical 135 CPU; it resulted in the location of a diagnostic device (the CE panel) near the drives where it was easier to use; it reduced cable lengths and electrical noise interference problems; and it simplified engineering control and record keeping for IBM by assuring that the engineers and the laboratories that were most familiar with the disk-related electronics would be responsible for them. On this record, the Mallard concept was a superior design.

Mallard's effect should also be considered. It appears the market segment affected by the 2319A was not something that held a great **[**119]** attraction for PCMs. The 2319A was expected to be an interim disk file for the 135 and the 145. Once IBM's 3330 became available, 2314-type devices would no longer be very attractive because the 3330's offered better performance at lower price. And during that interim, PCMs had their hands full supplying System/360 users with 2314-type disk drives and control units. These subsystems were more profitable for the PCMs (and therefore more attractive) than supplying only disk drives for attachment to the once-contemplated Apricot would have been. For instance, Telex had a backlog of orders for 2314-type subsystems that lasted until November of 1973, and thus, had little capacity or motivation to copy either the Apricot or Mallard interface in order to supply the less profitable drives. And, in any event, PCMs were not effectively precluded from competing for disk placements on the 135 and 145. Selector channels were available on the machines, and PCM subsystems attached without modification to those channels.

Mallard was a design adopted primarily to preclude PCM competition, but it was a superior design, and its effect on competition was negligible. A finding adverse to IBM on this aspect **[**120]** of its conduct would amount to a punishment for intent alone. This Court concludes that Mallard interface did not unreasonably restrict competition, and did not violate the Sherman Act.

B. Price Differences Justified by Design Changes.

Transamerica alleges that the Aspen and Mandan tapes, and the 2319s were in reality simply repackaged old devices, that the design changes that differentiated them from their predecessors were meaningless except insofar as they permitted IBM to continue to enjoy monopoly profits on its on-lease older equipment while meeting PCM competition with lower priced "new" machines. This price discrimination between users is, they say, entry barrier raising conduct of the type condemned in United Shoe. [106]

[*1006] The premise for this argument, the identity of products, is inapplicable to the Aspen tape drives. The Aspen 3420s were partly built from parts salvaged from 2420s, but over half of the 3420 parts were new. Conversion of a 2420 drive to the 3420 drive **[**121]** was impossible. And the changes made resulted in an improved product. Newer technology was used for the circuitry. A data format not available on the 2420 could be used on the 3420 (NRZI). And changes were made to enhance the reliability, availability and serviceability of the

[106] Supra n. 13.

newer tapes. The Aspen tapes were different and better products than the 2420s, available to all customers, not price discrimination.

The differences between the 2314s and the 2319s were not as great. The functional characteristics (including reliability, availability, and serviceability) were identical. Packaging was different. The 2319s came only in three-spindle versions; prior to the 2319 announcements, no 2314s were available in three-spindle packages. Even if that is insufficient to conclude that different products are involved, the manner in which the 2319s were marketed refutes any allegations that they represented price discrimination. The 2319As were widely publicized and available to all customers whether or not PCM competition threatened. The same is true with the 2319Bs. Within one year of the announcement, IBM had placed over 20,000 2319B spindles, more than they predicted they would place. Users **[**122]** knew that the 2319B was a 2314-type device with a lower pre-spindle price, and they chose it in great numbers. No price discrimination was involved with the 2319s.

The 2319B price discrimination claim surfaced early in the trial, and IBM convincingly refuted it. Mandan was different. Both parties essentially ignored the alleged price discrimination aspect of Mandan. That was probably because Mandan was a relatively insignificant program; only 550 Mandan units were ever sold by IBM.

The Mandan 2401 Model 2 was a slow (75 inches per second) tape drive introduced by IBM in 1964. By 1970 IBM had a warehouse full of these older drives and 2803 controllers. To make them more competitive, IBM made the minimal interface changes already described, changed the name plates, and offered a seven-track only, Mandan subsystem (the 2401 Model 2 came in either seven or nine-track versions) at reduced prices. There is some evidence that IBM did not put its greatest marketing efforts into the Mandan program. But to conclude it was discriminatorily priced would require an inference from its poor market reception that it was only offered to customers if PCM competition threatened. That is an inference **[**123]** this Court will not make on the skimpy record before it. And, in any event, this Court previously endorsed a conclusive presumption that price manipulations resulting in prices greater than average cost were legal. Mandan's prices were above average cost and would have eliminated only less efficient competitors. Mandan did not unreasonably restrict competition, and did not violate the Sherman Act.

C. Design Changes on the System/370 Models 115 and 125.

The 115 and 125 were the smallest of IBM's fourth generation System/370 CPUs. Initially it was planned that an improved product, the 3340 disk drive, would attach natively to these machines through an IFA-type device. When it became apparent that the 3340 would not be ready at the time of the announcement of the 115 and 125, IBM planned to natively attach third generation disk drives (2314 types) as an interim disk solution. That plan did not last long. IBM realized that permitting third generation IBM equipment also meant permitting third generation PCM equipment, and that once users had third generation disk equipment installed, they would resist efforts to persuade them to migrate to IBM's fourth generation disks. The plans to natively **[**124]** attach third generation disk equipment on these machines were dropped in favor of fourth generation equipment.

Transamerica claims the failure to introduce a new CPU with native attachment capabilities for old disk equipment violates **[*1007]** the Sherman Act. There is no doubt that the 115 and the 125 were superior products. Nor is there any doubt that the disks ultimately selected were superior products. Their data rates, access times, and capacity exceeded the performance available in third generation disks. This performance improvement was critical if the machines were to operate efficiently in a virtual mode, and a virtual operating system later became standard on both the 115 and the 125. Even if, as Transamerica suggests, the switch to newer and better disks was done to impact competition and occasioned some delay in the program, this Court would find that the introduction of an improved CPU with a superior disk natively attached did not violate the law. [107]

[125]** At one time, the 115/125 plans called for a selector channel to be made available on these machines. A selector channel would have permitted attachment of all the higher speed devices that were attachable to selector channels on the older System/360 CPUs. But that meant IBM would be exposed to PCM competition from channel

[107] Cf. *Berkey, supra n. 5, at 282*.

attached third generation tapes and disks, while trying to sell the natively attached fourth generation equipment. Primarily to preclude this competitive threat, IBM investigated the possibility of dropping the plans for a selector channel.

At that point it was determined that the selector channel had become superfluous. A different plan had already emerged to attach IBM's System 7 process control computers, and the IBM disks and tapes that would have attached to the selector, could be natively attached instead. The number of potential users of these systems that were already using systems with channel attached peripherals was insignificant. By far the greatest number of "migrator systems" were ones that did not have selector channels or peripherals that would attach to selectors. In short, IBM had no further need for the selector; its only function would have been **[**126]** to provide a means of PCM attachment. Eliminating it saved IBM time and development expense. The selector channel elimination did not unreasonably restrict competition.

The 115 and 125 also included a byte multiplexor channel for attaching slower speed devices. A byte multiplexor channel can operate in either byte mode or burst mode. If a multiplexor can operate in burst mode at the same speed at which a tape or disk peripheral can operate, it is possible to attach some relatively slow devices to it.

The byte multiplexor on the 115 and the 125 was initially planned to be able to transfer data at a rate of 50,000 characters per second (50KB). That would have permitted attachment of PCM copies of IBM's 2401 Model 1 and 2415 Model 6 tape drives which operated at 30,000 characters per second (30KB). When the head of the IBM's Computer Division called upon the engineer in charge of the 115 and 125 project to investigate the possibility of removing the selector channel, he also inquired about removing the multiplexor. The engineer's response was that while selector channel removal was feasible, multiplexor channel removal was not, but he would like "to investigate further the possibility **[**127]** of reducing the speed of the multiplexor channel and eliminating the possibility of attaching higher speed devices, e.g., 30KB magnetic tape."

When they were announced, the byte multiplexor on the 115 and the 125 were capable of operating at 29 thousand characters per second (29KB), just short of the speed that would have enabled the PCMs to attach. IBM's explanation is that an engineering problem caused by virtual storage operation caused the degradation. But there is no contemporaneous evidence of any such problem.

IBM degraded system performance, making its product less attractive to users. The only purpose served and the only effect of the degradation was the preclusion of competition. The law tolerates the perpetuation of a monopoly only where necessary to preserve competitive incentives **[*1008]** and to avoid being unfair to the innocent monopolist. [108] **[**128]** The law need not tolerate deliberate acts where the only purpose and effect is to use monopoly power to gain a competitive advantage. Slowing down the multiplexor on the 115 and 125 was unreasonably restrictive of competition and would have violated *Section 2* of the Sherman Act if IBM had monopoly power. [109]

VI.

OTHER CONDUCT

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[108] *Id. at 275*.

[109] It should be noted here that any finding this Court might make that the multiplexor degradation violated the Sherman Act would be accompanied by a finding that Transamerica suffered no injury as a result of that conduct. The market for the tapes excluded by this conduct was insignificant. Only tape drives with data rates between 30 and 50KB were affected. Those were older, low performance technology devices that would only have been competitive at prices far below those contemplated in Transamerica's damage claim. Transamerica probably owned some of them, but its President didn't know how many, and any Transamerica owned were purchased in the second Telex tape contract. Because that contract was not an arms-length transaction, this Court would be reluctant to award Transamerica any damages on the equipment purchased thereunder. Also, there is no evidence that Transamerica in the past supplied peripherals for the 115/125 migrator systems, or that it intended to, or took any steps to supply peripherals for the 115 and 125 systems.

One aspect of IBM's long-term lease plan, **[**129]** the pricing aspect, has already been discussed. Transamerica claims that even if the resultant price were not predatory, FTP was exclusionary and violated the Sherman Act. The basic argument, relying on United Shoe, [110] is that entry barriers are artificially raised when a monopolist leases its product for long terms; would-be competitors are unable to woo customers away from the monopolist because the lease provisions lock them out. United Shoe's leasing practices violated the Sherman Act even though they conformed to long-standing traditions in the shoe machinery business and were similar to leases employed by competitors.

IBM recognized the potential lock-out effect of FTP. They knew that if customers would opt for the longer leases on their peripheral devices, PCMs would be kept at bay long enough for IBM to complete its development and introduction of improved products. The improved products would also be leased for long terms, and PCM copies of the improvements would also be locked out. **[**130]** But an awareness of the truism that one's own successes in the market will mean losses for others is insufficient in itself to make an activity unreasonably restrictive of competition and illegal.

IBM's competitors all offered long term leases on their equipment. Leasing companies offered terms of two to nine years. Systems competitors offered three to six year terms, and PCMs offered terms of up to five years. Most PCM equipment was leased for one year terms, very few leases were shorter.

Despite the product introductions late in 1970, (2319s, Aspen, Mandan) IBM continued to lose business to the PCMs at an alarming rate. The lack of a long-term lease in IBM's marketing portfolio was a principal reason.

And customers brought that to IBM's attention. In April of 1971 the Comptroller General of the United States (IBM's largest customer) issued a report directing that acquisition of computer equipment be made on multiyear leases to the extent practical. IBM was the only major computer equipment supplier that did not offer a long-term lease alternative.

An economic recession forced customers to cut back on investment in computer equipment. IBM's peripherals, mostly on 30-day leases, **[**131]** were more vulnerable to the belt-tightening than PCM gear on longer contracts at cheaper prices. PCMs reacted to IBM's 1970 announcements by slashing their own prices and offering special concessions not available from IBM. As a result, IBM was losing ground in a growth market, suffering negative net placements while the PCM installation rate continued to climb.

[*1009] Against this background IBM adopted FTP. It gave the customer one and two-year lease options at an 8 percent and 16 percent discount respectively. Premature cancellation by the customer would lead to a penalty payment equivalent to two and a half months rent on the one-year lease and five months rent on the two year version. No penalty was incurred if the customer canceled prior to machine installation. FTP applied to most tape drives, disk drives and printers.

It was a manifestly reasonable reaction to competition. The lock-in effect was limited. After thirteen months, the two year customer could break the lease, pay the penalty and still be in the same position financially as if a month-to-month lease had been chosen. The one year customer's breakeven point came after nine months. Many PCMs did not offer such **[**132]** liquidated damages provisions; the defaulting customer would be liable for the total rent for the remaining contract term. And the lock-in did not effectively lockout. The PCMs enjoyed healthy increases in tape and disk placements and revenues from 1968 until 1975. PCMs' copies of the 3330 and the 3420, the equipment supposedly locked out to the greatest extent, were by far their best sellers. By 1976 PCMs had placed more of these devices than all of their older technology combined.

The situation before the court in United Shoe [111] was different. United Shoe did not sell its machines (as IBM does) or make them available on 30-day leases (as IBM does); it only rented them and only for ten-year periods. The

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[110] Supra n. 13.

[111] Id.

court refused to decree that United Shoe be required to abolish long term leasing altogether, five-year leases were permitted, in part because abolishing long term leasing would have disabled United Shoe's ability to compete. [112] The same consideration applies here. If FTP's one and two-year leases are condemned, that would severely handicap IBM's ability to compete in a market where buyers prefer long-term leases. FTP did not unreasonably restrict competition, and did not violate **[**133]** the Sherman Act.

Extended Term Plan ("ETP") was a similar long-term lease plan announced on March 1, 1972. Transamerica introduced very little evidence on ETP, and failed to show it was unprofitable or unreasonably restricted competition. ETP did not violate the Sherman Act.

Transamerica also complains that the System/360, and several time-sharing and scientific 360 models, were announced prematurely and at predatory prices. Evidence of these 1964 and 1965 announcements was admitted to permit the finder of fact to understand the history of the computer industry and to evaluate other conduct against that background. No evidence has been offered from which an inference could be drawn that these acts in any way injured Transamerica. All these announcements were made years before Transamerica was incorporated, and if anyone was negatively affected, it was systems competitors, not the PCMs or their financiers. Whether phrased in terms of causation or standing to sue, [113] Transamerica's **[**134]** contentions that IBM somehow violated the law with these announcements are immaterial to any cause of action for which it can hope to recover damages, and they will receive no further attention here. Likewise, no attention is required to Transamerica's contentions that IBM excluded competition by increasing System/370 purchase multipliers and by eliminating its so-called technological discount for the purchase of leased equipment. Transamerica makes no claim for relief based on these acts, and introduced no evidence supporting an inference that the events adversely affected its business.

VII.

ATTEMPT LIABILITY

In the preceding three sections IBM's conduct was analyzed under the assumption **[*1010]** that IBM was in possession of monopoly power. The pricing, marketing and design conduct which forms the gravamen of Transamerica's complaint was found permissible even for a monopolist. Those **[**135]** acts cannot, then, be impermissible for one whose market power falls short of monopoly. One act, the reduction of the 115/125 multiplexor channel capacity, would have violated the Sherman Act had IBM been in possession of monopoly power. The question addressed here is whether, assuming the market structure was such that IBM was dangerously close to monopoly power, the law forbidding attempts to monopolize has been broken.

Beyond the assumed dangerous probability of success there are two additional elements of the attempt offense, the specific intent to control prices or destroy competition, and predatory or anticompetitive conduct. There is some independent evidence of specific intent. IBM's Chairman deemed market share a consideration well above that of profit, and IBM fought hard to maintain market share. They undertook intensive studies of the chief PCM competitors in order to determine their viability and to predict what would be required to contain them. That is not enough to prove illicit intent. More than an intent to win every sale, even if that would result in the demise of a competitor, is required before it can be concluded a defendant has the type of exclusionary intent **[**136]** condemned by the ***antitrust law***. Intent and conduct are closely related; [114] and there must be some element of unfairness in the conduct before an anticompetitive intent can be found, as distinguished from the benign intent to beat the opposition. [115]

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[112] ***Id., at 349, 352***.

[113] See CalComp, Supra n. 4, at 734, holding that plaintiff there, a PCM, lacked standing to sue on this same conduct.

[114] See text accompanying notes 41 to 47 Supra.

[115] *Pacific Engineering & Prod. Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790, 795 (10th Cir. 1977)*, Cert. denied, ***434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977)***; *Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 140 (D.Mass.1960)*, *Modified, 284 F.2d 582 (1st Cir. 1960)* Cert. denied, ***365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)***. See

IBM's conduct for the most part, was beyond reproach. Only the 115/125 multiplexor degradation would have violated the Sherman Act had IBM possessed monopoly power, and **[**137]** it can only be characterized as unfair under the assumption that the market was so structured. The 115/125 multiplexor degradation was only thought unreasonable because it involved some use of the assumed monopoly power. A future market was involved, and it does not strike this Court as unfair or unreasonable for a non-monopolist to refuse to take a course of action that would make it easiest for others to copy its products or to compete for sales.

The conduct here was not illegal, was not predatory, was not anticompetitive, was not unfair, and did not unreasonably restrict competition. Transamerica has failed to prove that IBM acted with the specific intent to control prices or destroy competition, or that it engaged in anticompetitive or predatory conduct with that end in mind. This Court finds that IBM did not attempt to monopolize any part of commerce.

VIII.

DAMAGES

Transamerica has failed to establish liability on either the monopolization or the attempt claim. But even had it done so, it would still suffer an adverse judgment because its damages proof affords the factfinder no opportunity to calculate resulting injury without resort to speculation.

Transamerica claimed it **[**138]** was damaged in two respects:

1) that the revenues it actually received on its plug-compatible equipment were less than the revenues it would have received had IBM not violated the law (the lost revenues claim); and

2) that IBM's actions forced it to abandon plans to purchase more plug-compatible equipment and lose the profits it would **[*1011]** have earned by leasing that equipment (the lost profits claim).

There are four alternative lost revenues calculations, Alternatives A, B, C and D. All of the lost revenue alternatives involve some assumption about the rental rate Transamerica would have received on the plug-compatible equipment it bought from Telex and Marshall; they all require some assumption about the number of months, on average, the equipment could have been returning that full rental (the "rental life"); and all purport to make provision for revenue shortfalls attributable to causes other than IBM's act (the "revenue erosion" factor). In most cases the assumed rental rate is multiplied by the rental life for each piece of equipment, then a fixed percentage is subtracted as revenue erosion, to give the total revenue Transamerica claims it would have received absent **[**139]** IBM's acts. From this expected revenue figure Transamerica subtracts the actual revenues it received on the equipment. The revenue difference is said to be a measure of Transamerica's loss, because the expenses Transamerica actually incurred are claimed to be at least as great as the expenses it would have incurred had IBM not acted.

Lost revenue Alternative A is a calculation that produces a damages claim (before trebling) of $ 36,469,000. The disk rental rates assumed are those in effect immediately preceding IBM's 2319B announcement in December 1970. The rental lives used are equivalent to the depreciation lives assigned to Transamerica's equipment in late 1970 by its Executive Vice President, Dr. Fraser Wallace. Wallace assigned six year lives to Transamerica's tape devices and its 2311-type disks (five years if they were purchased in 1971), and eight year lives to the 2314-type disks (seven years if purchased in 1971). The late 1970 rental rates were multiplied by the rental life remaining after a designated damage start date, then revenue erosion was subtracted. Revenue erosion was assumed to be zero for the first year of the remaining disk rental life and for the first six **[**140]** months of the remaining tape rental life. The next twelve months revenue were assumed to fall by 4 percent, and every year thereafter revenue is decreased by 15 percent. This 0-4-15 revenue erosion factor was suggested by Mr. Rush, Transamerica's President. Expected revenues were decreased by actual revenues to calculate lost revenue.

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also, Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich.L.R. 373, 395 (1974) and authorities cited therein.

Lost revenue Alternative B is a damage claim for $ 19,994,000. Transamerica calculated the Alternative B rental lives from a study of Telex made in 1970 by an IBM financial analyst. The study includes a chart depicting the number of units Telex was expected to have installed with customers from 1970 to 1976. Transamerica assumed Telex would have to manufacture 10 percent more drives than the maximum depicted on the installation chart (a 10 percent "float"), and from this total number of units manufactured, together with the number installed each month, Transamerica purported to calculate the average number of months each manufactured unit would product Some revenue. Rental life (the average number of months each unit would produce Full revenue, i. e., produce revenue at its original rent) was then calculated by reversing the study's assumptions of how **[**141]** much Telex's price would erode each year. The Alternative B rental life was multiplied by the same pre-act 1970 price assumed in Alternative A. No revenue erosion was applied to the quotient on the theory that price erosion and off rent units had already been considered in the Telex study. Expected revenue was increased by 10 percent of capital costs to reflect a salvage value, and then actual revenues were subtracted.

Lost revenue Alternative C is a $ 21,301,000 damage calculation. Pre-act prices were used here as well. The origin of the rental lives used was an IBM internal memorandum (the Nern Memo) sent to the author of the Telex study so that he might check his calculations. The Nern Memo lives were multiplied by pre-act prices, and, as with Alternative B, a 10 percent salvage value was added before actual revenues were subtracted.

Lost revenue Alternative D is a $ 12,700,000 calculation that results from multiplying **[*1012]** the price Transamerica was actually charging for its equipment during each month of the damage period, by the number of units of off rent in excess of 15 percent. The first 15 percent of the off rent units is a revenue erosion allocation. Only this **[**142]** portion of the off rent is assumed to be attributable to causes other than IBM's acts.

Transamerica's lost profits claim is grounded on a claimed intention to make additional purchases of plug-compatible equipment between 1972 and 1975. That intention is said to have been reflected in the profit and opportunity plans for 1971-1975 which were prepared by Transamerica in late 1970 and submitted to its parent, Transamerica Corporation, as indicative of long-range goals. According to Transamerica Corporation's Chairman, Mr. Beckett, and Transamerica's President, Mr. Rush, about one-half of the new computer equipment would have been plug-compatible peripherals. They further testified that the plan was not implemented because of IBM's conduct.

Transamerica contends that it would have invested $ 109,000,000 in plug-compatible equipment had the plan been carried out. Transamerica then theorizes that plug-compatible manufacturers would have entered into contracts whereby title to equipment would have passed to Transamerica on payment of a purchase price equal to 27 times the equipment's monthly rental price. The assumed contract would have provided that Transamerica retain all the rental **[**143]** revenues for the first 50 months. Thereafter Transamerica would have received 30 percent of the revenue and the manufacturer would get the balance.

The equipment would have produced some revenues over a 72 month life. Revenue erosion would be zero for the first year, 4 percent for the following year, and 15 percent thereafter. Estimated expenses are deducted from the anticipated rental revenues to give a lost profits figure of $ 51,200,000.

There is an alternative lost profits calculation as well. If one assumes, in addition to the 0-4-15 percent revenue erosion, that 20 percent of the units would not have produced any rental revenues after the first two years, the lost profits damages are $ 30,600,000.

The damage evidence advanced by Transamerica would permit total (untrebled) damages to be calculated between $ 43.3 million at one extreme, and $ 87.7 million at the other. In general, all the damage evidence can be characterized as showing a general decline in anticipated revenues and profits due to IBM's illegal conduct. The evidence that the decline was so caused consists of conclusory statements by Transamerica's corporate officers, and the inferences that can be drawn from the **[**144]** nature of IBM's acts and their tendency to injure one in Transamerica's position.

A plaintiff need prove no more in order to establish a Prima facie case. As the Supreme Court said in Bigelow v. RKO Radio Pictures, [116]

> . . . in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." ([117])

And that Court has suggested that a plaintiff's burden is satisfied by proof of Some damage flowing from defendant's unlawful acts:

> "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 **[**145]** his burden of proving compensable injury . . . " ([118])

[*1013] So, a plaintiff, in order to withstand a directed verdict, need only prove that defendant's acts were a material cause of its reduced profits, and causation may be inferred from the nature of the acts.

Plaintiff need not negate all possible alternative sources of injury in order to get to the jury. That was the nature of Transamerica's damages proof: general declines in overall revenues and profits, and acts by IBM which would tend to cause such declines. IBM's defense concentrated on showing that Transamerica's profit and revenue projections were speculative, and, even if those projections had some merit, that Transamerica's shortfall was attributable to causes for which IBM could not be held responsible.

Because it was possible for the jury to find that Transamerica's projections were reasonable, that the conduct complained of was all illegal and was a material cause of the shortfall, and that IBM failed **[**146]** to prove that other sources were also material causes, IBM's directed verdict motion on damages was denied and the issue was submitted to the jury. However, if the factfinder determines that some of IBM's conduct was illegal and some legal, or that the shortfall was attributable in part to other causes, or that the projections were unreasonable, Transamerica's damages evidence would give no guidance. For instance, if the challenged price reductions, FTP, and some of the design conduct were all determined to be legal competition on the merits, but the multiplexor degradation on the 115/125 constituted an attempt to monopolize or monopolization, then even if the overall projections are accepted as reasonable, and other causes are rejected, damages could not be fixed without resort to speculation or guess. Where a plaintiff's damage and causation proof is generalized its case rests on all the prerequisites to that generalization. This is especially true where, as here, particularization of injury is possible. [119]

[147]** If injury is shown to be attributable to factors for which the defendant cannot be held liable, then a damage case that ignores those factors must fail. [120] This Court finds that causes other than IBM's conduct led to at least

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116 *327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*.

117 *Id., at 264, 66 S. Ct. at 579*.

118 *Zenith Corp. v. Hazeltine, 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571-1572 n. 9, 23 L. Ed. 2d 129 (1969)*.

119 Some courts have ruled that a plaintiff must come forward with the most accurate proof reasonably available. Cf. *Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 953-54 (5th Cir. 1975)*, Rehearing denied, *509 F.2d 758 (5th Cir. 1975)*; *Riss & Co. v. Association of American Railroads, 190 F. Supp. 10, 18 (D.D.C.1960)*; *ILC Peripherals Corp. v. IBM, 458 F. Supp. 423, 436 (N.D.Cal.1978)*.

120 *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3rd Cir. 1975)*; *Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 911 (2d Cir. 1962)*; *Momand v. Universal Film Exchanges, 172 F.2d 37, 43 (1st Cir. 1948)*; *ILC*

most of Transamerica's profit and revenue shortfall, and that Transamerica's profit and revenue projections are inherently speculative. Thus, even if the Court were to find that some or all of IBM's conduct was illegal, damages could only be based on guesswork and could not be awarded.

Plaintiff could have done better. Rather than showing a general decline **[**148]** in profits and revenues, the damage proof could have been more closely connected to the individual acts complained of. Damages from the 115/125 multiplexor degradation, for instance, are limited by the number of tape devices in Transamerica's portfolio. Such limiting evidence was available, but not presented. Practically every major decision at IBM was made with the benefit of a precise market analysis. Those forecasts could have been used as the basis for determining how much impact each act had on the marketplace and on plaintiff. From the difference IBM expected each act to produce in its revenues, Transamerica could have estimated, on the basis of historical data, its share of the business that IBM wrongfully gained. Where IBM's own forecasts were not available, Transamerica could have used accepted forecasting techniques to predict impact per act. If Transamerica's proof were particularized in this **[*1014]** manner, the influence of extraneous factors would have been filtered out, and the factfinder, in the event it found some activities to be lawful competition and others to be unlawful, would not have had to speculate as to how much injury each act caused.

A. Other Factors **[**149]** Materially Contributed to Transamerica's Injury.

Transamerica's expectations were naive and its business strategy was ill-conceived. Except as a computer user, Transamerica Corporation had no experience in the computer industry prior to the formation of its computer subsidiary in late 1967. What it did have was money, and the computer industry during this period was a magnet for people with money to invest. The initial plan called for Transamerica to borrow from a sister corporation, Transamerica Financial Corporation (TFC) and to purchase whole computer systems with the borrowings. The computer systems were to be leased to end users at prices slightly below IBM's but for periods long enough to recoup expenses and make a healthy profit. Under the assumption that IBM could not alter its System/360 prices without violating the antitrust laws, Transamerica bought 360 systems. What Transamerica did not anticipate was the stiff price competition it soon faced from other leasing companies. Competitor's prices, 30 to 36 percent below IBM's, forced Transamerica out of the systems leasing field.

Recognizing its own inability to develop, market and maintain computer equipment, Transamerica **[**150]** decided the best course was to cooperate directly with manufacturers who could provide these skills. Under the "master sales agreement" concept they developed, Transamerica planned to, and did purchase computer equipment from manufacturers who had already leased the equipment to an end user. The manufacturer received immediate cash payment, but remained obligated to maintain the equipment, and, when leases expired or were otherwise terminated, the manufacturer was obligated to refurbish and remarket. Transamerica was to receive all rents until it had recovered its capital investment and a specified profit. Thereafter the residual rents were to be divided between the manufacturer and Transamerica.

Transamerica was attracted to plug-compatible peripheral manufacturers because it presumed that the System/360 peripherals they were producing would remain in demand for a relatively long time. It felt prices on that equipment would remain stable, since IBM would not risk antitrust liability by responding to PCM price competition, and because the investment tax credit (ITC) was available on that equipment and the ITC could be used by the parent corporation to offset its consolidated tax liability. **[**151]** In October of 1968 Transamerica contracted with Marshall to buy $ 5,000,000 worth of on lease 2311-type disk drives. In April of 1969 Transamerica contracted with Telex to buy $ 5,000,000 worth of on lease 729-type and 2400-type tape drives. In July of that year another contract with Telex was signed which obligated Transamerica to buy $ 45,000,000 worth of on lease 2311-type and 2314-type disk drive and control unit subsystems. Finally, in August of 1970, Transamerica contracted for another $ 10,000,000 worth of 2400-type tape drives from Telex.

Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 435 (N.D.Cal.1978); *Admiral Theatre Corp. v. Douglas Theatre Company, 437 F. Supp. 1268, 1296 (D.Neb.1977)*, *Aff'd, 585 F.2d 877 (8th Cir. 1978)*.

Typically, these contracts obligated Transamerica to pay a price equal to over 40 times the equipments' monthly rental rate (almost the full retail price), and obligated the manufacturer to maintain and remarket throughout the rental life.

Only after 70 months could the manufacturer hope to share in the residual rental fees.

The contracts themselves contained the seeds of Transamerica's disappointment. Transamerica's interests and the manufacturer's were divergent. The manufacturer, having been paid at the outset, had little incentive to spend time and money maintaining and remarketing Transamerica's gear. The lure of residual rentals six **[**152]** years distant was insufficient. Telex was attracted to Transamerica's financing because it needed capital to fund development projects, and once those developments became realities, Telex's incentive to market Transamerica's older equipment, instead of **[*1015]** its own newer, more exciting and more profitable follow-ons, dwindled to nothing. Transamerica says now it expected Telex would market its equipment to second and third users, people who were not so interested in the latest technology. Assuming there are customers with little interest in better performance at a lower price, there is no evidence that Telex knew of any. The entire PCM industry concentrated on "leading-edge" customers, large users who demanded the latest in technology and the best price/performance.

And the peripherals that Transamerica had to offer were certainly not the latest technology. Telex and Marshall unloaded $ 6,000,000 worth of 2311-type disk drives onto Transamerica in 1968 and 1969. They were equivalent to a device announced in early 1964 by IBM. Telex recognized their obsolescence and was reluctant to purchase them from Information Storage Systems (ISS), their disk supplier. In June of 1970, **[**153]** Telex requested ISS to discontinue production of these models because the market for them was shrinking. Transamerica didn't want them either, but was obligated to purchase them by Telex in order to buy the newer 2314-type devices.

The 2314, announced by IBM in 1965, was part of the reason Transamerica's 2311 types were already obsolete. But by the time Transamerica signed a $ 45 million contract with Telex (the bulk of which was for 2314-type subsystems), the 2314 was also becoming a thing of the past. In June of 1970 IBM announced the long rumored System/370 fourth generation of computers, and with it the 3330, a disk device far superior to 2314 types. Six months later Transamerica's regional manager in charge of the Telex account concluded that the 3330 had obsoleted all of Telex's 2314 types. [121] In August of 1971 Telex announced an improved double-density 2314-type, and a 3330 copy as well. Virtual storage, announced in 1972, further reduced demand for the slower 2314 technology, as did the March 1973 IBM announcement of the 3340. Customers appreciated the improved price/performance of the newer disks. Transamerica lost little ground to the older, low priced IBM products at **[**154]** issue here; 73 percent of Transamerica's 2314-type customers replaced that equipment by the newer technology offered by IBM and the PCMs. The 2314-type disk, when Transamerica bought it, was about to become a thing of the past.

Transamerica's 2400-type tape drives were no better. Telex sold them to Transamerica a mere three months before discontinuing their production. When the second Telex tape contract was signed in August of 1970, IBM had already shipped an improved generation of tapes, the 2420s, and Telex had already announced its 2420 equivalents. Three months later IBM announced Aspen (3420) outmoding the 2420s. As Transamerica argues elsewhere, [122] "Mandan, (a 2400-type), **[**155]** was old technology, dating back two generations". In March of 1973, IBM announced Birch, still more 3420 models with vastly improved tape density (6250 bpi v. 1600 bpi). By late 1973, Telex classified the NRZI 2400s (about one-half of Transamerica's stock) "prior technology" and thought them unmarketable.

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[121] In another context, when arguing that the 50-month rental life assumed by IBM for the 2319B was unrealistically long, Transamerica acknowledges the negative impact of the 3330 on 2314-type devices. Here they ignore it and would have this court believe that Wallace's 96-month rental life on the same type of equipment was reasonable.

[122] Transamerica advances this argument against the reasonableness of a 58-month rental life for Mandan, while maintaining a 72-month life was reasonable for its own 2400-type equipment.

Transamerica's indifference to the level of technological sophistication of the equipment in which it invested is well illustrated by the purchases on which no damages are claimed. The bulk of the first Telex tape contract was for 729 type drives. IBM announced the 729 in 1957, and it was obsoleted in 1964 when the third generation of computers, the System/360 was announced. The 729s would only attach to second-generation **[*1016]** equipment, but Transamerica paid $ 2.9 million for 729-type drives in 1968. Non-plug-compatible **[**156]** investments were also untimely. In February 1971, Transamerica's outside auditors suggested a 20 million dollar equipment write down because of the high off rent experienced. Only 20 percent of the equipment they addressed is at issue here. And two months later Transamerica's own internal assessment echoed that concern. Obsolescence had caused a $ 25,000,000 decline in the value of non-plug-compatible equipment.

Some of Transamerica's problems have to be pinned on its poor management. Its first President, according to an officer of Transamerica Corporation, failed to provide leadership or control, exercised poor judgment, misrepresented matters to the parent's officers, and violated the corporation's policy guidelines. The problems didn't come to light initially because Transamerica Corporation made the error of allowing the President to locate Transamerica in southern California, away from the parent, where its activity was difficult to monitor. By late 1969, the difficulties became clear, and the President was terminated. During 1970 Transamerica operated without a President. Fraser Wallace, the Executive Vice President, became acting Chief Executive Officer, and Edwin Carter (the **[**157]** Transamerica Corporation officer referred to above) was the acting President. But Carter could only devote part of his time to Transamerica, and Wallace, according to Carter, ignored problems until the crisis stage, entered agreements that violated corporate policy, was administratively incapable, and caused Transamerica substantial losses. Finally in 1971, James Rush became President. However Rush's experience was as an administrator. He had little knowledge of computer technology or the competition Transamerica faced. None of these executives had any experience with third-party leasing. The combination of inept management and no management produced predictable results. Working conditions at Transamerica were confused and chaotic, expensive contracts for obsolete merchandise were signed and losses inevitably followed.

Even had IBM remained the sleeping giant Transamerica presumed it to be, some of the difference between Transamerica's optimistic projections and reality would have to be ascribed to hungry PCMs scrambling to place their third generation peripherals at a time when the introduction of the fourth generation's was shrinking the market. By early 1974, Transamerica had reduced **[**158]** its price for 2314-type disk drives to under $ 200 per month. The IBM prices complained of here were $ 333 per month. Clearly the PCMs were cutting prices too. As early as November of 1970, Telex recognized that Peripherals General, California Computer Products, and Memorex would create price instability in the disk market. And customers took advantage of that. One-third of Transamerica's 2314-type disk customers were lost to other PCMs. The same PCM price competition that eventually goaded IBM into action, would, and did, cause Transamerica to lower its prices substantially below the prices assumed in its damages calculation.

Besides the injuries Transamerica claims were directly caused by IBM's pricing product actions, it is also claimed that Telex and Marshall were injured, and that the injury to the viability of the maintenance and marketing subcontractor indirectly injured Transamerica's ability to place its equipment. Telex was allegedly injured in its ability to secure financing, its ability to hire and retain qualified employees, and its ability to market, since customers were concerned the company might fail. Wholly aside from the question of whether Transamerica has standing **[**159]** to complain of the injury to a business partner, it appears that the problems of Telex and Marshall were self induced, or at least not IBM induced.

Other PCMs fared much better than Telex and Marshall. PCMs' plug-compatible disk revenues increased dramatically from $ 4.3 million in 1968 to $ 857.3 million in 1975. During that same period PCM tape revenues rose steadily from $ 23.7 million to $ 352.5 million. There was nothing about IBM's conduct that would have caused Telex and Marshall to be more impacted than **[*1017]** others; if they could not keep pace, the cause must lie elsewhere.

Marshall's products were unreliable, had excessive down-time, and were highly vulnerable to the competition of other PCMs.

Transamerica's notion that Telex was unable to obtain financing because of IBM's conduct is refuted by the evidence. Following FTP, Telex was still able to negotiate lines of credit totaling $ 69,000,000, and in November of 1971, Telex sold 27.5 million dollars worth of debentures to the public. If the financial community lost confidence in Telex, it could largely be traced to valid criticism of Telex's accounting methods made by the SEC and financial commentators in late **[**160]** 1969 and early 1970. Telex was using the financing method of accounting for its leases. Once a lease was signed, the equipment was accounted for as if it were sold. No provision was made for the substantial risk that the machine might not produce sufficient revenues to cover the recorded sale price. And the maintenance, remarketing, interest and other expenses on that equipment were to be charged against future periods. In this manner Telex kept its earnings, and its stock price, artificially inflated. When the bubble burst, Telex was forced to restate its earnings and the stock price sank along with investor confidence. In late 1972, the Accounting Principles Board issued opinion 27 (APB 27) mandating a more conservative approach. Telex reversed transactions it had previously booked as sales; the effect on Telex's fiscal 1973 results was a devastating $ 18 million loss. Investors and customers understandably became wary.

More than questionable accounting hurt Telex. By mid-1971 it had little to offer the customer, and what it did offer often functioned poorly. In June of 1971, Telex salesmen had only the 2420-type tape to sell; Telex's factories were not building anything else. Telex **[**161]** was slow to offer a 3420 equivalent, and as a result, other PCMs began replacing Telex's 729 and 2400-type tape drives with their 3420-types. Later, when the Telex 3420-type was in shipment, Telex expected one-half of them to be defective on arrival, and 25 percent to fail badly within the first three months of use. The Telex 2400-type tapes were also experiencing difficulties. Transamerica Corporation's own Computer Division found them "proven to be unacceptable in all regards." Telex, suffering from a lack of qualified tape engineers and field maintenance technicians, was late in starting, and even then produced poor quality equipment.

If Transamerica suffered problems indirectly through Telex, at least some part of those problems was due to the serious deterioration of relations between the two. In 1970, Transamerica invested heavily in a company called Computer Micro-Image Systems (CMS). CMS began to experience financial problems, and a worried Transamerica induced Telex to invest some time and money in CMS by holding the promised August, 1970 $ 10 million tape agreement as hostage. For its part, Transamerica agreed to pay Telex for its disk purchases at time of shipment rather **[**162]** than upon acceptance (about a 60 day "float" on $ 26,000,000 in remaining disk purchases), concluded the tape agreement, and, at least according to Telex's interpretation, promised Telex it would be held harmless from its CMS involvement. By March of 1971, Telex had invested $ 1.5 million in CMS, and CMS went into bankruptcy. When Telex tried to collect on the guarantee, Transamerica balked.

As a result of Transamerica's refusal to reimburse Telex, Telex concluded it would not be doing any additional business with Transamerica, and it would interpret existing contracts strictly in Telex's favor.

In November of 1971, Telex attempted to prematurely fulfill the substitution obligation on Transamerica's 2314-type disk. Transamerica disputed their right to do so. Maintenance also became an area of dispute, with Transamerica ultimately forced to pay Telex an additional $ 1.25 million to cover maintenance costs. And Transamerica felt that Telex's negligent record keeping was costing it money.

In sum, relations between Telex and Transamerica had broken down, Telex's **[*1018]** products were technologically outdated and of inferior quality, and investors and customers alike shied away **[**163]** from a company whose accounting practices were publicly criticized. Even if damage to Transamerica by virtue of injuries to Telex were cognizable, Transamerica's damage claim makes no provision for the other factors that materially caused Telex's problems.

Transamerica's damage claim also fails to take account of the recession that led to a decrease in demand in 1970 and 1971, and ignores the effect of the Tenth Circuit's opinion in Telex, [123] although Transamerica decided to increase the depreciation on its Telex equipment by.$ 1.4 million as a result of that decision.

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[123] Supra n. 5.

Transamerica's revenue aspirations were built on sand. They depended on others to perform essential services, when those others had little incentive to perform. They counted on a tax benefit that was later suspended. They assumed a continued demand for third generation peripherals at a time when the fourth generation was being born. They trusted incompetent and inexperienced management. They ignored the threat of competition **[**164]** from other PCMs and the deterioration of relations with their principal supplier. And they assumed that the antitrust laws had so stifled IBM that non-competitive pricing conditions would prevail indefinitely. Factors other than IBM's conduct were the predominant cause of Transamerica's lost revenues.

According to Beckett and Rush, the plan to invest further in plug-compatible equipment was not implemented because of IBM's price cuts. This Court does not accept the single-cause theory with respect to the lost profits claim either. It does not appear the plan was ever firmly embraced by management, nor does it appear likely that it ever would have been.

The 1971-1975 Transamerica Profit and Opportunity Plan ostensibly called for a doubling of the subsidiary's portfolio, an investment of almost ten times the parent's consolidated 1970 earnings. The previous year's plan had called for a limitation on purchases, and in October 1970, the Transamerica Board, smarting from the obligations its officers had incurred, required that all major transactions involving over $ 1 million be subject to board approval. It was, of course, possible that the corporation made such an abrupt about-face, **[**165]** but the evidence that they did so is slim. There is no contemporaneous documentation of any discussions regarding the plan, nor was there ever any specification of manufacturer or equipment type. There is no evidence of any initial contract negotiations, product evaluations, or any other preparatory steps. And the Profit Plan was never approved by Transamerica's board although Transamerica Corporation's procedures called for that before Profit Plans become operative.

Transamerica appears to have been winding down its operations even before the IBM conduct at issue here. In October of 1970, its regional market offices, the contact point with manufacturers, were closed. The reasons for the cutback are evident. Computer equipment was becoming a less attractive investment. The Investment Tax Credit was suspended in 1970, and even if it were to be revived, the parent corporation had a surplus of carry over ITC anyway. Transamerica had changed its accounting procedures, and plug-compatible investments appeared much less profitable as a result. And Transamerica's track record was poor. In 1970, it recorded a $ 5.5 million pre-tax loss. One year later that loss grew to $ 9.6 million.

The **[**166]** source of funds for plug-compatible investing is also questionable. The parent's consolidated earnings were down sharply in 1970, and the TFC loan was drying up. TFC's bond rating suffered because the intra-company loan was viewed with suspicion, and TFC's creditors joined in that criticism. Because of that, Beckett decided that Transamerica should decrease the TFC loan balance to $ 100 million by the year-end 1973. But no mention is made of an alternative source of investment funds.

[*1019] APB 27, issued by the Accounting Principles Board had a heavy impact. It effectively precluded leasing companies from acting as mere financial intermediaries as Transamerica had. Transamerica would have had to shoulder some maintenance and remarketing responsibilities on its future equipment leases. But no indication appears as to how this was to be done.

The 1971-1975 Profit and Opportunity Plans were a dream. Nothing precludes a corporation from sketching its future so lightly, but the law precludes that corporation from collecting damages when the dream fails to become a reality. An antitrust plaintiff must have an intention to enter a business and certain degree of preparedness before **[**167]** a business expansion concept can be compensated in damages. [124] Transamerica has shown neither.

Plaintiff aggregated some very large numbers to represent its lost revenues and profits, and charges IBM with responsibility for the entire damage. This Court finds that Transamerica's lost revenues were predominantly caused

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[124] *Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979)*; *Martin v. Phillips Petroleum Company, 365 F.2d 629, 633-34 (5th Cir. 1966)*, Cert. denied, ***385 U.S. 991, 87 S. Ct. 600, 17 L. Ed. 2d 451 (1966)***.

by factors other than IBM's conduct, and that Transamerica's investment plan, if it ever reached the status of a corporate intention, was abandoned primarily for reasons other than the IBM actions challenged here. Under this state of the evidence, even if this Court were to find that some of all of IMB's conduct violated the Sherman Act, and that that conduct caused some material part of the loss, damages could not be fixed except by guess.

B. Transamerica's Damage Estimates Are Not Based On Credible **[**168]** Evidence.

If the causation problem could somehow be solved, if this Court were to find that IBM's conduct was the primary or sole cause of Transamerica's loss, the verdict would still be for IBM because the damage computations are not based on reasonable assumptions. The best example of that is Rush's revenue erosion factor.

It might be argued that Transamerica has made some provision for other causes by subtracting the 0-4-15 percent revenue erosion from its total revenue and profit expectations. But these numbers are no more than Rush's unsubstantiated self-interested guess. The fact that a witness has recognized other causative factors and decreased the damages by an arbitrary figure does not change the character of the result. Guesswork is guesswork, whether it originates on the witness stand or in the jury room.

If Rush were qualified as an industry or economic expert, his Ipse dixit might carry more weight; but he is not. He has not had any formal education in computer sciences or the computer industry. He displayed a minimum of technical knowledge on the witness stand; and his work experience has chiefly been as an administrator. The numbers assigned to revenue erosion were **[**169]** pulled out of thin air. There was no comparison with the off rent experiences of other leasing companies, or with similar firms in other industries. Indeed, an examination of Transamerica's off rent experience with non-plug-compatible equipment leads to the conclusion that the modest figures Rush applied are grossly understated and incurably optimistic.

There is more to substantiate the various rental lives assumed, but not enough. Wallace's depreciation lives were probably chosen with an eye toward maximizing the ITC on the equipment. They are unreasonably long. Wallace assigned the same 6 year life to the vintage 729 type tape drives as he did to the 2400 types, and selected disk subsystem lives of up to 8 years while Telex was depreciating the same equipment over four. Products not at issue here, to which Wallace also assigned long lives, suffered large amounts of off rent within a short time. The rental lives calculated from the Telex study were improperly calculated since no provision was made for the fact that the study included purchased units and rental **[*1020]** units in the same inventory curve, and there is no evidentiary support for the assumption of a ten percent float **[**170]** factor. Nothing more than the bare numbers support the Nern lives. Nern's assumptions appear nowhere in the record. The critical assumptions behind the Telex study and the Wallace lives are also missing. What assumptions do appear are untenable. Wallace assumed that the System/360 would not be displaced by the System/370, and the Telex study was based on the assumption that IBM would not do anything to improve its position in the peripherals markets.

Transamerica's lost revenue damage calculations are not based on credible evidence. Neither are the lost profits calculations.

The lost profits claims assume that manufacturers with products that would produce full rental revenues for 72 months would sell those products to Transamerica for a price equal to 27 times the monthly rental and a share of the rentals after 50 months. Only financially unstable concerns, desperately in need of cash would have done so. Telex turned down similar propositions because it found bank financing less expensive. Transamerica did enter four contracts with non-plug-compatible suppliers on comparable low multiple, quick-residual terms, but those suppliers were all financially distressed. A lost profits calculation **[**171]** that fails to provide for the contingency that a critical business partner would go bankrupt, cannot logically be predicated on a business plan that would only appeal to partners on the verge of financial disaster.

APB 27 is another factor that makes the envisioned contracts unlikely. Following that opinion, manufacturers were unable to book their transactions with leasing companies as sales if, as in the past, they retained remarketing and maintenance obligations. Few manufacturers would be willing to deal on that basis. The market for Transamerica's financing was drying up.

Transamerica was incapable of shouldering marketing and maintenance responsibilities itself and would have had to have made some provisions for those services. But no clear plan for accomplishing that emerges from the lost profits proof. This need to provide services also makes untenable the lost profits assumption that future expenses would run parallel to historical expenses.

The likelihood that, absent IBM's acts, Transamerica's expansion would have been successful, is severely undermined by the record of their dismal past. Through 1971 Transamerica lost about $ 16 million before taxes, and each year things **[**172]** were getting worse. While a past profit record might not be indispensable to lost future profits proof, [125] its absence goes a long way towards discrediting fanciful projections.

Courts have been properly sympathetic to the antitrust plaintiff's plight in proving what might have been, but not so sympathetic that they have permitted damage claims to be grounded on speculation rather than on relevant data. [126] Transamerica's damage estimates failed to meet this test. Where opinions were offered, they were not based on relevant data, and the assumptions behind those opinions were not shown or were not realistic. [127] Future profits were predicted only by assuming hypothetical transactions which never were likely to occur and were **[**173]** never even proposed. [128] And non-liability factors, which had a profound effect, were dismissed with an arbitrary **[*1021]** and insignificant revenue erosion deduction. [129]

This Court finds that Transamerica's evidence fails to afford it a basis on which it might justly and reasonably, have estimated damages that might have flowed from IBM's acts.

IX.

CONCLUSION

Transamerica, charged with proving that IBM had monopoly power, that IBM's conduct violated the Sherman Act, and that such conduct **[**174]** caused injury to Transamerica, has failed to carry its burden of persuasion on each of those critical elements.

The proof of monopoly power rested on a weak base. To find monopoly power, this Court would have to accept a narrow market definition, combine it with a distorting measurement technique, and evaluate the resulting statistic against a background that ignores the dynamic competitive history of the computer marketplace.

Damages proof also failed to persuade. Transamerica's projections were unreasonably optimistic. Its approach to causation leaves the factfinder, having found that some significant non-IBM causes were responsible for Transamerica's misfortunes, with no way to fix any damages attributable to IBM except by guess.

Finally, IBM's conduct could only be found illegal if this Court were to adopt a novel theory with serious and far reaching anticompetitive effects. This case has been, first and foremost, a case about conduct and what tactics a firm with assumed monopoly power can employ. Transamerica would subject a monopolist to punitive damages for any action that tends to preserve that market status, unless that action was inevitable. Thus, monopolists could

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[125] See *Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 565-67 (2d Cir. 1970)*; *Flintkote Company v. Lysfjord, 246 F.2d 368, 392-94 (9th Cir. 1957)*; *Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, 444-49 (E.D.Pa.1960)*, *Aff'd, 297 F.2d 199 (3rd Cir. 1961)*.

[126] *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*; *Sunkist Growers, Inc. v. Winckler and Smith Citrus Prod. Co., 284 F.2d 1, 34 (9th Cir. 1960)*; *Wolfe v. National Lead Co., 225 F.2d 427, 433-34 (9th Cir. 1955)*.

[127] See *Lessig v. Tidewater Oil Co., 327 F.2d 459, 473-74 (9th Cir. 1964)*.

[128] See *Webb v. Utah Tour Brokers Association, 568 F.2d 670, 677 (10th Cir. 1977)*.

[129] See *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1352 (3rd Cir. 1975)*.

not **[**175]** reduce price from a profit-maximizing price, could not alter the design of a product, and could not change marketing techniques, if any alternative was open to them which would have less impact on competitors. The failure to walk the narrowest path would lead to liability because, on that theory, competition would otherwise be "unnecessarily", excluded, [130] and monopoly status would have been "willfully" [131] preserved as opposed to "thrust upon" [132] the defendant as the "passive beneficiary" [133] of natural forces.

This Court will not attempt to improve upon the careful critical analyses of the cases and language whereon Transamerica relies. [134] It suffices to say that Transamerica's interpretation of the seemingly restrictive language becomes untenable when that language is considered in **[**176]** the light of contradictory language from the same cases and conduct permitted to a monopolist in other cases. This Court's main concern here is with the consequences of Transamerica's suggested rule.

Monopolists do not wear a label proclaiming their market status. Ascertaining that status is unfortunately difficult, whether the determination is to be made by a court, or even by the suspected monopolist. A market must be defined and measured, the market's characteristics must be evaluated, and its historical performance must be considered. This appraisal of market power is time-consuming, arduous, And imprecise. As a result, one must expect that any legal rule governing a monopolist's conduct will affect all firms large enough to fear that some **[**177]** disgruntled competitor will charge them with the emotion-provoking title of "monopolist."

[*1022] Large firms attempting to conform their conduct to Transamerica's proposed rule would have a difficult time indeed. Any successful action they might take to win sales necessarily tends to improve or preserve their market position. Disappointed competitors, if they can conceive of some alternative price, product, modification or practice they would have preferred, would be encouraged to bring suit. Even if the large firm recognizes and tries to resolve the problem, it cannot assure its safety. One alternative might exclude or restrict one set of potential plaintiffs, while another set would be affected by the other alternative. Management's safest course might be to do nothing, but that, of course, would violate their duty to shareholders, and would do nothing to benefit a healthy, innovative and competitive market.

It is an unwise policy for the law to coddle competitors, especially if the protection comes at the expense of destroying a larger firm's incentive to compete. Even companies that choose to enter dominated markets must be prepared to face competition on the merits. Where **[**178]** a monopolist chooses an alternative that does not unreasonably restrict competition, the law is not offended. It is the choice of an unreasonable alternative, not the failure to choose the least restrictive alternative, that leads to liability.

IBM did not lie dead in the water when faced with competition. It took action. And the action it took may have caused some competitors to suffer more than other actions would have. But the action IBM took, under the circumstances in which it acted, did not unreasonably restrict competition, and thus, did not violate the law.

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[130] See *United Shoe, supra n. 13, at 344-45*; *Greyhound, supra n. 4, at 498*.

[131] See *Grinnell, supra n. 4, 384 U.S. at 570-71, 86 S. Ct. 1698*.

[132] See Alcoa, supra n. 44, at 429.

[133] See *id., at 430*.

[134] See e.g., *Berkey, supra n. 5, at 273-274*; *Telex, supra n. 5, at 927*; Borden Inc., 1978 Trade Reg.Rep., Case No. 21,490, at 21,517-18 (FTC 1978) (Pitofsky concurring); 3 P. Areeda and D. Turner, ***Antitrust Law***, Section 608, at 13-26; Sullivan, Supra n. 15, at 94-97.

Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.

Court of Appeal of California, First Appellate District, Division Two

October 23, 1979, Filed

Civ. No. 40428.

Reporter

159 Cal. Rptr. 255 *; 1979 Cal. App. LEXIS 2240 **; 97 Cal. App. 3d 932

SUBURBAN MOBILE HOMES, INC. Plaintiff and Appellant, v. AMFAC COMMUNITIES, INC., et al., Defendants and Respondents.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REHEARING

Subsequent History: [1]** Rehg. granted Nov. 21, 1979 (see *101 C.A.3d 532*)

Prior History: Superior Court of San Mateo County, No. 177201, Thomas M. Jenkins, Judge.

Core Terms

mobile home, tying arrangement, tied product, dealers, sales, tying product, economic power, spaces, tie-in, respondents', antitrust, damages, Sherman Act, buyers, commerce, display, nonsuit, coach, Cartwright Act, insubstantial, appreciable, cases, home site, participating, double-wide, customers, reserving, restrain, filling, seller

LexisNexis® Headnotes

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1[] **Pretrial Judgments, Nonsuits**

A nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Neither the appellate court nor the lower court may weigh the evidence or consider the credibility of the witnesses. Plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions. Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] Private Actions, Remedies

Summary proceedings are not favored in antitrust suits. 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.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN3[] Antitrust & Trade Law, Sherman Act

Cal. Bus. & Prof. Code §§ 16720, *16726* of the California Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, are patterned after the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and both statutes have their roots in the common law.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN4[] Antitrust & Trade Law, Sherman Act

Both the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and its California equivalent, the Cartwright Act, *Cal. Bus. & Prof. Code § 16700, et seq.*, prohibit every contract, combination or trust which is formed for the purpose of restraining trade or commerce. Although the statutory language prohibiting restraints on trade or commerce is couched in all-encompassing terms in both acts, each has been interpreted by the courts to ban only unreasonable restraints. However, 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.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] Regulated Practices, Price Fixing & Restraints of Trade

See *Cal. Bus. & Prof. Code § 16720*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Cal. Bus. & Prof. Code § 16726*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

For the purposes of antitrust violation, a tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to prove an illegal per se tying arrangement there must be a showing that: a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. Such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN11[] **Private Actions, Remedies**

In antitrust cases the common law rules of damages are not controlling. While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that is accomplished, the jury will be permitted to act upon probable and inferential proof and to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

An illegal tying arrangement may be found if the offeror of the tying product has an economic interest in the tied product, even though the latter is manufactured or otherwise produced by another party or entity.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > Purchase & Sale

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN14[] **Private Actions, Remedies**

Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN15[] **Private Actions, Remedies**

Under *Cal. Bus. & Prof. Code § 16727*, the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under *Cal. Bus. & Prof. Code § 16720*, both conditions must be met.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] **Actual Monopolization, Anticompetitive & Predatory Practices**

See *Cal. Bus. & Prof. Code § 16727*.

Antitrust & Trade Law > Sherman Act > General Overview

Real Property Law > Brokers > Fiduciary Responsibilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

If the tie does not involve a commodity but concerns land, services or credit, which do not fit the Clayton Act's language, it is governed by the Sherman Act, *15 U. S.C.S. § 1 et seq.*, and the plaintiff is required to bear the additional burden of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint.

Counsel: Carr, Smulyan & Hartman and Yale H. Smulyan for Plaintiff and Appellant.

Gendel, Raskoff, Shapiro & Quittner and Palmer, Grundstrom & Duckworth for Defendants and Respondents.

Opinion by: CALHOUN

Opinion

[*257] CALHOUN, J. [*]

This is an appeal from a judgment of nonsuit rendered in favor of defendants in an action brought for violation of the California ***antitrust law*** (Cartwright Act, *Bus. & Prof. Code,* [1] *§ 16700 et seq.*).

The parties to the lawsuit are plaintiff Suburban Mobile Homes, Inc. (hereafter Suburban or appellant) and four named defendants (hereafter respondents): AMFAC Communities, Inc. (AMFAC), Instant Housing Corp. (Instant), Roberts & Aguirre Mobile Home Sales, Inc. (R & A), and S & S Mobile Home Sales, Inc. (S & S). Suburban is a mobile home dealer with its principal place of business in South San Francisco. AMFAC is the owner and developer of a mobile **[**2]** home park known as "Franciscan Bay Mobile Country Club" (hereafter Franciscan), located in Daly City, California. The three other respondents are mobile home dealers, selling mobile homes in the San Francisco trading area and elsewhere.

The centerpiece of the present litigation is the use of mobile home sites in the Franciscan. As the relevant evidence reveals, the Franciscan was developed by AMFAC by about 1971. It had 501 mobile home sites capable of accommodating double-wide mobile homes sold by Suburban. While at the outset the Franciscan was an open park where home sites were available to all buyers irrespective of from which dealer they purchased their mobile homes,

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[*] Assigned by the Chairperson of the Judicial Council.

[1] Unless otherwise indicated, all further references will be made to the Business and Professions Code of California.

at the end of 1971 AMFAC entered into agreement with four mobile home dealers, including the three corespondents here. In essence, these agreements and the amendments thereto, **[*258]** secured 288 spaces out of the 501 total for four named participating dealers who gained exclusive right to display their mobile homes in the Franciscan. In return for an exclusive right to display their merchandise and reservation of home sites in the park, the participating dealers were obligated to pay a certain sum of money **[**3]** to AMFAC. For instance, the park promotion agreement concluded between R & A and AMFAC provided that R & A shall contribute to the park promotion and advertising costs up to $1,200 per month, and also that R & A shall pay AMFAC $200 for each coach sold in the park in consideration for reserving space for the home sold. The evidence introduced at trial showed that until fall 1972, R & A in fact paid AMFAC $500 for every coach sold in the Franciscan.

Since the sales of mobile homes are dependent upon the availability of suitable mobile home sites in the trading area, Suburban's business was seriously affected by the aforesaid restrictive agreements and the actual sales practice conducted pursuant thereto. The evidence adduced at the trial convincingly demonstrated that the older parks belonging to or surrounding the San Francisco trading area were already full prior to 1971, the opening date of the Franciscan. At the same time, it was shown that the Franciscan was an outstanding five-star park. It had large spaces and full recreational facilities, and was the only park close to San Francisco that had double-wide spaces available. The evidence as a whole leaves no doubt that the Franciscan **[**4]** was a unique park, both because of its location and superb facilities.

The record is replete with evidence that the exclusion of Suburban from the Franciscan resulted in considerable actual and/or potential loss of profit to appellant. Thus, it was shown that Suburban had a waiting list of customers for the Franciscan; that there were numerous prospects (half a dozen a week) who wanted mobile homes in the Franciscan; and that there were a number of concrete sales or potential sales which were lost because of the unavailability of mobile home sites in the Franciscan to the Suburban customers. In addition, it was statistically demonstrated that while Suburban filled 90 to 95 percent of the mobile home park vacancies in northern San Mateo County from 1971 to 1975, in the disputed period it could sell only six mobile homes of the total of 253 sales in the park.

Based upon the foregoing facts, appellant brought an action against respondents charging multiple violation of the Cartwright Act, including an illegal restraint of trade and an illegal tie-in arrangement (*§ § 16720*, *16726*, *16727*). Upon the conclusion of Suburban's evidence, the trial court refused to submit the case to **[**5]** the jury and granted respondents' motion for nonsuit. In accordance therewith, judgment was entered as to all causes of action in favor of respondents. The appeal is taken from the judgment.

Appellant contends on appeal that the trial court erred in granting respondents' motion for nonsuit, because the evidence of record supports the elements of an illegal tie-in arrangement which constitutes a per se violation of the Cartwright Act (*§ § 16720*, *16726*, *16727*). In the alternative, appellant argues that the evidence is sufficient to prove a restraint of trade under the "rule of reason" standard (*§ 16720*; *Standard Oil Co. v. United States (1911) 221 U.S. 1 [55 L.Ed. 619, 31 S.Ct. 502]*; *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 930 [130 Cal.Rptr. 1, 549 P.2d 833]*), even if the preconditions of an unlawful tying arrangement or agreement are absent. We are persuaded that respondents' conduct, as reflected by the evidence, clearly amounts to an illegal tying arrangement which, under well established case law, constitutes a per se violation of both the federal ***antitrust law*** (Sherman Act, *15 U.S.C. § 1 et seq.*) and the California Cartwright Act (*§ § **[**6]** 16720*, *16726*). Accordingly, we are compelled to reverse the judgment.

Before discussing appellant's contention on the merit, we underline a few important preliminary matters. First is the legal principle under which a nonsuit may be **[*259]** granted. It has become the established law of this state that ***HN1***[] a nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff (*O'Keefe v. South End Rowing Club (1966) 64 Cal.2d 729, 733 [51 Cal.Rptr. 534, 414 P.2d 830, 16 A.L.R.3d 1]*; *Morgenroth v. Pacific Medical Center, Inc. (1976) 54 Cal.App.3d 521, 530 [126 Cal.Rptr. 681]*). Neither the appellate court nor the lower court may weigh the evidence or consider the credibility of the witnesses (*Lasry v. Lederman (1957) 147 Cal.App.2d 480 [305 P.2d 663]*). Plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions **[**7]** (*Anthony v. Hobbie (1945) 25 Cal.2d 814 [155 P.2d 826]*). Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury (*Estate of Lances (1932) 216 Cal. 397, 400 [14 P.2d 768]*; *Umsted v. Scofield Eng. Const. Co. (1928) 203 Cal. 224, 228 [263 P. 799]*).

The second point is that ***HN2***[] summary proceedings are not favored in antitrust suits. As the court put it in *Poller v. Columbia Broadcasting (1962) 368 U.S. 464, 473 [7 L.Ed.2d 458, 464, 82 S.Ct. 468]*, "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." (See also *Fortner Enterprises v. U.S. Steel (1969) 394 U.S. 495, 500 [22 L.Ed.2d 495, 503, 89 S.Ct. 1252]*; *Santa Clara Valley Distributing v. Pabst Brewing (9th Cir. 1977) 556 F.2d 942, 944-945*.)

Finally, **[**8]** it has been widely recognized that ***HN3***[] *sections 16720* and *16726* of the Cartwright Act were patterned after the Sherman Act (*15 U.S.C. § 1 et seq.*), and both statutes have their roots in the common law (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 852 [94 Cal.Rptr. 785, 484 P.2d 953]*). Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act (*Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920, 925*; *Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]*; *Sherman v. Mertz Enterprises (1974) 42 Cal.App.3d 769, 775 [117 Cal.Rptr. 188]*). With these preliminary considerations in mind, next we set out the legal principles governing the tying agreements or arrangements and apply them to the facts of the instant case.***HN4***[]

Both the Sherman Act and its California equivalent, the Cartwright Act, prohibit every contract, combination or trust which is formed for the purpose of restraining trade or commerce. [2] Although the statutory language prohibiting restraints on trade or commerce is couched in all-encompassing terms in both **[**9]** acts, each has been interpreted by the courts to ban only unreasonable restraints (*Standard Oil Co. v. United* ***[*260]*** *States, supra, 221 U.S. 1, 60 [55 L.Ed. 619, 645]*; *People v. Building Maintenance etc. Assn. (1953) 41 Cal.2d 719, 727 [264 P.2d 31]*). However, as the United States Supreme Court put it in *Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5 [2 L.Ed.2d 545, 549-550, 78 S.Ct. 514]*, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an

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[2] ***HN5***[] United States Code, *section 1* (Sherman Act) provides in part that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

HN6[] *Section 16720* of the Cartwright Act sets out in relevant part that "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

"(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." (Italics added.)***HN7***[]

Section 16726, in turn, reads that "Except as provided in this chapter, every trust is unlawful, against public policy and void." (Italics added.)

inquiry so often wholly fruitless when **[**10]** undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing [citation]; division of markets [citation]; group boycotts [citation]; and tying arrangements [citation]." (Italics added.)

HN8[] For the purposes of antitrust violation, a tying arrangement is defined **[**11]** as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." (*Northern Pac. R. Co. v. United States, supra, 356 U.S. at pp. 5-6 [2 L.Ed.2d at p. 550*]; *Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at p. 856*.) The evil accompanying the tying arrangement is described as follows: "'[T]ying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306*. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co. v. United States, [**12] 345 U.S. 594, 606*." (*Northern Pac. R. Co. v. United States, supra [2 L.Ed.2d at p. 550*].) Tying arrangements are illegal per se "whenever 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 Pac. R. Co. v. United States, supra, at p. 6 [2 L.Ed.2d at p. 550*]), and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie." (*Fortner Enterprises v. U. S. Steel, supra, 394 U.S. at p. 501 [22 L.Ed.2d at p. 504*].)

In sum, *HN9*[] in order to prove an illegal per se tying arrangement there must be a showing that: a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act (*Beegle v. Thomson [**13] (7th Cir. 1943) 138 F.2d 875, 881* [59 U.S. Pat.Q. 416]; *Alberto-Culver Company v. Andrea Dumon, Inc. (N.D. Ill. 1969) 295 F. Supp. 1155, 1157* [160 U.S. Pat.Q. 822]; *McCormack v. Theo. Hamm Brewing Co. (D. Minn. 1968) 284 F.Supp. 158, 164)*. As will be demonstrated below, all four conditions enumerated above find abundant support in the record which is but another way of saying that appellant made out a prima facie case for the consideration of the jury **[*261]** under the doctrine of an illegal tying arrangement.

(a) Existence of Tying Arrangement: As noted earlier, the existence of a tying arrangement between AMFAC and the four participating mobile home dealers (including respondents Instant, R & A and S & S) was evidenced first by the December 29, 1971, agreement which explicitly put aside and reserved 288 out of 501 home sites in the park for those dealers who displayed their mobile homes in the Franciscan and who, under the terms of other agreements and understandings, were bound to pay monetary contribution to AMFAC after each coach that was sold in the park. In addition to the written agreements, there is a host of evidence showing that the restrictive policy agreed upon **[**14]** by the parties was strictly carried out in the every day practice. For example, Instant told people coming to see its mobile home display that it would be necessary to purchase the home from it or other dealers in the area (not Suburban) if they wanted a space in the Franciscan. Mr. Cole, the park manager of AMFAC, also advised people that reservations in the park were up to the management, and that anyone reserving a space for his mobile home would have to purchase the home from one of the dealers who displayed homes in the park. Mr. O'Neil, the sales representative of R & A, likewise admitted that when people came to the Franciscan they were told that they must buy through one of the displaying dealerships (most specifically through R & A) if they wanted to get a home site in the park. The above testimonies were reaffirmed by individual home buyers as well. Thus, Mr. Bishop testified that although he wanted to buy a mobile home from Suburban, he was told by Instant that only certain dealers could get their homes on the Franciscan spaces. Mrs. Varni, who had already made a deposit in order to purchase a mobile home from Suburban, rescinded the deal and bought her coach from R & A, **[**15]** upon learning from AMFAC that only those people could move into the park who bought their homes from one of the participating dealers. Finally, the February 27, 1972, advertisement published in the San Francisco Chronicle also made it clear that the potential buyers had to select their home from the mobile homes on display in the park.

(b) Economic Power of AMFAC: Before resorting to the record to show that AMFAC possessed sufficient economic power to impose an appreciable restraint on the free competition of the tied product (here, mobile homes), we emphasize that ***HN10***[] the power over the tying product (here, home sites) can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes (*United States v. Loew's, Inc. (1962) 371 U.S. 38, 45 [9 L.Ed.2d 11, 18, 83 S.Ct. 97]*; *Fortner Enterprises v. U.S. Steel, supra, 394 U.S. at p. 503 [22 L.Ed.2d at p. 505*]; *Lessig v. Tidewater Oil Company (9th Cir. 1964) 327 F.2d 459, 470)*.

In the case **[**16]** at bench, the evidence demonstrates that the Franciscan was both desirable and unique within the meaning of the aforestated rule. As mentioned earlier, the Franciscan had an excellent location attracting many potential mobile home customers in the San Francisco Bay Area. The other parks within commuting distance of San Francisco (i.e., in San Mateo, Santa Clara, Alameda, Contra Costa and Marin Counties), with a few exceptions, were filled at the time the Franciscan opened in 1972. The desirability of the Franciscan was demonstrated inter alia by the fact that Suburban had a backlog of customers waiting for spaces in the Franciscan, and that dozens of other customers expressed their interest in placing their mobile homes in the Franciscan. At the same time, the Franciscan was not only highly desired but also unique. As pointed out earlier, it was a first-class park with large sites and full recreational facilities, including swimming pools. Moreover, it was the only park close to and within commuting distance of San Francisco that had spaces for double-wide coaches sold by Suburban.

[*262] (c) Substantiality of Sales: The record is also revealing with respect to the third element **[**17]** of an illegal tie-in arrangement, that is the requisite of a substantial volume of sales in the tied product. A short summary of the pertaining evidence discloses that the sale of mobile homes was tied up as to 288 spaces out of 501. The data presented at the trial substantiate that appellant's rivals took full advantage of the illegal tying agreement. Out of the 253 sales effected in the park, 247 were made by appellant's competitors (113 by R & A, 62 by Instant, 51 by S & S, and 16 all others), and appellant was able to sell only 6 mobile homes out of the total of 253. Considering the circumstance that in the period in question the sales price of single-wide mobile homes ranged from $7,000 to $12,000, and the double-wides from $10,000 to $20,000, even taking a low average of $10,000 per coach, the amount of sales in the tied product exceeds $2,500,000. This volume of sales, of course, cannot be considered insubstantial or de minimis, especially in light of the case law which held that the sum of $60,800 was regarded to be a not insubstantial amount of commerce in *United States v. Loew's, Inc., supra, 371 U.S. 38, 49 [9 L.Ed.2d 11, 20]*, and likewise the sum of almost $200,000 was **[**18]** not looked upon as "paltry or 'insubstantial'" in *Fortner Enterprises v. U. S. Steel, supra, 394 U.S. 495, 502 [22 L.Ed.2d 495, 504]*.

(d) Proof of Damages: We are equally satisfied appellant provided sufficient proof that as a result of the illegal tying arrangement it suffered considerable loss by virtue of loss of profit. In this connection, it bears emphasis that ***HN11***[] in antitrust cases the common law rules of damages are not controlling. While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue (*Flintkote Company v. Lysfjord (9th Cir. 1957) 246 F.2d 368, 392)*. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." (*Bigelow v. RKO Radio Pictures (1946) 327 U.S. 251, 264 [90 L.Ed. 652, 660, 66 S.Ct. 574]*.) This is in line with the California **[**19]** authorities which emphasize that while the plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of the defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult to ascertain with precision (*Stott v. Johnston (1951) 36 Cal.2d 864, 875 [229 P.2d 348, 28 A.L.R.2d 580]*). On the contrary, the law only requires that some reasonable basis of computation be used and will allow damages so computed even if the result has been reached by way of approximation (*Allen v. Gardner (1954) 126 Cal.App.2d 335, 340 [272 P.2d 99]*). And where, as here, the operation of an established business was prevented or interrupted by the tort of the defendants, it has been held that the loss of prospective profits may be proven by the past volume of business and other provable data relevant to the probable future sales (*Grupe v. Glick (1945) 26 Cal.2d 680, 692 [160 P.2d 832]*; *Gainer v. Storck (1959) 169 Cal.App.2d 681, 687-688 [338 P.2d 195]*).

Appellant here established with reasonable certainty the required causal connection between respondents' wrongful conduct and its **[**20]** business loss suffered as a result of such conduct, and also provided sufficient relevant data upon which the extent of its lost profit may be ascertained by the jury by way of a reasonable estimate or approximation. To begin with, appellant introduced proof that as a consequence of the restrictive practices of respondents, its share in the mobile homes sales was drastically reduced in 1972. Thus, it was shown that while previously Suburban was one of the most successful mobile home dealers in the area capturing the lion's share of the market (90-95% of sales in northern San Mateo County and 50-60% of sales in the Pacific Skies Estate in Pacifica), it sold but a minimal **[*263]** 2.37 percent of mobile homes in the Franciscan in 1972. Moreover, appellant introduced concrete evidence as to individual losses suffered as a result of the oppressive sales policy of the respondents. The most notable of these instances were the loss of sale or potential sale to Bracato, Sinnard, Bishop, Ellis, Scott, Madrone, and Varni. Finally, Mr. Brayshaw, who was employed by Suburban as a salesman from 1971 to 1975, testified that as many as half a dozen prospects a week told him that they could not **[**21]** buy a mobile home from him for use in the Franciscan. If the aforesaid evidence is considered together with the testimony of Mr. Fischer, the president of Suburban, who explained that the net profit on a single-wide mobile home was about $1,500, and about $2,100 on a double-wide coach, it becomes clear that the jury was provided with a solid basis upon which to calculate or at least estimate the amount of damages incurred by the appellant.

Although the foregoing discussion leaves no doubt that appellant made out a prima facie case of an illegal per se tying arrangement which should have been submitted to the jury for proper consideration and resolution, respondents nonetheless insist that the granting of nonsuit was proper in the present case because: appellant failed to introduce evidence as to the relevant geographic market; an actionable tying arrangement requires that both the tying product and the tied product be sold or leased by the same entity; the proof of damages was inadequate; and appellant failed to introduce evidence to prove actual exercise of economic power--coercion. We find no merit in any of these contentions.

Respondents' first argument, that the delineation **[**22]** or proof of the relevant geographic market is a conditio sine qua non to the establishment of an actionable tying arrangement, flies directly in the face of well settled law. As pointed out earlier, the standard of illegality under the tying theory is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ." (*Northern Pac. R. Co. v. United States, supra, 356 U.S. at p. 6 [2 L.Ed.2d at p. 550*]). Consistently therewith, it has been amplified that "The requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie" (*Fortner Enterprises v. U.S. Steel, supra, 394 U.S. at p. 501 [22 L.Ed.2d at pp. 503-504*]); and that "Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power . . ., it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for **[**23]** the tying product and into the corollary problem of the sellers's percentage share in that market." (*United States v. Loew's, Inc., supra, 371 U.S. at p. 45, fn. 4 [9 L.Ed.2d at p. 18, fn. 4*].) (Italics added.) Indeed, ***HN12***[] the requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market (*Lessig v. Tidewater Oil Company, supra, 327 F.2d 459, 469)*.

Respondents' next contention is also mistaken. It has been established that an illegal tying arrangement does not require that one party or entity offer both the tying product and the tied product. Contrary to respondents' assertion, such violation ***HN13***[] may be found if the offeror of the tying product has an economic interest in the tied product, even though the latter is manufactured or otherwise produced by another party or entity.

The leading case dealing with that very issue is *Osborn v. Sinclair Refining Company (4th Cir. 1960) 286 F.2d 832*. In Osborn, defendant Sinclair, an oil refining company, entered into an agreement with Goodyear Tire and Rubber Company. Under the terms of the arrangement **[**24]** Sinclair agreed to sell and promote Goodyear tires, batteries and accessories through its filling station **[*264]** operators and in exchange Goodyear agreed to pay 5-10 percent commission to Sinclair on the Goodyear merchandise sold. In order to carry out the agreement, Sinclair imposed upon its filling station dealers the requirement that they purchase a certain quantity of Goodyear products and conditioned the continued sale of gasoline to them on the purchase of Goodyear merchandise. Osborn, a filling station operator who was terminated because of failing to purchase sufficient quantities of Goodyear tires, batteries and accessories, brought an antitrust suit against Sinclair, charging that the conduct in question constituted an unlawful tying arrangement under the Sherman Act. The court found for the plaintiff and held that the tying arrangement in question was illegal per se, because it involved a not insubstantial amount of commerce. As to the contention that the tying and tied products were not produced or sold by the same entity and therefore a crucial element of an illegal tie-in was lacking, the court had the following to say: "The perniciousness of the imposed tie-in **[**25]** is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power." (*Osborn v. Sinclair Refining Company, supra, pp. 839-840*, italics added.)

Osborn is on all fours with the case at bench. Similar to Sinclair, AMFAC, the owner of the tying product, exerted its coercive economic power to restrict the trade of mobile homes (the tied product) sold by third parties in return for extra benefit extorted from the latter parties. Consequently, what has been said in Osborn, is equally applicable to the present case.

We note in passing that *Crawford Transport Company v. Chrysler Corporation (6th Cir. 1964) 338 F.2d 934*, and *Nelligan v. Ford Motor Company (W.D.S.C. 1958) 161 F. Supp. 738*, upon which respondents primarily rely, **[**26]** are clearly distinguishable from Osborn. The crucial distinguishing factor is that unlike in Osborn (and the case at bench), the seller of the tying product did not receive direct benefit from the tying arrangement in either Crawford or Nelligan.

Respondents' third claim, that the evidence of loss produced by appellant was inadequate, has been fully discussed and answered in the previous chapter and requires no repeated elaboration here.

Respondents' fourth claim is that there was no evidence introduced to show that AMFAC utilized economic power to coerce an appreciable number of lessees of mobile home spaces to purchase mobile homes from the participating dealers. This contention is without merit. "***HN14***[] Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes." (*Moore v. Jas. H. Matthews & Co. (9th Cir. 1977) 550 F.2d 1207, 1217*.) As discussed previously in relation to the existence of a tying arrangement, the record makes it abundantly clear that many buyers had to accept the tied product and forego possibly desirable substitutes.

This brings us to two more unresolved questions. One is whether in the circumstances of the present case **[**27]** an unlawful tying arrangement can arise also under *section 16727*. [3] This question gains some **[*265]** significance because the burden of proving an illegal tying arrangement differs somewhat under *section 16720* and *section 16727*. ***HN15***[] Under *section 16727* the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under *section 16720* standard, both conditions must be met (*MDC Data Centers, Inc. v. International Bus. Mach. Corp. (E.D. Pa. 1972) 342 F. Supp. 502, 504)*.

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[3] ***HN16***[] *Section 16727* reads that "It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State." (Italics added.)

[28]** In addressing the merit of the issue, we agree with respondents that *section 16727* is based on section 3 of the Clayton Act (*15 U.S.C. § 14*), hence federal decisions interpreting section 3 of that act are applicable (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 315*). The federal cases, in turn, explain that the statutory word "commodities" in section 3 of the act obtains only to goods, wares, merchandise, machinery, supplies and other similar movable items which do not include land (*Baum v. Investors Diversified Services, Inc. (7th Cir. 1969) 409 F.2d 872, 875*; *United States v. Investors Diversified Services (D. Minn. 1951) 102 F. Supp. 645, 648)*. It is well to remember that in the case at bench the tying product is not a movable item but rather is land, more specifically, lease of land. It thus falls squarely within *N.W. Controls, Inc. v. Outboard Marine Corporation (D. Del. 1971) 333 F. Supp. 493, 500*, where the court held that "***HN17***[] If the tie does not involve a commodity but concerns land, services or credit, which do not fit the Clayton Act's language, it is governed by the Sherman Act and the plaintiff is required to bear the additional burden **[**29]** of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint." (Italics added.) *Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920*, cited by appellant, does not control the situation here. In Palsson, the word "commodity" was interpreted under *section 16720*, the equivalent of *section 1* of the Sherman Act, and as a consequence it did not cover *section 16727* which is governed by the Clayton Act and the case interpretation thereunder.

Turning to the last issue, we note appellant's contention that it is entitled to recover also under the "rule of reason" theory has been raised only as an alternative if we would find that the elements of an unlawful tie-in have not been established. Since we have concluded that appellant has made out a prima facie case of an actionable tying arrangement under *section 16720*, the complex issues raised in appellant's alternative argument need not be reached.

That portion of the judgment granting a nonsuit as to the tie-in cause of action is reversed; in all other respects the judgment is affirmed.

Taylor, P. J., and Miller, J., concurred.

Arnott v. American Oil Co.

United States Court of Appeals for the Eighth Circuit

June 16, 1979, Submitted ; October 24, 1979, Decided

No. 79-1150

Reporter

609 F.2d 873 *; 1979 U.S. App. LEXIS 10973 **; 1979-2 Trade Cas. (CCH) P62,967

George Arnott, Appellee, v. The American Oil Company, a corporation, Appellant.

Subsequent History: **[**1]** Rehearing and Rehearing En Banc Denied November 29, 1979.

Prior History: Appeal from the United States District Court for the District of South Dakota

Core Terms

lease, station, prices, franchise, dealer, damages, terminating, Oil, gasoline, franchise relationship, instructions, service station, renew, retail, lease agreement, district court, contends, products, carwash, parties, fiduciary duty, future profits, cancellation, price-fixing, directives, lessee, terms, good faith, misrepresentations, interrogatories

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Appeals, Standards of Review**

An appellate court views the evidence together with all reasonable inferences to be drawn therefrom in the light most favorable to the jury verdict.

Evidence > Admissibility > Circumstantial & Direct Evidence

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Evidence > Inferences & Presumptions > General Overview

HN2[] **Admissibility, Circumstantial & Direct Evidence**

Fraud, like other issues of fact, may be established by inferences arising from all the other facts and circumstances in evidence.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN3[] **Affirmative Defenses, Fraud & Misrepresentation**

Parol evidence is permitted when a contract is induced or procured by fraud.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Governments > Fiduciaries

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fiduciary Duties

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

HN4[] **Conveyances, Franchises**

A franchise relationship exists between a service station dealer and the oil company whose trademark the dealer is promoting. Inherent in a franchise relationship is a fiduciary duty.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Business & Corporate Law > Distributorships & Franchises > Trademark Licensing

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

HN5[] **Conveyances, Franchises**

A franchise is a license from the owner of a trademark which permits another to sell a product or service under the name or mark. The course of performance pursuant to the agreement between the parties is considered a strong indication of their relationship.

Business & Corporate Law > Distributorships & Franchises > General Overview

Commercial Law (UCC) > Leases (Article 2A) > Construction & Formation > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

HN6[] **Business & Corporate Law, Distributorships & Franchises**

A franchisee, unlike a tenant pursuing his own interests, builds the goodwill of his own business and the goodwill of the franchiser.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Commercial Law (UCC) > Leases (Article 2A) > Construction & Formation > General Overview

HN7[] **Distributorships & Franchises, Termination**

The franchise relationship imposes a duty upon franchisers not to act arbitrarily in terminating the franchise.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fiduciary Duties

Commercial Law (UCC) > Leases (Article 2A) > Construction & Formation > General Overview

HN8[] **Causes of Action, Fiduciary Duties**

The South Dakota Franchise Act, *S.D. Codified Laws § 37-5A-66(7)* (1977), prohibits unfair or inequitable terms or conditions in franchise agreements and unfair or inequitable practices by the franchiser.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fiduciary Duties

Governments > Fiduciaries

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

HN9[] **Causes of Action, Fiduciary Duties**

The franchiser and franchisee of a service station operation are involved in a fiduciary franchise relationship whereby the parties should act with good faith toward each other.

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

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Any resale price-fixing, whether by combination or agreement, is a per se violation *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN11[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A supplier may not use coercion on its retail outlets to achieve resale price maintenance. It matters not what the coercive device is.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

See *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Sherman Act, Scope

Price fixing is contrary to the policy of competition underlying the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN14[] Private Actions, Remedies

Going concern value and lost future profits are viable alternative measures of antitrust damages.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Trials > Jury Trials > Jury Deliberations

HN15[] Jury Trials, Jury Instructions

The duration of the period during which plaintiff might be expected to profit will vary from case to case; it is susceptible of no precise formulation, and must be left to the processes of the jury informed by the presentation of conflicting evidence. The court might properly instruct the jury that it may consider as one factor in its deliberations the length of time which plaintiff had been in business as of the time of defendant's anticompetitive actions; but the youth of a business, like the precise manner of its doing-in, will never alone be enough to justify severe restrictions upon the duration of damages.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

HN16[] Relief From Judgments, Motions for New Trials

The court may condition a new trial on remittitur if it feels strongly that the jury verdict is excessive. But it is arbitrary and improper to limit damages as a matter of law to the precise period of plaintiff's business operations if the reason for that limitation is either the means used to drive plaintiff out of business or the relatively short history of his business before its demise.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN17[] Jury Trials, Province of Court & Jury

The weight to be given to an expert witness is a jury matter.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Commercial Law (UCC) > ... > Application & Construction > Remedies > Damages

Civil Procedure > Remedies > Damages > General Overview

HN18[] Private Actions, Remedies

Punitive and treble damages cannot both be awarded for violation of the antitrust laws.

Civil Procedure > ... > Jury Trials > Verdicts > General Verdicts

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN19[] **Verdicts, General Verdicts**

The failure of a party to request any instructions or special interrogatories on damages or to make objection to the general verdict form results in a waiver of such objections on appeal. *Fed. R. Civ. P. 51*.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN20[] **Reviewability of Lower Court Decisions, Preservation for Review**

A party's failure to object or seek clarification when the verdicts were rendered waives objection to the form of the verdict.

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

HN21[] **Jury Instructions, Objections**

Any plain error exception to *Fed. R. Civ. P. 51* is confined to the exceptional case where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Counsel: Maurice R. Glover, Chicago, Ill., argued and Timothy J. Nimick, Woods, Fuller, Shultz & Smith, Sioux Falls, S. D., on brief, for appellant.

Michael F. Pieplow and Edwin E. Evans, Davenport, Evans, Hurwitz & Smith, Sioux Falls, S. D., for appellee.

Judges: Before HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

Opinion by: STEPHENSON

Opinion

[*876] Defendant-appellant, American Oil Company (Amoco), appeals from a judgment entered against it by the district court [1] upon a jury verdict of $ 100,000 (trebled by the court under the antitrust laws to $ 300,000 plus attorney fees and costs) and punitive damages of $ 25,000. Numerous issues are raised, including insufficiency of the evidence to create submissible jury issues on plaintiff's claims. We affirm on condition that plaintiff-appellee, George Arnott, file a remittitur of all damages exceeding $ 125,000 plus interest and costs.

[2]** This action involves the relationship between a major oil company, Amoco (often referred to in the record as Standard Oil), and George Arnott, one of its service station dealers. On August 6, 1973, Amoco terminated Arnott as a Standard Oil dealer by terminating his lease and evicting him from the service station. Arnott's complaint alleged, and the jury found in answer to special interrogatories accompanying the general verdict, that (1) Amoco was guilty of false and fraudulent representations in inducing Arnott to execute the service station lease agreement; [2] **[**3]** (2) Amoco breached the fiduciary duty owed to Arnott by terminating his lease without good cause and by not dealing with Arnott in good faith during the term of the lease agreement; (3) Amoco was guilty of a retail price-fixing combination in violation of the antitrust laws; and (4) Amoco breached its promise to pay certain legal fees and expenses in the amount of $ 393.75 incurred by Arnott in a state court action involving a suit brought by Amoco against Arnott and the former lessee of the service station in question. [3]

[*877] I. Facts.

The record when viewed most favorably to the jury verdict for Arnott discloses the following. In October 1971 Arnott was operating a Standard Oil station in Minneapolis, Minnesota, [4] when he was approached by Amoco's sales manager for the Sioux Falls district, Dick Lucas, about operating a Standard station at an interstate location in Sioux Falls, South Dakota. Arnott declined. He was again contacted by Lucas in late 1971 and, as a result, flew to Sioux Falls. Lucas showed Arnott projected profit figures on the service station which were considerably better than those from Arnott's Minneapolis station. Arnott agreed **[**4]** to make the change. He entered into a lease agreement dated February 18, 1972, for a one-year period. It was then a standard policy of Amoco to issue only one-year leases, but there was also evidence at the trial that these leases were routinely renewed on an annual basis if the dealer operated the station in a reasonable manner. Arnott testified that it was his understanding that as long as he operated the station in a reasonable manner and it was a profitable venture for himself and Standard Oil, he could have it for as long as he wanted, which was in accord with his experience as a Standard Oil dealer.

The lease required the service **[**5]** station to remain open twenty-four hours a day. There was no specific agreement that Amoco would supply any specified amount of gasoline to the station. The lease was later amended in certain details. At the time the lease was executed, Arnott was given a written Statement of Policy issued by Amoco which set out the dealer-company relationship. Arnott was familiar with it as it was read as a part of the dealer indoctrination schools which Arnott attended and was followed by Amoco at Arnott's prior Standard Oil stations.

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1 The Honorable Fred J. Nichol, Chief Judge, United States District Court for the District of South Dakota.

2 Arnott also claimed that during the operation of the lease agreement Amoco misrepresented the benefits to be received by Arnott from the installation of a carwash.

3 In instructing the jury the court stated: "This is not disputed by the plaintiff (sic)." No further reference is made to this $ 393.75 item until Amoco in its reply brief complains that the court elected not to charge the jury on this issue and thus the judgment should be reversed. Earlier in the trial proceedings Amoco's counsel indicated there was no dispute about this item. Under the circumstances we pretermit any further discussion of the same.

4 Prior thereto Arnott, after attending a two-week training school sponsored by Amoco, had operated Standard Oil stations at Lake Preston, Wessington Springs, and Huron, South Dakota, during the period 1960-67. He discontinued his dealership in 1967 to become a life insurance salesman. In 1970, after again attending a dealer training school, he opened the Minneapolis station.

The Statement of Policy contained several provisions which were repeatedly violated by Amoco employees. [5] The Policy provisions **[*878]** which the record discloses were violated by Amoco may be summarized as follows: (1) Arnott would be an independent businessman who would have the right to run his station free from coercion or pressure on the part of any company representative; (2) no company representative would bring any pressure to bear on Arnott if he chose to handle competitive brands of motor oils; (3) with respect to tires, batteries, and accessories, Arnott would have complete freedom to buy these products from whomever he chose; the company would **[**6]** not tolerate coercion, harassment, or improper pressure of any kind by its salesmen in the sale of these products; (4) Arnott would have the absolute right to set his own resale price with respect to all Standard Oil products, including gasoline, and would be free to display and promote all products as he saw fit; and (5) Arnott would not be pressured into participating in advertising, sales promotions, or merchandising programs sponsored by the company.

[7]** On several occasions when Arnott placed competitive brands on display along with Standard Oil products, he was instructed by Amoco to remove the same. On one occasion Arnott purchased and placed on display Goodyear tires. Amoco's highest ranking dealer representative in South Dakota, Jack Reutschler, told Arnott that he should return the Goodyear tires and display only Atlas tires (Standard's brand) if he wanted to continue to operate the station. Arnott returned the Goodyear tires and discontinued selling them. Furthermore, Arnott's purchase of Standard's motor oil from a local wholesale distributor was discontinued by the wholesaler on instructions of Amoco, thereby requiring Arnott to purchase motor oil directly from Amoco. Arnott was also required to purchase Green Stamps, which he did at a cost of $ 3,000. Amoco threatened nonrenewal of his lease if he refused to do so. During the time Arnott operated his station, he received telephone calls from Amoco representatives instructing him to raise or lower his retail gasoline prices. When he deviated from Amoco pricing directives, Arnott was threatened with nonrenewal of his lease.

In addition, the evidence discloses that **[**8]** during the course of the lease agreement Amoco misrepresented the benefits to be received by Arnott for the installation of a carwash. Arnott was persuaded to purchase a carwash from Amoco for $ 15,430. In turn, a lease rider effective June 1, 1972, was entered into whereby Arnott was to receive a minimum monthly rebate. On October 13, 1972, Amoco cancelled the carwash rider agreement and

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[5] Since the Statement of Policy contained several representations which Arnott claims were false and fraudulent and made with intent to deceive, which were relied upon by Arnott in entering into the lease agreement with Amoco, and which form the basis for his claim for damages as a result thereof, pertinent portions are set out as follows:

STATEMENT OF POLICY

Since we first began leasing service stations to independent dealers over 35 years ago, this company has been committed to a policy which recognizes that the dealers it serves are independent businessmen who have the right to run their stations free from coercion or improper pressure on the part of any Company representative. * * *.

FIRST, with respect to our gasoline, we believe every dealer must use his best efforts to promote their sale to the motorist. We believe every dealer should provide prompt and courteous service and just treatment to customers, hire adequate help, maintain reasonable hours of operation and keep the premises in a clean and attractive condition.

SECOND, with respect to motor oils, we expect you as a minimum to stock and display our line of oils, since most motorists who buy our gasolines also wish to purchase our motor oils. However, no Company representative may bring any pressure to bear on you if you also choose to handle some competitive brands.

THIRD, with respect to tires, batteries, and accessories, you have complete freedom to buy these products from whomever and in whatever quantities you choose. The Company will not tolerate coercion, harassment, or improper pressure of any kind by our salesmen in the sale of these products. However, because we believe our line of TBA offers you an unparalleled opportunity for additional profit, we expect our salesmen to call your attention to the merits of our products and try to sell them to you.

FOURTH, with respect to all products, you have an absolute right to set your own resale prices except in states where Standard Oil products are fair traded. You also are free to display and promote your products as you see fit. While we have developed a wide variety of advertising, sales promotion and merchandising programs which we believe will assist you in your sales efforts, you are free to reject them if you desire. We will, of course, give you our suggestions and advice on all of these matters based on our long experience in the business, but you alone must decide your own course of action.

presented Arnott with a new lease that substantially increased the amount of gallonage sales necessary before a rebate could be realized. This had the effect of reducing by one-half the monthly rental rebate paid to Arnott under the carwash agreement. In addition, the carwash installation necessitated the removal of a car hoist in one of the service bays. An Amoco representative stated that a new hoist compatible with the carwash would be installed. The new hoist was never received, and thus the station's capacity for mechanical work was reduced by half.

The difficulties Arnott had with Amoco over the misrepresentations made orally and those contained in the Statement of Policy and the carwash agreement described above took place during the first year Arnott operated the station. On one occasion **[**9]** a representative of Amoco suggested that Arnott move to a new location which was less desirable. Arnott refused to consider it.

Arnott signed a new lease agreement on December 8, 1972, effective February 19, 1973, for an additional one-year term. Arnott was not given a copy of the executed lease until June 1973. During the interim from February through May 1973 Arnott operated the station without a lease. He was advised by Amoco representatives that he was on probation and would not be given a lease unless he agreed to abide by the prices set by Amoco and to participate in their promotional programs. Arnott agreed **[*879]** to be cooperative in order to secure the lease renewal.

However, the problems continued. Amoco representatives visited the station twice a week. If matters were not handled to their satisfaction, Arnott was reminded that if he wanted to continue at his location, he would have to comply with Amoco's requirements.

The severe nationwide gas shortage which occurred in the spring of 1973 brought additional problems. On May 1, 1973, Amoco established an allocation program for each Standard Oil dealer. Arnott followed the allocation program and limited sales **[**10]** to customers. Nevertheless, he often exceeded his daily allocations and on several occasions ran out of gasoline.

Eventually Amoco's representative, Dick Lucas, suggested a program whereby Arnott was to place signs up in the daytime indicating that he was out of gasoline and then in the evening, when the service stations downtown would close, he was to remove the signs and sell gasoline. The purpose was to send motorists downtown in the daytime. Arnott refused because the costs were prohibitive. His main product was gasoline. To remain open during the daytime for oil changes and grease jobs was too costly.

During the last two weeks of his operation Arnott ran out of gasoline most evenings and eventually closed the station because it was not profitable to remain open. In addition, customers became very irate after pulling into the station only to find gasoline unavailable.

Arnott advised Amoco of his situation and that he was closing down from 10:00 p. m. to 6:00 a. m. However, Amoco advised Arnott that he was in violation of the lease in failing to maintain a 24-hour operation.

Arnott became frustrated, and on July 17, 1973, he signed a cancellation agreement to voluntarily **[**11]** leave the station. Later in the day he reconsidered his position and called an Amoco representative to rescind his consent to the cancellation. A few days later Amoco marketing representative, Clint Bucklin, told Arnott that if he cooperated with Amoco's policies, he could keep the station. The next day Bucklin advised Arnott that Bucklin apparently had acted without authority and that Arnott would be removed August 6, 1973. A formal letter to that effect dated July 26, 1973, was mailed to Arnott, who then retained counsel. Amoco was advised by letter that its August 6 takeover was being treated by Arnott as an involuntary cancellation of the lease. Arnott left the station August 6, 1973. On that date Amoco hand-delivered a letter to Arnott advising him that his lease was being cancelled effective September 5, 1973, because of violation of the 24-hour clause in the lease. Subsequently Amoco leased the station to J. K. Sadler, and Arnott sold his Standard Oil inventory and carwash to the new lessee. Additional facts disclosed by the record will be reviewed in connection with discussion of the issues raised by Amoco in this appeal.

II. Fraud and Deceit.

Amoco initially contends **[**12]** that there is no evidence of any misrepresentations, much less evidence of misrepresentations of a material fact; no evidence that the statements claimed to be false were knowingly false when made; and no evidence of an intent to defraud. These contentions have already been answered in our discussion of the facts above and require no further elaboration. ***HN1***[] We of course view the evidence together with all reasonable inferences to be drawn therefrom in the light most favorable to the jury verdict. After reviewing the record, we are inclined to agree with the statement made by the district court in denying Amoco's motion for a directed verdict:

> I must confess that I'm somewhat shocked with the manner in which the evidence shows that the Standard Oil Company undertook to negotiate the lease, and to try to, in its dealings with the dealer in connection with its lease, to completely frustrate the ***antitrust law***, and the decisions under it, in the manner in which they did this.
>
> First of all, they go and get this they negotiate this lease. They put as an addendum **[*880]** to the lease a receipt acknowledging that the lessee has received a copy of the policy statement of the **[**13]** Standard Oil. * * * And then they proceed to violate practically every single one of the paragraphs in the policy statement.

HN2[] Fraud, like other issues of fact, may be established by inferences arising from all the other facts and circumstances in evidence. *Aschoff v. Mobil Oil Corp., 261 N.W.2d 120, 124 (S.D.1977)*; *Funke v. Holland Furnace Co., 78 S.D. 374, 102 N.W.2d 668, 670 (1960)*. The record amply supports the jury finding, implicit in its verdict and answer to the pertinent interrogatories, that Amoco was guilty of misrepresentations of a material fact, that the misrepresentations were known to be false when made and were made with intent to defraud, and that Arnott relied thereon in entering into a lease agreement with Amoco.

Amoco further contends that in any event Arnott's reliance thereon did not proximately cause the loss of his station or any other loss because the initial lease had expired. The short answer is that Arnott, based on his previous experience operating Standard stations and on representations made by Amoco's Dick Lucas prior to Arnott's leaving Minneapolis and entering into the first Sioux Falls lease, was led to believe that he was entering into a dealership **[**14]** with excellent prospects for an extended period of time as long as he performed satisfactorily as a dealer. Under the circumstances, the jury could find that the mere fact that the initial lease had been amended to provide for the carwash installation and had later been renewed by a second one-year lease did not deprive Arnott of his anticipated long-term dealer relationship with Amoco at the new location.

Amoco's contention that the testimony regarding the alleged misrepresentations violated the parol evidence rule is not well taken. ***HN3***[] Such testimony is permitted when a contract is induced or procured by fraud. *Sabbagh v. Professional & Business Men's Life Ins. Co., 79 S.D. 615, 116 N.W.2d 513, 520 (1962)*.

Amoco additionally contends that even if the representations claimed to be fraudulent were fraudulent, they were made prior to the execution of the renewal lease, which was executed on December 8, 1972, for an additional one-year period, and that Arnott had full knowledge of such falsity when he executed the new lease and the amendments thereto concerning the carwash. Thus Arnott waived any right to sue for such alleged fraudulent representations; See *Taute v. Econo-Car Int'l, **[**15]** Inc., 414 F.2d 828 (9th Cir. 1969)*; *Commodity Credit Corp. v. Rosenberg Bros. & Co., 243 F.2d 504, 512* (9th Cir.), Cert. denied, *355 U.S. 837, 78 S. Ct. 62, 2 L. Ed. 2d 48 (1957)*; and Arnott is estopped from questioning the validity of the lease agreement and provisions therein. See *Schutterle v. Schutterle, 260 N.W.2d 341, 350 (S.D.1977)*. Moreover, Arnott entered into an accord and satisfaction with Amoco by the negotiation and execution of the lease rider agreements and acceptance of payments thereunder. S.D. Compiled Laws §§ 20-7-1, et seq. (1967).

The district court fully instructed the jury on the defenses urged by Amoco of waiver, estoppel, and accord and satisfaction. The instructions were proposed by Amoco. Each defense involved factual issues which were determined against Amoco by the jury. The record amply supports the jury's resolution of these issues. For example, it can hardly be said on this record that Arnott, with full knowledge of the fraud, asked for and received a material concession from Amoco. See *United Forest Prod. Co. v. Baxter, 452 F.2d 11 (8th Cir. 1971)*. The matter of the amount of damages proximately caused by Amoco's fraud and deceit will be discussed **[**16]** under "V. Damages," Infra.

III. Fiduciary Relationship.

Arnott alleged that Amoco breached the fiduciary duty owed to Arnott by terminating his lease without good cause and by not dealing with Arnott in good faith during the lease term. The court instructed the jury that a fiduciary relationship existed **[*881]** between the defendant and the plaintiff. [6] **[**17]** Amoco contends that the evidence does not support the existence of a fiduciary relationship and that the court erred in instructing that the relationship existed as a matter of law. Further, Amoco argues that it properly terminated Arnott's lease for failure to maintain a 24-hour operation as set out in the lease. [7]

[18]** Although the existence of a fiduciary relationship is a close question, the dealer-oil company relationship has been the subject of much recent litigation, and the current trend of authority recognizes that ***HN4***[] a franchise relationship exists between a service station dealer and the oil company whose trademark the dealer is promoting. Inherent in a franchise relationship is a fiduciary duty.

A New Jersey court ruled that a franchise existed between tenant-dealer Marinello and landlord Shell Oil Co. in *Shell Oil Co. v. Marinello, 120 N.J.Super. 357, 294 A.2d 253 (1972)*, *Aff'd, 63 N.J. 402, 307 A.2d 598 (1973)*, Cert. denied, *415 U.S. 920, 94 S. Ct. 1421, 39 L. Ed. 2d 475 (1974)*.

> The fact that Shell here asserts its rights as a landlord to terminate a lease is not the end of the inquiry. It is now recognized that a lease is simply a species of contract which happens to concern real estate, and we must determine under principles of contract law the construction of the document in question in a manner consistent with the true intent and purpose and the reasonable expectations of the parties as suggested not only by the contents of the instrument but the whole of the relationship that **[**19]** existed between them. * * *.
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> Furthermore, it should be apparent that we are not dealing here with a traditional landlord-tenant relationship but with what is essentially a form of commercial venture a franchise for the marketing of Shell's products, in which both parties have a common interest and profit from the activities of the other. Shell's interest in these premises is obviously more than the interest of a landlord, and Marinello's interest transcends that of a tenant his investment and very livelihood depend on his remaining within the good graces of Shell's local **[*882]** employees who, as the record here demonstrates, exercise final and absolute authority over his tenure as a Shell dealer.

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[6] (Y)ou are instructed that a fiduciary relationship existed between the defendant and the plaintiff. A fiduciary relationship is one founded on trust or confidence placed by one person in the integrity and fidelity of another person. Out of such a relation, the law requires that neither party exert undue influence or pressure upon the other, take selfish advantage of his trust or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of the other person involved.

[7] In this connection the district court further instructed the jury Inter alia :

If you find that the circumstances presented during the time period in question were such that the reason for maintaining a 24-hour operation could not be fulfilled, then you may consider that fact in deciding whether the plaintiff substantially performed his obligations under the terms of the lease, notwithstanding his failure to maintain a 24-hour operation.

You are instructed that under the laws of the State of South Dakota that the terms of the contract may be implied if manifested by the conduct of the parties. Therefore, if you should find that under all the facts and circumstances presented, that the defendant's conduct implied that it would supply plaintiff with sufficient quantities of gasoline and other petroleum products to enable the plaintiff to maintain a 24-hour operation, then you may also find that the defendant's failure to fulfill that implied condition would excuse the plaintiff's failure to maintain a 24-hour operation of the station.

You are instructed that under the laws of the State of South Dakota the failure of a party to perform under the terms of an agreement is excused when the party's performance is prevented by the act of the other party, or by the operation of law.

The district court further instructed as follows as to the essential elements which plaintiff must establish:

First, that the defendant terminated its lease with the plaintiff without good cause. In this regard, good cause is defined as the failure by plaintiff to substantially perform his obligations to the defendant under the terms of the lease;

Second, that as a direct and proximate result of the defendant's termination of the lease, the plaintiff suffered a loss; and

Third, the monetary amount of that loss.

Id. 294 A.2d at 261 (citations omitted). See *Amerada Hess Corp. v. Quinn, 143 N.J.Super. 237, 362 A.2d 1258 (1976)*.

More recently, the Pennsylvania Supreme Court determined in *Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978)*, that while the dealer and oil company were landlord and tenant, their lease and business practices indicated a franchise relationship. The court defined ***HN5***[] a franchise as a license from the owner of a trademark which permits **[**20]** another to sell a product or service under the name or mark. *Id. 390 A.2d at 740*, Quoting from *Piercing Pagoda, Inc. v. Hoffner, 465 Pa. 500, 351 A.2d 207, 211 (1976)*. Razumic purchased fuel and other products from Arco and resold them under the Arco trademark. Razumic was required to have his station open twenty-four hours a day, to maintain adequate and efficient attendants, and to allow Arco to inspect the station.

The course of performance pursuant to the agreement between the parties was considered a strong indication of their relationship. *Id. 390 A.2d at 741 n.6*. Because the facts showed the actual practice of a franchise relationship, the court did not feel it was significant that the service station lease had not specified a franchise relationship. In ruling that a franchise relationship existed, the court determined that "it is clear that Razumic was not pursuing solely his own business interests. Rather, Razumic conducted his business and sold his products in accordance with methods prescribed by Arco." *Id. 390 A.2d at 740*.

It is likewise clear that Arnott was not pursuing solely his own business interests in his relationship with Amoco. Arnott sold Amoco products **[**21]** under the Amoco trademark, was expected to remain open twenty-four hours a day, was responsible for hiring adequate help, and was subject to inspections from Amoco representatives. Further examples of Amoco's control are Amoco's pricing directives, Amoco's requirement that Arnott purchase Green Stamps, and Amoco's control over Arnott's product advertising as indicated by the forced return of the Goodyear tires. Obviously, a franchise relationship in which Arnott and Amoco had a common interest and profit in the activities of each other, and not the typical landlord-tenant relationship, existed.

HN6[] A franchisee, unlike a tenant pursuing his own interests, builds the goodwill of his own business and the goodwill of the franchiser. *Atlantic Richfield Co. v. Razumic, supra, 390 A.2d at 742*. This facet of the relationship has led to the recognition that ***HN7***[] the franchise relationship imposes a duty upon franchisers not to act arbitrarily in terminating the franchise.

> (A)n Arco dealer such as Razumic can justifiably expect that his time, effort, and other investments promoting the goodwill of Arco will not be destroyed as a result of Arco's arbitrary decision to terminate their franchise **[**22]** relationship. Consistent with these reasonable expectations, and Arco's obligation to deal with its franchisees in good faith and in a commercially reasonable manner, Arco cannot arbitrarily sever its franchise relationship with Razumic. A contrary conclusion would allow Arco to reap the benefits of its franchisees' efforts in promoting the goodwill of its name without regard for the franchisees' interests.

Id. 390 A.2d at 742 (footnote omitted). See *Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 437 P.2d 892 (1968)*; *Ashland Oil, Inc. v. Donahue, 159 W.Va. 463, 223 S.E.2d 433 (W.Va.1976)*; Brown, Franchising A Fiduciary Relationship, 49 Tex.L.Rev. 650 (1970-71).

In *Shell Oil Co. v. Marinello, supra, 294 A.2d at 262, 263*, the court ruled that public policy required a term to be implied in the service station lease that the lessor cannot refuse to renew the lease without good cause. The court stated:

> Surely no person would make the kind of investment in money, time and effort as did Marinello without the reasonable expectation that if he substantially performed his obligations to Shell, the latter would in turn continue to renew his lease **[*883]** and dealership. **[**23]** He was, by virtue of Shell's dominant position in their relationship and the legal structure of the agreements whose terms he could not vary, compelled to rely upon Shell's good faith in living up to these expectations.

Id. 294 A.2d at 262.

Further indication of the fiduciary nature of a franchise relationship is found in the recent surge of general franchise legislation. As of May 1, 1977, legislation under which franchisers are prohibited from terminating franchises prior to the end of their terms without good cause, are required to make payments for goodwill if franchises are terminated or not renewed at the end of their term, or are prohibited from failing to renew franchises at the expiration of their terms without good cause has been adopted in twelve states and Puerto Rico. Baird, Hay & Bailey, Government Regulation of Real Estate Franchising, 112 Real Prop., Prob. & Tr. J. 580, 594 (1977). Congress has recently enacted legislation specifically regulating the relationship between service station dealers and their franchisers in the Petroleum Marketing Practices Act, *15 U.S.C. § 2801, Et seq. (1978)*. "Congress sought to remedy a situation which had led to "numerous **[**24]** complaints by franchisees of unfair terminations or non-renewals of their franchises by franchisers for arbitrary and even discriminatory reasons.' " *Saad v. Shell Oil Co., 460 F. Supp. 114, 115 (E.D.Mich.1978)*, Quoting from S.R. 95-731 at 17. The Act prohibits the franchiser from terminating or failing to renew a franchise relationship except under specific conditions and for specific grounds. *Frisard v. Texaco, Inc., 460 F. Supp. 1094, 1097 (E.D.La.1978)*.

South Dakota, in accord with this modern trend, enacted ***HN8***[] the South Dakota Franchise Act, S.D. Compiled Laws, ch. 37-5A (1977) in 1974. S.D. Compiled Laws *§ 37-5A-66(7)* (1977) prohibits unfair or inequitable terms or conditions in franchise agreements and unfair or inequitable practices by the franchiser. Although this statute is not controlling since the Arnott lease agreement was initiated in 1973. It is relevant in determining South Dakota's position regarding franchise terminations. In both *Shell Oil Co. v. Marinello, supra, 294 A.2d at 263*, and *Atlantic Richfield Co. v. Razumic, supra, 390 A.2d at 743*, the courts' decisions relied on the public policy exemplified by the state statutes though the statutes were not controlling **[**25]** because they were enacted after the parties had established their franchise relationships. The statutes were viewed as reinforcing the obligations inherent in a franchise relationship. The South Dakota statute indicates that in South Dakota unfair or inequitable practices by a franchiser will not be tolerated. South Dakota law therefore indicates that ***HN9***[] the franchiser and franchisee of a service station operation are involved in a fiduciary franchise relationship whereby the parties should act with good faith toward each other. Judge Nichol, during an informal discussion of Amoco's motion for a directed verdict, indicated it was his view that South Dakota, in enacting the 1974 Franchise Act, "was codifying what was really the common law in South Dakota, anyway." It was the court's opinion that, in light of Amoco's superior position in dictating the terms of the lease agreement, the relationship of the parties was a matter of law. [8] We give great weight to the district court's view of state law. *American Motorists Ins. Co. v. Samson, 596 F.2d 804, 807 (8th Cir. 1979)*; *Gatzemeyer v. Vogel, 544 F.2d 988, 992 (8th Cir. 1976)*.

[26] [*884]** In light of the undisputed facts in this case, it is our view that the district court did not err in instructing that a fiduciary relationship existed between the parties and in instructing that the law requires that neither party exert undue influence or pressure upon the other. See note 6 Supra. In any event, when the instructions on breach of fiduciary duty are considered as a whole, error, if any, was harmless. See note 7 Supra.

We are satisfied that the evidence amply supports the jury's finding that Amoco breached its "fiduciary" duty of good faith and fair dealing with Arnott in terminating its lease agreement with Arnott without good cause and that as a direct and proximate result of the termination Arnott suffered damages.

IV. Violation of the Antitrust Laws.

Arnott charged that during the time he operated his service station, various Amoco representatives instructed him to raise or to lower his retail gas prices to specified levels at specified times; that when he did attempt to vary his retail

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[8] It is true, as Amoco contends, that the court's instruction was taken from *Mobil Oil Corp. v. Rubenfeld, 72 Misc.2d 392, 339 N.Y.S.2d 623 (N.Y.City Civ.Ct.1972)*, a case in which the determination that a fiduciary relationship existed between the dealer and the oil company was reversed on appeal. In reversing, however, the court noted that the New York legislature had passed a franchise statute, but the bill was vetoed by the governor and did not become law. The court concluded that New York, therefore, had negated any fiduciary policy of termination only for cause by failing to enact the statute. *Mobil Oil Corp. v. Rubenfeld, 48 A.D.2d 428, 370 N.Y.S.2d 943, 949 (Sup.Ct.1975)*. This is plainly distinguishable from the instant case due to South Dakota's Franchise Act.

gasoline prices from those specified by Amoco, he was threatened with cancellation or nonrenewal of his short-term station lease; that as a result of Amoco's price-fixing **[**27]** activities he lost profits on gasoline sales during the term of his lease; and that his lease was cancelled because, among other reasons, he failed to follow the pricing directives of Amoco representatives, thereby causing him loss of his business and loss of future profits.

Amoco denied that it violated any antitrust laws or that it attempted to infringe upon or restrict free trade or fix prices to restrain competition or otherwise. By way of affirmative defense, Amoco alleged that Arnott made his own judgment regarding operation of the station; that if there were any representations made in connection with gasoline prices, Arnott, by renewal of his lease and riders thereto, acquiesced in such conduct and cannot now be heard to complain; and that the lease itself gave Amoco the absolute right to terminate the same on any material violation thereof, which it contends occurred when Arnott failed to operate said station twenty-four hours a day, seven days a week, as specified in the lease.

Amoco contends that there was insufficient evidence to create a submissible jury issue on price-fixing. We disagree. Although there were conflicts in the testimony of other dealers as to whether **[**28]** Amoco's calls regarding retail prices for gasoline were merely suggestions, there was sufficient evidence upon which a jury could find that retail prices were dictated by Amoco. For example, Mrs. Bill Pasco testified that she and her husband operated a Standard station in the same general area during the same period and that they would receive calls from Amoco representatives stating what price should be posted. She added, "I would say it was not a suggested price." If they deviated, "we would be checked, and my husband, he would have conversation with them. * * * We would take and put our prices where they had stated." Similarly, Greg White, who operated a Standard station in Sioux Falls during the relevant period, testified that representatives of Amoco would call, stating "your cost is this, and your selling price is this." At times when he deviated, he received calls from Standard representatives: "That you know, we should fall in line with other dealers. * * * they'd remind you next February your lease is coming up."

Arnott testified that representatives of Amoco would call and tell him what the retail price was to be, and when he failed to comply, he would receive further **[**29]** calls advising him that he was not in compliance; that his second one-year lease was withheld during February-May 1973 and he was placed on probation until he agreed to abide by the prices set by Amoco; and that a couple of days after Arnott in frustration signed a mutual cancellation agreement and then rescinded the same, he was advised by an Amoco representative that he could keep the station if he cooperated with resale pricing and other directives. Shortly thereafter, by letter dated August 6, 1973, Amoco **[*885]** notified Arnott that it was cancelling his lease effective September 5, 1973, for failure to keep the station open for operation twenty-four hours a day. Arnott's testimony with respect to coercion by Amoco's representatives in connection with the fixing of the retail price of gasoline was also corroborated by the testimony of former employees. The witnesses generally testified in terms of Amoco "fixing prices"; one witness described Arnott's price as usually being "one cent higher."

HN10[] Any resale price-fixing, whether by combination or agreement, is a per se violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*. [9] In *Albrecht v. Herald Co., 390 U.S. 145, 88* ***[**30]*** *S. Ct. 869, 19 L. Ed. 2d 998 (1968)*, the Supreme Court noted that "agreements to fix maximum prices "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' " *Id. at 152, 88 S. Ct. at 873*, Quoting from *Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*. Furthermore, ***HN11***[] "a supplier may not use coercion on its retail outlets to achieve resale price maintenance. * * * (I)t matters not what the coercive device is." *Simpson v. Union Oil Co., 377 U.S. 13, 17, 84 S. Ct. 1051, 1054, 12 L. Ed. 2d 98 (1964)*.

In *United States v. McKesson & Robbins, 351 U.S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 (1956)*, the Supreme Court emphasized:

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[9] *15 U.S.C. § 1* reads in part: ***HN12***[] "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal(.)"

> It has been held too often to require elaboration now that *HN13*[] price fixing is **[**31]** contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.

Id. at 309-10, 76 S. Ct. at 940 (footnotes omitted).

In *Albrecht v. Herald Co., supra, 390 U.S. at 149, 88* S. Ct. (869) at 871, the Supreme Court in discussing *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, observed: "The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers."

In the instant case there is evidence from which the jury could find that Arnott and other dealers were forced by means of threats and other **[**32]** coercive tactics to set gasoline retail prices at prices fixed by Amoco. Amoco's threat not to renew the annual lease was enough to make the dealers toe the line. In this context the suggested price became the required price. See *Lehrman v. Gulf Oil Corp., 464 F.2d 26, 37-41* (5th Cir.), Cert. denied, *409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972)*; *Phillips v. Crown Central Petroleum Corp., 395 F. Supp. 735, 760-64 (D.Md.1975)*.

The jury could find from the evidence in the case that Amoco's actions constituted an unlawful combination under either of two theories: (1) That a combination existed between Amoco and Arnott at those times he complied, even though unwillingly, with Amoco's pricing directives; and (2) that Amoco had combined with other dealers who acquiesced in the enforced pricing policy. *Albrecht v. Herald Co., Supra, 390 U.S. at 150 n. 6, 88 S. Ct. 869*. We are satisfied that the evidence supports the jury finding of price-fixing in violation of the Sherman Act.

Amoco further urges that Arnott failed to show a causal connection between the alleged unlawful price-fixing combination and the termination of his lease. We cannot agree. The evidence discloses that **[**33]** a **[*886]** representative of Amoco told Arnott that he could keep the station if he were more agreeable in adhering to Amoco's pricing policies. It is also noted that other dealers were allowed to reduce their hours of operation during the gasoline shortage. The jury could infer that Arnott's failure to follow Amoco's pricing directives was the proximate cause of the termination of his lease and subsequent loss of income as a result thereof.

V. Damages.

Initially Amoco contends that Arnott has failed to establish the fact of damage resulting from unlawful acts on the part of Amoco. The fact of damage arising from Amoco's price-fixing activities has been discussed above. Arnott's claim for damages arising out of his contention that Amoco fraudulently induced him to enter into the lease agreement is also based on wrongful termination of the lease. He testified that he sold his home and his business in Minneapolis and acquired the dealership in Sioux Falls upon the representations of Amoco that as long as he operated the service station in a reasonable manner and it was a profitable venture for himself and Standard Oil, he could continue to operate the station. The fact of **[**34]** damage is Arnott's loss of a profitable business caused by Amoco's wrongful termination of the lease.

VI. Amount of Damages.

Arnott's claim for damages on all three complaints of Amoco's (1) fraudulent misrepresentations in inducing him to enter into the lease agreement, (2) breach of fiduciary duty, and (3) violation of the antitrust laws is based on loss of future profits. In this connection Arnott offered the expert testimony of Dr. Dennis Johnson, Professor of Economics at the University of South Dakota. Basically Dr. Johnson computed Arnott's average income with the Standard station during the years 1972-73 and compared the same with Arnott's average income without the station in 1971 and 1974-77. The figures were obtained from Arnott's income tax returns. After computing the difference of $ 11,886, Dr. Johnson multiplied that figure by Arnott's work life expectancy from the date the lease was terminated, with an allowance for productivity increase, and reduced it to its present value of $ 318,622. [10] Johnson used adjusted gross income in making his computations.

[35]** Amoco contends that the expert's projection of loss of income was speculative and completely erroneous because Arnott had a nonrenewable one-year lease which by its terms would expire February 18, 1974; further, that the proper measure of damages is the going concern value of a destroyed business. Amoco relies on *Albrecht v. Herald Co., 452 F.2d 124, 129-31 (8th Cir. 1971)*, for the proposition that there can be no recovery for loss of future profits as such; such profits may be considered only for purposes of determining lost value of business by using the capitalized profit method of valuation. The difficulty with Amoco's analysis of the Albrecht case is that it overlooks the fact that the district court in Albrecht permitted the jury to make an award based on the difference between the fair market value at the time of sale and the actual sale price received, Plus the loss of future profits. *Albrecht v. Herald Co., 321 F. Supp. 99 (E.D.Mo.1970)*, *Modified, 452 F.2d 124 (8th Cir. 1971)*. In reversing the district court, this court held that it was improper to permit a plaintiff damaged by an antitrust violation to recover both the value of the business as a going concern at the time **[**36]** of the damage and future profits of that business after the time of the damage. Future profit potential is taken into consideration in valuing the business as a going concern.

In the instant case it must be acknowledged that Arnott cannot sell his business for the fair market value and also recover future profits. However, the record demonstrates that Arnott's sale of his inventory to the new lessee selected by Amoco was not a willing buyer-willing seller transaction. Under Amoco's supervision, **[*887]** Arnott sold his Standard Oil inventory to the new lessee, a former Standard Oil salesman from Chamberlain, South Dakota, Jay Sadler. Arnott's initial investment in February 1972 was $ 27,722.14, and he sold the inventory to Sadler for $ 30,638.05. The jury could infer from all of the circumstances that it was a forced sale with no allowance for goodwill or the value of a going business and therefore that Arnott had not received the fair market value of his business.

In *Albrecht v. Herald Co., supra, 452 F.2d at 128-29*, the court discussed numerous cases in which future profits were allowed and used as a method of calculating the damage to the value of the business involved **[**37]** because no other reliable method of valuing the business was presented. [11] In *Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974)*, Cert. denied, *420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975)*, the court recognized that ***HN14***[↑] going concern value and lost future profits are viable alternative measures of antitrust damages.

> Clearly, going concern value and lost future profits are each viable alternative measures of antitrust damages. Future profits cannot be condemned as inordinately more speculative **[**38]** than the going concern value since the former is a crucial component of the latter. In addition going concern or goodwill value may present difficult problems of proof if the lessor of a particular station places restrictive conditions on the transfer of the lease. Finally, future profits accompanied by an award for any decline in asset values will often more fully compensate a businessman by measuring his lost earnings, not just what it is worth to someone else to reach for those earnings.

Id. at 663-64 (footnotes omitted). See *Lehrman v. Gulf Oil Corp., 464 F.2d 26, 43-44* (5th Cir.), Cert. denied, *409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972)*.

Amoco argues that the short-term nature of the lease limits future damages. However, this ignores the evidence from which the jury could properly infer Arnott's long-term expectations, based on future profit projections related to

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[10] The jury's award of actual damages was $ 100,000.

[11] Cases discussed were *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)***; *Osborn v. Sinclair Ref. Co., 324 F.2d 566 (4th Cir. 1963)*; *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959)*, Cert. denied, ***363 U.S. 843, 80 S. Ct. 1608, 4 L. Ed. 2d 1727 (1960)***; and *Twentieth Century Fox-Film Corp. v. Brookside Theatre Corp., 194 F.2d 846* (8th Cir.), Cert. denied, ***343 U.S. 942, 72 S. Ct. 1035, 96 L. Ed. 1348 (1952)***.

him prior to execution of the first lease and the custom and practice of long-term renewals known to Arnott through his prior experience with Amoco. The trial court instructed the jury that it should consider the terms and conditions of the lease and all other testimony concerning renewals. We **[**39]** cannot say the evidence does not support a finding that Amoco's actions indicated a long-term intention or fraudulent misrepresentation of such an intention.

There was a factual dispute concerning the duration and the reasonableness of Arnott's expectations. As stated in *Lehrman v. Gulf Oil Corp., supra, 464 F.2d at 47*:

> ***HN15***[] The duration of the period during which the plaintiff might be expected to profit will vary from case to case; it is susceptible of no precise formulation, and must be left to the processes of the jury informed by the presentation of conflicting evidence. Of course, the court might properly instruct the jury that it may consider as one factor in its deliberations the length of time which the plaintiff had been in business as of the time of the defendant's anticompetitive actions; but the youth of a business, like the precise manner of its doing-in, will never alone be enough to justify severe restrictions upon the duration of damages. ***HN16***[] The court may condition a new trial on remittitur if it feels strongly that the jury verdict is excessive. But it is arbitrary and improper to limit damages as a matter of law to the precise period of the plaintiff's business **[**40]** operations if the reason for that limitation is either the means used to drive the plaintiff out of business or the relatively short history of his business before its demise.

[*888] Finally, with respect to the damage issue, Amoco contends that Dr. Johnson was not qualified to testify as an expert witness. The contention is without merit and requires little comment. The thrust of Amoco's contentions is a rehash of its argument that the fact that the lease provided for a one-year term is controlling and therefore computations with respect to loss of future profits should not have been admitted. Dr. Johnson made computations with respect to Arnott's work life expectancy and loss of income and reduced the same to present value. ***HN17***[] The weight to be given thereto was a jury matter. We find no abuse of discretion by the trial court in admitting such testimony for whatever assistance it might give to the jury in weighing the evidence with respect to damages. Cf. *Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856 (8th Cir. 1975)*.

VII. Instructions.

Appellant makes the broad allegation that the court's instructions were basically erroneous and supports this allegation with a lengthy **[**41]** enumeration of alleged errors in the instructions themselves and in the court's failure to give proposed instructions. In effect, appellant is merely repeating the argument that the evidence offered did not create a submissible case. We deem it sufficient to say that we have reviewed the instructions in detail and, when considered as a whole, we are satisfied that the issues were properly submitted to the jury.

VIII. Verdict Ambiguity.

The jury returned a general verdict in favor of Arnott and against Amoco in the sum of $ 100,000 actual or compensatory damages and punitive and exemplary damages of $ 25,000. The jury further answered special interrogatories with respect to liability only against Amoco:

> Did you find Defendant American Oil Company liable based on:

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The district court trebled the $ 100,000 actual or compensatory damages in view of the jury's finding of liability under the antitrust laws.

Amoco contends that the verdict is ambiguous **[**42]** and that the court must speculate as to its meaning; there is no way of determining what portion of the lump sum damages was allotted to each item; it cannot be assumed that $ 100,000 was properly attributable to the antitrust claim; the court erred in trebling the award; and therefore a new trial must be ordered. See *Rea v. Ford Motor Co., 497 F.2d 577, 579* (3d Cir.), Cert. denied, *419 U.S. 868, 95 S.*

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[12] Attorney fees in state court action were conceded not to be in dispute, so there will be no further discussion thereof. See n. 3 Supra.

Ct. 126, 42 L. Ed. 2d 106 (1974). Furthermore, the court awarded treble damages in the amount of $ 300,000 and allowed the punitive damages of $ 25,000 to stand, thus making a total award of $ 325,000. ***HN18***[] Punitive and treble damages cannot both be awarded for violation of the antitrust laws. *Hansen Packing Co. v. Armour Co., 16 F. Supp. 784, 788 (S.D.N.Y. 1936)*.

Arnott argues that the jury found for him on all three counts [13] submitted to it and that the sole evidence of damages offered was the same on all three counts loss of future profits. Arnott also points out that prior to making the record on instructions, Amoco asked for interrogatories on the issues of liability, which were granted, and that the trial court inquired of Amoco counsel whether they cared to propose any interrogatories **[**43]** on damages, which they did not. We cannot consider the latter argument because the inquiry and response were not made on the record. However, counsel for Amoco does concede, and the record indicates, that no objection was made by Amoco to the verdict form except the general objection that there were no **[*889]** submissible jury issues. Under the circumstances ***HN19***[] the failure of Amoco to request any instructions or special interrogatories on damages or to make objection to the general verdict form results in a waiver of such objections on appeal. *Fed.R.Civ.P. 51*; *Missouri Pac. R.R. v. Star City Gravel, 592 F.2d 455 (8th Cir. 1979)*; See *Richardson v. Communications Workers, 486 F.2d 801, 804-05 (8th Cir. 1973)*. ***HN20***[] Amoco also failed to object or seek clarification when the verdicts were rendered [14] **[**44]** and therefore waived objection to the form of the verdict. See Tennessee *Consol. Coal Co. v. United Mine Workers, 416 F.2d 1192, 1200-1201 (6th Cir. 1969)*, Cert. denied, *397 U.S. 964, 90 S. Ct. 999, 25 L. Ed. 2d 256 (1970)*.

It is our task to determine if it was plain error for the court not to instruct the jury with respect to awarding damages separately as to each count and not to submit interrogatories or verdict forms as to the amount of damages found on each count. ***HN21***[] Any plain error exception to *Fed.R.Civ.P. 51* is " "confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " 2 Barron and Holtzoff, Federal Practice and Procedure 475 (1961 ed.), Quoted in *Horace v. St. Louis Southwestern R.R., 489 F.2d 632, 634 (8th Cir. 1974)*.

We are persuaded that the failure of the trial court to submit verdict forms or interrogatories on each theory of recovery prevented it from trebling the $ 100,000 actual damages awarded in the general verdict. It would be purely speculative to assume that the entire general verdict of $ 100,000 was awarded as damages resulting from violation of the antitrust laws. We are, however, satisfied that the evidence amply supports an award of $ 100,000 actual and compensatory damages on any of the three counts of (1) false and fraudulent representations, (2) breach of fiduciary duty, and (3) violation **[**45]** of the antitrust laws. [15] We are also persuaded that the jury's award to Arnott and against Amoco of punitive and exemplary damages in the sum of $ 25,000 is supported by the record.

Upon condition that appellee George Arnott file a remittitur within thirty days hereof of that portion of the judgment in excess of $ 125,000, plus interest and costs from the date judgment was entered herein, the judgment is affirmed. Otherwise this cause is remanded for a new trial.

Affirmed on condition that a remittitur be filed.

Dissent by: BRIGHT

Dissent

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[13] See n. 12 Supra.

[14] Counsel for Amoco was present when the jury returned its verdicts and in fact requested that each juror be individually polled on each and every interrogatory and verdict.

[15] Although not raised by the parties, we suggest that if a new trial occurs, the better practice is to omit from the jury instructions any reference to the trebling of damages in connection with the recovery of damages under the antitrust laws. See Devitt & Blackmar, 3 Federal Practice and Instructions § 90.39 (3d ed. 1977).

BRIGHT, Circuit Judge, concurring and dissenting:

I concur in the result reached by the majority, but only because I believe that substantial evidence **[**46]** in the record supports the jury verdict on the claim of fraud and because I believe that the payment of the suggested remittitur would constitute a reasonable resolution of this litigation. [1] I do not believe that, as a matter of law, a fiduciary relationship existed between the parties in this case, nor do I believe that the evidence demonstrates a violation of the antitrust laws. Because the majority's reasoning on those issues appears to me to be in error and because this case may be retried, I set forth my views in dissent.

[*890] I. The Relationship Between the Parties.

The district court twice **[**47]** instructed the jury that, as a matter of law, a fiduciary relationship existed between Arnott and Amoco, requiring Amoco to act for itself only with utmost good faith and the full knowledge and consent of Arnott. These strictures, though appropriate in the case of a trustee, should not be applied to a commercial lessor. Rather, the lessor should be held to the rules governing contracts in general. It is true that a franchiser might have other duties. But only if the evidence shows a relationship between lessor and lessee extending significantly into other areas is it necessary or desirable to characterize their arrangement as a franchise. Even then one must determine which of the full gamut of fiduciary responsibilities should be required of the franchiser. See *Eaton, Yale & Towne, Inc. v. Sherman Industrial Equip. Co., 316 F. Supp. 435, 445 (E.D. Mo.1970)*. In my view both the district court and the majority erred in deciding this matter; in fact, South Dakota law does not justify the conclusion they reach.

The majority acknowledges (Ante, at 883 n. 8) that Judge Nichol's instruction on fiduciary duties was based on a New York case that was later reversed. The majority maintains, **[**48]** however, that the instruction properly reflected South Dakota law because of the subsequent enactment there of a comprehensive franchise statute, S.D. Compiled Laws Ann. ch. 37-5A. The majority quotes Judge Nichol as expressly construing that franchise statute as a codification of the common law of South Dakota. Ante, at 883-884. I do not so read the record. [2]

[49]** The South Dakota franchise law contains detailed registration and public disclosure provisions akin to those found in the Securities Act of 1933, *15 U.S.C. §§ 77a-77aa (1976)*. This scheme of franchise regulation doubtless represents a substantial departure from the common law of South Dakota. But even if the franchise statute reflected existing common law standards applicable to the lease challenged here, the district court's instructions would remain unjustified. The statute merely enjoins unfair or inequitable practices. S.D. Compiled Laws Ann. §§ 37-5A-51 and 37-5A-66(7). It does not establish a fiduciary relationship between franchiser and franchisee or impose a standard of utmost good faith.

The cases cited by the majority go no further than the South Dakota statute. *Shell Oil Co. v. Marinello, 120 N.J.Super. 357, 294 A.2d 253 (1972)*, *Aff'd, 63 N.J. 402, 307 A.2d 598 (1973)*, Cert. denied, *415 U.S. 920, 94 S. Ct. 1421, 39 L. Ed. 2d 475 (1974)*, nowhere mentions the concept of a fiduciary relationship. Rather, the court there simply granted dealer Marinello's prayer for contract reformation by inferring a contractual term that Shell could

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[1] The appellant's objection that the proof of damages offered by the appellee was speculative has merit, but it does not appear that appellant objected to some of the evidence now questioned. Moreover, the jury quite obviously did not accept the calculations of plaintiff's expert. Under these circumstances, I agree with the majority that the jury award may stand if the appellee accepts the remittitur.

[2] In the passage relied on by the majority, plaintiff's counsel was attempting to explain the New Jersey Superior Court's interpretation of that state's franchise statute in *Shell Oil Co. v. Marinello, 120 N.J.Super. 357, 294 A.2d 253 (1972)*, *Aff'd, 63 N.J. 402, 307 A.2d 598 (1973)*, Cert. denied, ***415 U.S. 920, 94 S. Ct. 1421, 39 L. Ed. 2d 475 (1974)***. Judge Nichol interrupted to observe, "In other words, they were codifying the common law." Plaintiff's counsel replied, "That's exactly right." Judge Nichol then said, "Just as Maybe South Dakota did when it adopted the Franchise Act, was codifying what was really the law in South Dakota anyway." (Emphasis added.) Plaintiff's counsel responded, "That's exactly what the New Jersey Court said."

refuse to renew his franchise (comprising **[**50]** both a lease and a multifaceted dealer agreement) only for good cause. *Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736, 743 (1978)*, is to the same effect. Not only do these cases fail to state a general principle of fiduciary duty, but they are also readily distinguishable on their facts from the case at hand. Here Arnott breached the terms of his lease agreement by failing to stay open twenty-four hours a day; in terminating his lease, Amoco was proceeding under a clause permitting termination for cause. [3]

[*891] The parties in this case entered **[**51]** into a business relationship, not a fiduciary relationship. Each party served the interests of the other, but each also quite properly sought its own interests. The district court was unwilling to find the terms of their agreement unconscionable. Cf. Shell Oil Co. v. Marinello, supra, 307 A.2d at 602-03 (striking the disputed termination provision as unconscionable and contrary to public policy). I think that it was unnecessary to go beyond this conclusion, and I believe the court committed error when, on the facts of this case, it instructed the jury that a strict fiduciary relationship existed between Arnott and Amoco. [4]

II. The Antitrust Claim.

The majority concludes that Amoco combined to fix vertical prices, **[**52]** a Per se violation of *section 1* of the Sherman Act, *15 U.S.C. § 1 (1976)*. [5] Having reviewed the record, I believe that there is insufficient evidence to support this conclusion. Specifically, I find no proof of a combination or conspiracy in this case; the contract between Arnott and Amoco was admittedly innocuous. My reading of the record is supported by Judge Nichol's observation at the close of plaintiff's case: "I don't see any evidence of conspiracy or combination in this case * * * (.) " Unlike Judge Nichol, I believe this implicit finding of unilateral activity vitiates Arnott's antitrust claim. See *Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 (8th Cir. 1976)*, Cert. denied, *433 U.S. 914, 97 S. Ct. 2986, 53 L. Ed. 2d 1100 (1977)*.

The record in this case reflects that Arnott usually posted **[**53]** his retail gasoline prices a penny or two above those suggested by Amoco. Such deviations led to "coffee" with Amoco representatives, but no change. In the only direct incident regarding prices recalled by Arnott or his employees, Dick Lucas, field sales manager for Amoco, refused one day to purchase gas from Arnott because he thought it was too expensive. Arnott let his prices stand. [6]

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[3] The evident purpose of the statutory and common law termination requirements * * * is the protection of franchisees who have conscientiously striven to carry out their obligations under the franchise agreement. They were not intended to prevent the severance of those who deliberately disregard reasonable requirements contained in their contract with the franchiser. (*Amerada Hess Corp. v. Quinn, 143 N.J.Super. 237, 362 A.2d 1258, 1267 (1976)*.)

[4] This error was not made harmless by the context in which it occurred, as the majority suggests. Ante, at 884. The disputed instruction was repeated by the court without benefit of context when, after two hours of deliberations, the jury returned with the question, "Define fiduciary duty."

[5] *15 U.S.C. § 1* provides in pertinent part: "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, * * * is hereby declared to be illegal(.)"

[6] If I were writing on a clean slate with only the rule of reason for guidance, See *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*, I would be hard pressed to find unlawful an actual combination that succeeded in keeping down Arnott's prices. Arnott was, after all, exploiting the modicum of monopoly pricing power that he enjoyed by virtue of his location on an interstate highway.

Arnott testified that, in effect, many of his customers were ignorant of the prices charged by his off-highway competitors. He therefore found it advantageous to raise his prices; demand for his gas was not greatly reduced. Amoco, on the other hand, had a direct interest in maintaining the volume of Arnott's sales, in part because his lease payments were based solely on fuel gallonage. 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)*. Amoco also had an important interest in the pricing reputation of its stations generally. Success in restraining Arnott's prices would have advanced the interests of both Amoco and Arnott's customers, at the same time replicating (with respect to Arnott) the consequences of a fully competitive retail gasoline market. See *Albrecht v. Herald Co., 390 U.S. 145, 169, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* (Stewart, J., dissenting).

[54]** **[*892]** The majority suggests two theories under which the jury could find a combination or conspiracy in this case: first, that Amoco and Arnott combined when the latter unwillingly complied with Amoco's "pricing directives"; and second, that Amoco combined with other dealers who "acquiesced in the enforced pricing policy." Ante, at 884. Both of these theories are derived from dicta in *Albrecht v. Herald Co., 390 U.S. 145, 150 n. 6, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)*. Neither one is applicable here.

First, the evidence provides no support for the notion that Arnott complied with Amoco's "pricing directives." "Directives" cannot mean merely Amoco's suggested prices: such suggestions, standing alone, were clearly permissible. *Susser v. Carvel Corporation, 332 F.2d 505, 510* (2d Cir.), Cert. granted, *379 U.S. 885, 85 S. Ct. 158, 13 L. Ed. 2d 91 (1964)*, Cert. dismissed as improvidently granted, *381 U.S. 125, 85 S. Ct. 1364, 14 L. Ed. 2d 284 (1965)*. The majority must be referring more particularly to the conversations over coffee that Arnott had with Amoco representatives when he deviated from the suggested prices. But there is no evidence that Arnott changed his prices as **[**55]** a result of these conversations, or that he thereafter hewed more closely to Amoco's suggested prices. The cited incident with Dick Lucas likewise resulted in no change; Arnott continued to price independently (I. e., generally higher than Amoco's suggested prices) throughout the period of his lease. Hence, in this case no combination existed and no actual fixing of prices occurred. Cf. *Quinn v. Mobil Oil Company, 375 F.2d 273* (1st Cir.), Cert. dismissed, *389 U.S. 801, 88 S. Ct. 8, 19 L. Ed. 2d 56 (1967)* (affirming dismissal of an antitrust complaint on similar facts).

The panel's second theory is also inapplicable to the facts of this case. Having reviewed the record, I find no substantial evidence of a combination between Amoco and its other dealers. The record simply does not support the majority's characterization of the dealers' behavior as "acquiesence in (an) enforced pricing policy." Ante, at 885. In contrast to the fragments of Mrs. Pascoe's testimony quoted by the majority, Ante, at 885, nine witnesses who were past or present Amoco lessees (including Greg White) testified that retail gas prices were only suggested by Amoco, that the dealers possessed final authority **[**56]** to set prices, and that this authority was frequently exercised independently. Moreover, not one testified that his lease had been threatened or terminated in retaliation for independence in pricing. Cf. *Umphres v. Shell Oil Company, 512 F.2d 420, 422* (5th Cir.), Cert. denied, *423 U.S. 929, 96 S. Ct. 278, 46 L. Ed. 2d 257 (1975)* (holding comparable evidence of vertical price fixing to be clearly insubstantial).

Even if a combination with other dealers were shown to exist, I would be loath to hold that it satisfies the statutory requirement of a "combination * * * in restraint of trade." In fact, any such combination would be wholly irrelevant to the restraint of trade alleged here. See *Albrecht v. Herald Co., supra, 390 U.S. at 161, 88 S. Ct. 869* (Harlan, J., dissenting). The other dealers in the Sioux Falls area had little or no interest in Arnott's affairs. To the extent that they had an interest, it was not that of Amoco: in all likelihood, the other dealers preferred that Arnott keep his price higher than that suggested, as such a policy might well bring them more customers. Cf. *Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978)* (finding similarly collateral **[**57]** dealings involving the defendant to be insufficient evidence of concerted activity).

Under either of the majority's theories, Arnott failed to establish the "contract, combination or conspiracy" essential to his Sherman Act claim. Hence, the cases the majority relies upon in finding an antitrust **[*893]** violation are not

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The Supreme Court has, however, displaced the rule of reason in cases such as this by making agreements or combinations to fix maximum prices Per se illegal. *Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*; *Albrecht v. Herald Co., supra, 390 U.S. at 151, 88 S. Ct. 869*. But cf. *Continental T. V., Inc. v. GTE Sylvania Inc., supra* (restoring the rule of reason in cases addressing the legality of vertical nonprice restrictions). Notwithstanding the caveat in Continental T. V. distinguishing price from nonprice restrictions, *433 U.S. at 51 n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, the Court's reasoning in that case suggests that the Per se approach adopted in Albrecht may not survive reexamination. See *Continental T. V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. at 69-70, 97 S. Ct. 2549* (White, J., concurring); Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U.Chic.L.Rev. 1, 12 (1977); Koches, Developments in the Law of Vertical Nonprice Restrictions: A Welcome Return to the Rule of Reason, 33 U.Miami L.Rev. 247, 266-68 (1978); Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum.L.Rev. 1, 16 n. 59 (1978).

controlling here. In *Simpson v. Union Oil Co., 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*, plaintiffs challenged retail service station leases that were tied to "consignment" agreements expressly empowering the supplier to set the selling price. The presence of this price-fixing term, the Court found, distinguished Simpson from *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*; its enforcement made the "consignment" agreements contracts in restraint of trade. *Simpson v. Union Oil Co., supra, 377 U.S. at 24, 84 S. Ct. 1051*. In the case at hand there was no such price-fixing term; indeed, in the only written agreement concerning pricing, Arnott was promised "an absolute right to set (his) own resale prices * * *." [7]

[58]** *United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, is also inapposite. In that case a drug manufacturer was found to have combined not only with acquiescing retailers but also with its wholesalers in order to terminate those retailers that cut prices. Similarly, in *Albrecht v. Herald Co., supra, 390 U.S. at 149-150, 88 S. Ct. 869*, the defendant newspaper publisher was found to have combined with two other persons, including a rival carrier, to force plaintiff to charge only the advertised retail price for his newspapers. In the case at hand, by contrast, Amoco acted unilaterally in terminating Arnott's lease. The other Amoco dealers cannot be said to stand in the position of the wholesalers in Parke, Davis or the rival carrier in Albrecht because they had no power over Arnott. Amoco therefore could not and did not employ the other dealers as a weapon in its dispute with Arnott.

In sum, I believe that the majority's treatment of fiduciary duties and the antitrust claims in this case is in error. I fear that their approach will also have unfortunate consequences in practice. Arnott clearly breached the express terms of his lease agreement. **[**59]** To limit unduly Amoco's power of termination in circumstances such as these (putting aside the issue of fraud), and to uphold a dubious antitrust claim by the dissatisfied lessee, invites wholesale suppliers to replace their lessees and distributors with company employees whose freedom of action will be considerably more restricted. See *Continental T. V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. at 57 n. 26, 97 S. Ct. 2549*. [8] That is to say, the approach taken by the majority encourages increased concentration in the retail market for gasoline and related products. I consider this to be unwarranted and unfortunate.

[60]**

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[7] To be sure, Arnott alleged that Amoco breached this promise. But the breach of a contract term does not transform the contract, so that what it once promised, it now forbids. Nor can it be argued that price fixing was a term in an implied contract that replaced the fraudulently induced lease agreement; as noted above, Arnott never agreed to such a term. If Amoco sought to fix Arnott's prices, it did so in spite of, not in furtherance of, the terms of their agreement. Theirs was simply not a contract in restraint of trade.

[8] Examples of this process may be found in *Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623* (4th Cir.), Cert. denied, ***434 U.S. 923, 98 S. Ct. 400, 54 L. Ed. 2d 280 (1977)***; *Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976)*, Cert. denied, ***433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)***; and *McGuire v. Times Mirror Co., 405 F. Supp. 57 (C.D.Cal.1975)*.

Ambook Enterprises v. Time, Inc.

United States Court of Appeals for the Second Circuit

May 31, 1979, Argued ; October 29, 1979, Decided

No. 1105, Docket 79-7184

Reporter

612 F.2d 604 *; 1979 U.S. App. LEXIS 10871 **; 1979-2 Trade Cas. (CCH) P62,979; 5 Media L. Rep. 1989

AMBOOK ENTERPRISES, a/k/a AMERICAN BOOK CLUB, on behalf of itself and all others similarly situated, Plaintiff-Appellant, v. TIME INCORPORATED, NEW YORK TIMES COMPANY, J. WALTER THOMPSON CO., YOUNG & RUBICAM INTERNATIONAL INC., BATTEN, BARTON, DURSTINE & OSBORNE, INC., AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., Defendants-Appellees .

Prior History: [1]** Appeal from an order of the *District Court for the Southern District of New York, Thomas P. Griesa, Judge, 464 F. Supp. 1127 (1979)*, granting defendants' motion for summary judgment in an action charging that advertising agencies and publications media had violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*, by agreeing that advertisements placed through advertising agencies should receive a 15% discount from the "card rate", whereas directly placed advertisements should receive no discount.

Disposition: Affirmed in part, reversed in part and remanded.

Core Terms

advertising, agencies, media, conspiracy, summary judgment, advertising agency, discount, distributors, antitrust, newspaper, magazine, Interstate, no evidence, publisher, parallelism, cases, card, trial court, commodities, conscious, Robinson-Patman Act, damages, dual, alleged conspiracy, antitrust case, district court, motion picture, eliminated, injunctive, requesting

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN1[] **Robinson-Patman Act, Claims**

Newspaper advertising is not a "commodity" under the Robinson-Patman Act, *15 U.S.C.S. § 13*.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] Jury Trials, Jury Instructions

Summary judgment for the defendants can be sustained when a jury does not see and hear all the witnesses if but only if the reviewing 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 have found that plaintiff was entitled to any relief.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

An agreement for Sherman Act, *15 U.S.C.S. § 1*, purposes can be inferred from commonality of the conduct.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

It is not necessary to find an express agreement in order to find a conspiracy under Sherman Act, *15 U.S.C.S. § 1*. It is enough that a concert of action is contemplated and that the defendants conformed to this arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

"Conscious parallelism" has not yet read conspiracy out of the Sherman Act, *15 U.S.C.S. § 1*, entirely.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

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

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

One factor to consider in determining if agreement should be inferred from parallel conduct is whether agreement benefited the alleged conspirators.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

One who participates in and furthers wrongful conduct may also be held liable with the other alleged wrongdoer.

Counsel: Daniel J. Kornstein, New York City (Cletus P. Lyman, and Richard A. Ash, Lyman & Ash, Philadelphia, Pa., of counsel), for plaintiff-appellant, Ambook Enterprises.

Floyd Abrams, New York City (Cahill, Gordon & Reindel, New York City, P. Kevin Castel, New York City, of counsel), for defendant-appellee The New York Times Company.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City (Sidney S. Rosdeitcher, and Jack A. Horn, New York City, of counsel), for defendant-appellee Young & Rubicam, Inc.

Cravath, Swaine & Moore, New York City (Frederick A. O. Schwarz, Jr., Richard M. Hirsch, and Ronald P. Mysliwiec, New York City, of counsel), **[**2]** for defendant-appellee Time Incorporated.

Breed, Abbott & Morgan, New York City (David S. Patterson, Donald B. Da Parma, New York City, of counsel), for defendant-appellee J. Walter Thompson Company.

Lunney & Crocco, New York City (J. Robert Lunney, Michael J. McAllister, and Luigi P. De Maio, New York City, of counsel), for defendant-appellee Batten, Barton, Durstine & Osborn, Inc.

Donovan, Leisure, Newton & Irvine, New York City (Thomas R. Trowridge III, and John K. Hendricks, New York City, of counsel), for defendant-appellee American Association of Advertising Agencies, Inc.

Judges: Before MOORE, FRIENDLY and FEINBERG, Circuit Judges.

Opinion by: FRIENDLY

Opinion

[*607] I.

This private antitrust action was commenced on June 1, 1972, in the District Court for the Eastern District of Pennsylvania. Plaintiff Ambook Enterprises a/k/a American Book Club (Ambook) is a Pennsylvania partnership which was organized to engage in the retail and wholesale selling of books and records in interstate commerce. The partners were two corporations, L-Club Corporation and American Book Club. L-Club Corporation is owned by eight persons connected with a highly regarded New York investment **[**3]** firm; an affidavit filed on its behalf states that this action has not been authorized by it. [1.] American Book Club is owned by three individuals, one of them Cletus P. Lyman, a Philadelphia attorney, whose firm, Lyman & Ash, was counsel of record when the action was brought and has participated in its prosecution, although New York counsel has now been substituted. Ambook, which began operations in January, 1968 and conducted them as a partnership since December, 1969, discontinued these in mid-1972, shortly after this action was brought.

The defendants are Time Incorporated (Time), publisher of the well-known weekly magazine of that name; the New York Times Co. (N.Y. Times), publisher of the nation's foremost newspaper; four of the country's largest advertising agencies, J. Walter Thompson Co. (JWT); Young & Rubicam International, Inc. (Y & R); Batten, Barton, Durstine & Osborn, Inc. (BBD&O); and Ted Bates & Company, Inc. (Bates); **[**4]** [2.] and American Association of Advertising

[1.] Defendants have not claimed the action to be dismissible on this ground.

Agencies (4As), a trade association engaged in formulating policies for and promoting its members including the above-named agency defendants. Ambook placed advertisements with Time and N.Y. Times, and 43 other non-defendant publications, but had no dealings with JWT, Y&R, BBD&O or Bates. It placed its ads at various times through three interrelated agencies, Newmark, Posner & Mitchell, Inc., Victor Schiff & Co. (a "division" of the Kaplan Agency), and Schiff/Brown & Co. (hereafter collectively referred to as Schiff-Brown), [3.] none of which was named as a defendant.

[5]** Ambook sought in an amended complaint to bring the action "individually and in a representative capacity on behalf of the class of all similarly situated advertisers, namely, producers, wholesalers and retailers of goods and services in interstate commerce in the United States who advertise in publications." The gravamen of the complaint was that by agreement between the two named publishers and countless others, the 4As, the named agencies and countless others, plaintiff and the class it wished to represent had been forced to utilize the services of advertising agencies, since the publishers granted the agencies a uniform discount of 15%, whereas any advertiser who wished to place an advertisement directly with the publisher was forced to pay the charges set in rate cards, which were **[*608]** 17.6% [4.] above the rates charged the agencies and, in addition, pay the costs of various services many of which were furnished by the agencies and paid for by them out of the 15% Discount. The complaint alleged that as a result of this conspiracy Ambook had paid the two publisher defendants $ 4,000 and other "conspirator publications" $ 20,000 more than if it had been able to receive the **[**6]** 15% Discount and pay its own expenses for doing what Schiff/Brown did. The corresponding figures for the class were estimated as at least $ 30 million for Time and the N.Y. Times and $ 300 million for unnamed "conspirator publications". Damages were sought against all defendants in an amount in excess of $ 500,000 for Ambook and in excess of $ 1 billion for members of the class. Injunctive relief was also requested. The District Court for the Eastern District of Pennsylvania transferred the action, pursuant to *28 U.S.C. § 1404*, to the District Court for the Southern District of New York where it was assigned to Judge Griesa.

In February, 1973, Time moved for a determination that the action could not be maintained as a class action. Ambook cross-moved for an order which, Inter alia, would allow the filing of a second amended complaint and would determine that the action should proceed as a class action. One count in the proposed second amended **[**7]** complaint was based on the Robinson-Patman Act, *15 U.S.C. § 13*. As a result of a hearing, Ambook submitted a revised definition of classes. This narrowed the field to three damage subclasses and one injunctive class. The damage subclasses were all advertisers in Time from January 1, 1968, all advertisers in the N.Y. Times excluding classified and retail advertisers from the same date, and all motion picture advertisers in the N.Y. Times from the same date; [5.] the injunctive class consisted of "(a)ll persons and entities who have advertised or who are likely to advertise in the future in the publications" of Time and the N.Y. Times.

In a considered opinion, *60 F.R.D. 476 (S.D.N.Y.1973)*, Judge Griesa held that the action could not be maintained as a class action. **[**8]** Agreeing with that determination, we see no need to discuss all the reasons the judge gave for it. It suffices that Ambook was out of business and that there was no assurance that it was "in a position to carry on class litigation in this Court in a responsible and vigorous manner", *60 F.R.D. at 487*; that Ambook had no dealings with the four agency defendants whom it had named and thus might stand differently from advertisers who had; and that, as subsequent discussion will reveal, much may hang on the ability of a particular advertiser to have established an "in house" advertising organization which the publishing defendants might have recognized or to

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2. Bates has settled with plaintiff and no longer has any interest in this action.

3. In each instance Ambook dealt with Victor Schiff, who specialized in the direct response advertising in which Ambook was interested. Mr. Schiff was associated with Newmark, Posner & Mitchell, Inc., in an office and credit sharing arrangement, and Victor Schiff & Company had a similar arrangement with Kaplan. Newmark, Posner & Mitchell, Inc. and the Kaplan Agency were apparently members of the 4As; Schiff/Brown & Company was not.

4. This figure is simply the arithmetical relationship of 15/85.

5. As the trial judge correctly pointed out, 60 F.R.D. 481-82, the date January 1, 1968, must have been an inadvertent error for June 1, 1968, since damages prior to the latter date were barred by the four-year statute of limitations, *15 U.S.C. § 15b*.

perform equivalent services. The judge denied the motion to file the proposed second amended complaint without prejudice to a motion to file a further pleading devoid of class action allegations. An appeal to this court was dismissed for want of appellate jurisdiction, even under the "death-knell" doctrine then prevailing in this circuit but subsequently rejected by the Supreme Court in *Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)*.

Plaintiff thereupon moved for leave to file a second amended **[**9]** complaint without class action allegations. The court granted this, with two exceptions. It struck a claim of discrimination under the Robinson-Patman Act on the ground that that statute deals only with the sale of commodities, and prayers for injunctive relief under *15 U.S.C. § 25*, since *§ 25* refers only to suits by the United States, and *15 U.S.C. § 26*, authorizing injunctive relief for private parties "against threatened loss or damage by a violation of the antitrust laws", since Ambook **[*609]** had been out of business since mid-1972 and was in the process of liquidation.

Although the quondam action for a billion dollars in damages and a sweeping injunction had thus dwindled to a relatively small damage suit on its own behalf, Ambook continued to pursue it with considerable vigor. After extensive pretrial proceedings, defendants moved for summary judgment in June, 1976, which was denied a year later, primarily on the ground of lack of sufficient evidence concerning the relationship between Ambook and Schiff-Brown, 464 F. Supp. at 1129-30. After further discussion of the issues, Ambook designated the witnesses it would call on that issue at a trial of the action. These **[**10]** were Victor Schiff and Stephen Brown, the principals of the three advertising agencies Ambook had used; K. Elia Georgiades, a former Vice President of Ambook; and Milton Pierce, a person in the advertising business who had introduced Ambook to Schiff. Their depositions were taken and plaintiff accepted their testimony as true except as noted in a letter of plaintiff's attorney dated March 24, 1978, which also indicated that Ambook might call an economist to testify what fees might be paid to advertising agencies in a free market environment.

On May 1, 1978, defendants renewed their motion for summary judgment. The court granted this on January 11, 1979, in a lengthy and reasoned opinion, *464 F. Supp. 1127*. Plaintiff has appealed.

II.

It will be convenient to deal at the outset with Ambook's contention that the court erred in striking its claim under the Robinson-Patman Act.

The Robinson-Patman Act, so far as here pertinent, makes it 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 **[**11]** in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

The question whether this applies to the sale of newspaper advertisements has not been determined by the Supreme Court, *Times Picayune Pub. Co. v. United States, 345 U.S. 594, 609-10 n. 27, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)* (dealing with similar language in § 3 of the Clayton Act), or by this court, *Syracuse Broadcasting Corp. v. Newhouse, 236 F.2d 522, 527 (1956)*.

National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 84-86 (D.D.C.1977), *Aff'd 194 U.S.App.D.C. 81, 595 F.2d 888 (D.C.Cir.1979)*, squarely held as the district court had done here, that ***HN1***[] newspaper advertising was not a **[**12]** "commodity" under the Robinson-Patman Act. The same result was reached in interpreting the term "commodity" under § 3 of the Clayton Act, *15 U.S.C. § 14*, in *ALW, Inc. v. United Air*

Lines, Inc., 510 F.2d 52 (9 Cir. 1975). Many other relevant cases, although less directly in point, have taken a strict view of the meaning of the term "commodities". [6.]

[13]** **[*610]** As against all this Ambook relies on a recent opinion of the Federal Trade Commission, CCH FTC Complaints and Orders P 21,448 in The Times-Mirror Co., (July 27, 1978), that the Robinson-Patman Act applies to the sale of retail newspaper advertising, to which a district court deferred in *Sun Communications, Inc. v. Waters Publications, Inc., 466 F. Supp. 387, 390-91 (W.D.Mo.1979)*. We decline to accord similar deference. The FTC opinion runs directly contrary to a statement by one of the bill's sponsors during the debate on the floor of the Senate:

> Mr. Gore. I should like to ask the Senator from Kentucky what application the provision now under discussion would have to newspapers which merely act as advertising mediums or agencies. Would it prevent a differential charge on their part respecting advertisers, based on or measured by the amount of advertising carried?
>
> Mr. Logan. No. (80 Cong.Rec. 3115, 3119 (March 3, 1936)) (emphasis added); See also 79 Cong.Rec. 9078-79 (June 11, 1935); H.R. 8277, 85th Cong., 1st Sess. (1957), discussed in *Kennedy Theater Ticket Service v. Ticketron, supra, 342 F. Supp. at 926*.

It also runs counter to a statement **[**14]** by Representative Patman in a book written only two years after passage of the Act, The Robinson-Patman Act, p. 75 (1938). We recognize that "post-passage remarks by legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases, 419 U.S. 102, 132, 95 S. Ct. 335, 353, 42 L. Ed. 2d 320 (1974)*. But here the term "commodities", in the ordinary use of language, would not be taken to include newspaper advertising. To regard advertisements as commodities would involve almost insolvable problems in determining whether these were of "like grade and quality". See *Baum v. Investors Diversified Services, Inc., supra, 409 F.2d at 875*. The page of the newspaper, the month, the day of the week, and many other factors would have to be weighed in answering this question, as well as in determining defenses allowed by the Act. Whatever the rule as to the deference to be accorded an agency's interpretation of a statute it has the duty to administer, see *Federal Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374, 385, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965)*, "this is a case where understanding of **[**15]** the statute depends in no small measure on prior judicial decisions and legislative history subjects on which a court has a greater competence than the agency." *Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 50* (2 Cir. 1976), aff'd Sub nom. *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977)*. The FTC's purported discovery, forty-two years after the event, of a meaning in the Robinson-Patman Act contrary to the ordinary reading of the language, disavowed on the floor of the Senate, disclaimed by the statute's principal author two years after its passage, raising grave problems of administration, and contrary to the consistent course of judicial decision on this and related matters, is a discovery of something that is not there. See *Romero v. International Terminal Operating Co., 358 U.S. 354, 370-71, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959)*.

III.

Turning to the claim under *§ 1* of the Sherman Act, we find no occasion for recapitulating at length the learning on the use of summary judgment in antitrust cases expressed in such leading decisions as *Poller v. C.B.S., 368 U.S.*

[6.] *Baum v. Investors Diversified Services, Inc., 409 F.2d 872* (7 Cir. 1969) (mutual fund shares); *TV Signal Co. of Aberdeen v. American Telephone & Telegraph Co., 462 F.2d 1256, 1259* (8 Cir. 1972) (space on telephone pole used for CATV service cables); *La Salle Street Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004, 1006 (N.D.Ill.1968)* (patent license), modified on other grounds, *445 F.2d 84* (7 Cir. 1971); *Kennedy Theater Ticket Service v. Ticketron, 342 F. Supp. 922 (E.D.Pa.1972)* (theater tickets); *Plum Tree, Inc. v. N. K. Winston Corp., 351 F. Supp. 80, 87 (S.D.N.Y.1972)* (shopping center leasehold); *American Telephone & Telegraph Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1114 (S.D.Miss.1976)*, aff'd on district court opinion, *579 F.2d 972* (5 Cir. 1978) (television program and advertising package).

464, 467-73, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962), on the **[**16]** one hand, and First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968), on the other. [7.] Still a few preliminary observations may be in order. The defendants stress that this is not a case where summary judgment was **[*611]** granted on affidavits alone. The parties engaged in extensive discovery including a number of depositions, although, as will appear, there was at least one question of credibility on a point of some importance. However, there is still the point that the body having the ultimate power to draw inferences, in this instance a jury, did not see and hear the witnesses. ***HN2***[] Summary judgment for the defendants can be sustained in such a case if but only if the reviewing court is satisfied that a properly instructed jury, giving full weight to plaintiff's evidence, drawing every reasonable inference in its favor, [8.] **[**17]** and subjecting defendants' evidence to a critical eye, [9.] could not rationally have found that plaintiff was entitled to any relief.

Since defendants submitted evidence contradicting Ambook's allegations, it was incumbent upon Ambook to provide some evidentiary support for its complaint, Fed.R.Civ.Pro. 56(e); First National Bank of Arizona v. Cities Service Co., supra, 391 U.S. at 289, 88 S. Ct. 1575, although this evidence did not have to be such as would require resolution of the substantive issues in Ambook's favor. Recognizing this, Ambook has not merely relied on its allegations but has submitted evidence. [10.] The question is of its quality. As put in Cities Service, did plaintiff's case remain devoid "of Any significant probative evidence tending to support the complaint"? 391 U.S. at 290, 88 S. Ct. at 1593 (emphasis supplied).

[18]** Defendants' primary contention is that Ambook's evidence would not permit the finding of a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" during the period from June 1, 1968 to June 1, 1972. There was an abundant showing that one had existed earlier. The record is replete with evidence that a prime objective of the 4As, organized in 1917, with JWT and a predecessor of BBD&O as members, was to perpetuate a dual price system. Advertisers dealing directly with the media would be charged a full card rate, whereas in the case of those employing recognized agencies, the latter would receive a 15% Deduction no more, no less none of which was rebated to the advertiser. [11.] Advertisers were thus economically forced to utilize agencies, who would receive and retain 15% Of the card rate as reimbursement for the services they performed; to the extent that the advertiser could have performed these services for less, the conspiracy increased his cost of advertising by the difference. [12.] The only exception was that a few large advertisers

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[7.] See generally 2 Areeda and Turner, ***Antitrust Law*** § 316 (1978).

[8.] See United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1972) (per curiam); 10 Wright and Miller, Federal Practice and Procedure § 2716, at 430-32.

[9.] See 6 Moore, Federal Practice P 56.15(3), at 56-469-472; P 56.15(8), at 56-642; Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-61, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

[10.] Compare Solomon v. Houston Corrugated Box Co., Inc., 526 F.2d 389, 393 (5 Cir. 1976); Beckers v. International Snowmobile Industry Ass'n, 581 F.2d 1308, 1311 (8 Cir. 1978), Cert. denied, ***440 U.S. 986, 99 S. Ct. 1801, 60 L. Ed. 2d 248 (1979)***; Merit Motors, Inc. v. Chrysler Corp., 417 F. Supp. 263, 266 (D.D.C.1976), ***Aff'd, 187 U.S.App.D.C. 11, 569 F.2d 666 (D.C.Cir. 1977)***.

[11.] The Time report, referred to below, indicates that the system may have gone back as far as 1864. Although it has become customary to speak of the 15% As a "commission", it is not such in the ordinary sense. The advertising agency is not the seller's agent but the buyer's. The system is thus better characterized as a dual price system the card rate for the direct advertiser and 15% Less when the advertising is done through an agency with the agency receiving the difference.

[12.] For example, if an advertiser could perform the services rendered by the agency at 8% Of the card rate, his costs would be 7% Less if he could deal directly with the medium at the rate accorded the agency. One item of potential saving would be any excess of the agency's profit over what would be a fair return on whatever assets the advertiser devoted to providing the services; plaintiff adduced evidence that the return on investment for five publicly traded advertising agencies during the period 1968 through 1972 averaged over 19%.

apparently had sufficient muscle that they were allowed to have "in house" agencies, who were treated in the **[**19]** same way as the independents.

[20]** **[*612]** This system was threatened when, on May 12, 1955, the United States filed a civil antitrust action in the District Court for the Southern District of New York. The defendants were the 4As and five media associations. The complaint alleged a number of conspiracies which we set forth in the margin. [13.]

[21]** In May 1956 the Government entered into a series of consent decrees with each of the defendants. These recited that no testimony had been taken and that defendants were consenting to the entry of judgment "without trial or adjudication of any issue of fact or law herein and without any findings of fact." The decree was to apply not only to each defendant and its officers, servants, employees, etc. but also "to any committee or groups of consenting defendant's membership when organized and functioning as committees or groups of consenting defendant, and to all other persons in active concert or participation with it who receive actual notice of the Final Judgment by personal service or otherwise." By paragraph IV A each defendant was

> enjoined and restrained from entering into, adhering to, promoting or following any course of conduct, practice or policy, or any agreement or understanding:
>
> (1) Establishing or stabilizing agency commissions, or attempting so to do;
>
> (2) Requiring, urging or requesting any advertising agency to refrain from rebating or splitting agency commissions;
>
> (3) Requiring, urging or requesting any media to deny or limit credit or **[**22]** agency commission due or available to any advertising agency;
>
> (4) Establishing or formulating, or attempting to establish or formulate, any standards of conduct or other qualifications to be used by any media or any association of media to determine whether media should or should not do business with or recognize any advertising agency;
>
> (5) Requiring, urging or requesting any media not to do business with or not to recognize any advertising agency;
>
> (6) Establishing or stabilizing advertising rates to be charged advertisers not employing an advertising agency, or attempting so to do;
>
> (7) Requiring, urging or requesting any media to adhere to publisher advertising rates or rate cards.

By paragraph IV B each defendant was likewise enjoined and restrained from

> requiring, urging or requesting any of its members to engage in any activities covered by Paragraphs (1) through (7) of subsection (A) of this Section IV.

The record leaves no doubt that many of the practices alleged by the Government in 1955 to have violated *§ 1* have since been eliminated. [14.] **[**25]** Taking item **[*613]** IV A (2) in particular, the evidence demonstrates that

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13. (A) A conspiracy among all the defendants whereby the media associations adopt substantially uniform standards for recognition of advertising agencies, only agencies meeting such standards may be extended credit and allowed agency commissions, agencies which rebate any part of their commissions to advertisers will be cut off; recognition will be denied to house agencies; and gross rates would be charged to direct advertisers. Also that members of the media associations adhere to their published rates, and that agency commissions be fixed and maintained at 15% Of the gross rate for advertising. (B) A conspiracy between the 4As and its members whereby members would retain all commissions and not rebate any part of them to advertisers; commissions would be retained at 15%; and that members refrain from competing with each other by submitting advertising copy etc. in solicitation of new business. (C), (D), (E), (F) and (G) Conspiracies between the media associations and their members to substantially the same effect as (A).

14. We are, of course, fully aware that under § 5(a) of the Clayton Act, *15 U.S.C. § 16(a)*, a plaintiff cannot make use of a consent decree against a defendant in an action where no testimony was taken, and also that private plaintiffs cannot enforce government consent decrees, see *United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003, 1007-08* (2 Cir.), Cert. denied, ***382 U.S. 877, 86 S. Ct. 160, 15 L. Ed. 2d 119 (1965)***; *Dahl, Inc. v. Roy Cooper Co., Inc., 448 F.2d 17, 20* (9 Cir. 1971); *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)*. However, we read the district court's opinion and appellees' argument as taking the consent decrees as a watershed, see *464 F. Supp. at 1137*. Conceding, as seemingly they must, that certain of the pre-1956 practices violated *§ 1*, appellees contend that all

there **[**23]** is no longer any policy of urging or requesting any advertising agency "to refrain from rebating or splitting agency commissions." At least eight types of compensation arrangements between advertisers and agencies are now in effect, [15.] although the record does not show their relative frequency or much else about them. Quite clearly there is no agreement among agencies not to solicit business from customers of their rivals, as was alleged in paragraph (B). There was, however, evidence from which a jury could conclude that a number of the practices alleged in the 1955 complaint still exist. Agency "commissions" remain a uniform 15%. Some standards are still being prescribed to determine which agencies will qualify for recognition as house agencies. And advertisers not employing a recognized agency, outside or house, are still being charged at card rates with no variance or discount available for performing the services provided by agencies. A jury could rationally conclude from the evidence here adduced that during the damage period substantially all advertising agencies and the publishing media pursued a plan whereby if a national advertiser approached a newspaper or magazine, **[**24]** he would typically be told that if he were willing to deal through a recognized agency, the agent would receive a 15% Deduction but that otherwise he would be charged the full card rate. While the 15% Deduction could play a part in negotiations between the advertiser and the agent as to the compensation the latter would receive, the record is silent how far most advertisers were aware of this. The only exception to this, if in fact it be one, was that some members of the media, including the two media defendants here, to a limited extent hereafter described, would allow the advertiser to establish a "house agency" which would be treated as an independent would have been. The critical question is whether a rational trier of facts could find that this plan was the result of an agreement among and between the media and the advertising agencies rather than representing independent identical decisions by hundreds of newspapers and magazines. See 2 Areeda and Turner, ***Antitrust Law*** § 317(e), at 82 (1978).

The leading case for the proposition that ***HN3***[] an agreement can be inferred from commonality of the conduct is *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*. In that case, Interstate and Consolidated, two affiliated large chains of motion picture exhibitors, who heavily dominated a portion of the Texas motion picture market, sought an **[**26]** agreement from a group of motion picture distributors that was designed to weaken competition the exhibitors faced from nonaffiliated motion picture houses in the area. Specifically, Interstate and Consolidated advised distributors that they would not purchase films for exhibition in their theaters unless the distributors accepted two constraints. These were that in selling the distributor's product for subsequent runs the minimum admission price to adults in the evening should be 25 cents and that its pictures exhibited at a night admission of 40 cents or more should never be exhibited as double features. As a result of conferences between Interstate and Consolidated **[*614]** and eight distributors, the latter accepted these conditions with respect to four of the six Texas cities served by Interstate. The obvious result of such a joint action by the distributors was to weaken the ability of the nonaffiliated exhibitors to draw audiences away from Interstate and Consolidated by offering substantially lower prices or double features.

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the evils existing then have since been cured. It is thus primarily the defendants who rely on the consent decree; we view it simply as a historical fact.

[15.] These are:

1. Media commissions plus percentage of other charges and additional fees for certain specified services.

2. Same as No. 1, without the additional fees for certain specified services.

3. Media commissions only.

4. One of Nos. 1, 2, or 3, plus an overall fee, sometimes called a retainer.

5. One of Nos. 1, 2, or 3, but with the addition of a guaranteed minimum profit percentage and a controlled maximum profit percentage.

6. Minimum fee or media commissions, whichever is larger.

7. Overall fee on the entire account, with no other compensation, the fee to be agreed upon in advance and billed periodically.

8. Cost plus an agreed overage.

The last two are wholly unrelated to the media 15% "commission".

Despite a lack of any express evidence that the various distributors actually agreed among themselves to abide by the demands of Interstate and **[**27]** Consolidated, the Court upheld the district court's finding of a conspiracy among the distributors, noting that "without substantially unanimous action with respect to the restrictions for any given territory there was a risk (to any distributor) of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits," *Id. at 222, 59 S. Ct. at 472*. In the instant case, a conspiracy among the media could be similarly inferred. In the absence of agreement, a magazine or newspaper refusing the lower rate to advertisers willing to perform the services rendered by agencies ran the risk of losing such advertising to any medium that did; indeed, one could conclude it was the threat of this that led a number of the media to grant the 15% Discount to a few house agencies. [16.] In addition, as is more fully developed below, a magazine or newspaper refusing to adhere to the dual rate system faced serious risks of reprisal from powerful agencies influencing a large section of the market.

[28]** In Interstate Circuit the Court also stressed the failure of the distributors "to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action," *Id. at 225, 59 S. Ct. at 474*. Noting that only local managers had been called, rather than those who had authority to act, the Court thought this "persuasive that their testimony, if given, would have been unfavorable . . . ." Here the media offered no evidence to show what legitimate business advantage, save continuity and fear of reprisal, inhered in the dual rate system. No independent reason was offered for one of the media's not doing what could be thought to be in its own self-interest offering the lower rate to direct advertisers who performed the same service for which agencies received discounts as a means of increasing the offeror's share of the direct advertising market.

In *United States v. Paramount Pictures, Inc., 334 U.S. 131, 142, 147, 68 S. Ct. 915, 922, 92 L. Ed. 1260 (1948)*, the Court found the point of drawing an inference of agreement from conscious parallelism scarcely deserving of **[**29]** elaboration. It contented itself with such remarks as:

> ***HN4***[] It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to this arrangement,

and "the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence."

The authority of these cases was not weakened by *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*. There a suburban theatre in a small shopping district near Baltimore complained of the judge's refusal to direct a verdict in its favor because a number of motion picture distributors and exhibitors had declined to grant it first run privileges, sought originally **[*615]** on an exclusive and later on a non-exclusive so-called "day and date" basis. The defendants advanced a multitude of substantial business reasons why the grant of first run privileges to the petitioner was counter to their individual business interests. It was in this context of upholding refusal to direct a plaintiff's verdict that Mr. Justice Clark observed, **[**30]** *346 U.S. at 541, 74 S. Ct. at 259*:

> this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ***HN5***[] "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

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16. The fact that apparently there was little direct advertising does not undermine the possibility of this inference. A jury could find that, without substantially unanimous action by the media to prevent it, a market for such advertising could be expected to develop, a market which those adhering to the dual rate system would lose to the renegades. Nor does the fact that the effect of unanimous action would be essentially to eliminate direct advertising as a mode of doing business (except for those advertisers able to create house agencies) invalidate the analysis: non-unanimous action would have the far more deleterious effect on those adhering to the system of channeling direct advertisers to non-adhering competitors.

This explanation of how the inference from parallel conduct can be explained away by proof of legitimate business considerations [17.] was repeated in *First National Bank of Arizona v. Cities Services Co., supra, 391 U.S. at 286-88, 88 S. Ct. 1575 (1968)*. In line with this analysis is our own decision in *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 111* (2 Cir. 1975), holding that summary judgment for defendants had been properly granted in a case where any inference from "conscious parallelism" had been overwhelmed by defendants' evidence of independent interest in refusing to deal with the plaintiff. As good a recent statement on the subject of conscious parallelism as any is Chief Judge **[**31]** Seitz' in *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446* (3 Cir. 1977), Cert. denied, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)*, that:

> ***HN6***[] 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.

Here defendants have offered no explanation why over a period of decades none of the media has engaged in the slightest experimentation in its rate structure in the respects here material. **[**32]** No explanation has been offered why uniform discounts were given to agencies but no discount (except by the house agency device) was given to advertisers willing to perform some or all of the agency services. There is no room for the argument against the significance of conscious parallelism which has been made in the case of an oligopolistic market with an inelastic demand, namely, that any downward price move would immediately become known to and put in effect by competitors, so that the result would be disadvantageous to all. [18.] The very number of competitors, among both the media and the agencies, argues against the claim that any price movement, however limited, would be immediately followed by everyone, so that its originator would derive no benefit. It is true that after the 1956 consent decrees there was opportunity for bargaining on price, not between the advertisers and the media but between the advertisers and the agencies. However, while the record demonstrates that a variety of arrangements were developed, see note 15 Supra, it conveys no idea how extensively these were used, see *National Lead Co. v. F. T. C., 227 F.2d 825, 833* (7 Cir. 1955), rev'd on other grounds, **[**33]** *352 U.S. 419, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957)*, and particularly how available they were to advertisers like Ambook as distinguished from great national concerns. In any event, we have been cited **[*616]** to no authority that would support the proposition that a *§ 1* conspiracy to prevent advertisers from placing ads directly or at least greatly to impair their ability to do so can be cured by the possibility that some might obtain similar financial results by subsequent bargaining with the agencies. The advertiser's bargaining position with the agency was weakened by the conspiracy in his not being able to bargain with the publishers themselves for reductions based on provision of similar services and by the agency's approaching the bargaining table with him with the 15% Reduction already in hand.

In the Cities Service **[**34]** case, the Court indicated that ***HN7***[] one factor to consider in determining if agreement should be inferred from parallel conduct was whether agreement benefited the alleged conspirators as the practice in Interstate Circuit clearly had, *391 U.S. 253 at 286-87, 88 S. Ct. 1575, 20 L. Ed. 2d 569*, cf. also *Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499, 534* (E.D.Mich., 1974), *Aff'd, 519 F.2d 119* (6 Cir.), Cert. denied, *423 U.S. 987, 96 S. Ct. 395, 46 L. Ed. 2d 304 (1975)*. Here there can be no question that the agencies were benefited. The effect of the parallel conduct was to give advertisers a powerful incentive to use agencies when they might otherwise have preferred to perform some or all of the agency services themselves. The 15% System also benefited the agencies by the peace and quiet of a uniform pricing policy on the part of the media, with competition among the agencies for the business of advertisers being on the basis of quality, salesmanship, or

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[17.] Professor Handler doubts whether a verdict for the plaintiff in Theatre Enterprises would have been upheld, 1 Twenty-Five Years of Antitrust 565-66, and so do we. Defendants had proffered such overwhelming evidence of the individual reasons for their parallel behavior as completely to overcome whatever inference would arise from that alone.

[18.] See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655, 665-73 (1962); cf. Posner, ***Antitrust Law*** 42-47 (1976).

contacts, rather than of their ability to obtain a lower price from the media. These advantages depended, as in Interstate Circuit, upon substantially uniform acceptance.

Admittedly the advantages to the media **[**35]** are more problematic. The dual rate agreement did benefit the media in the higher rate paid by the occasional transient direct advertiser, but the effect of the system was to reduce such advertising as much as possible. However, while Cities Service teaches that parallel conduct is less probative of an agreement if there is no benefit to the alleged conspirators therefrom, the Court specifically declined to consider the question of Coerced parallelism. [19.] Here the evidence of conscious parallelism can be joined with evidence of coercion in further support of an inference of agreement.

[36]** In 1970, Henry Luce III, publisher of Time, asked a committee to examine and report on how to eliminate the agency commission. [20.] The committee's study included interviews with advertisers, advertising agencies (including Y&R and BBD&O), and magazine competitors. The committee's report concluded there were several options eliminating, reducing, or increasing the commission or leaving it as it was. The committee recommended the latter. Increasing the commission would cost more in revenues than it would gain in increased business from agencies; elimination or reduction by a particular magazine, even such a leader as Time, would cause a risk that agencies would channel business away.

[37]** Although there is nothing particularly damaging in these recommendations, if considered alone, the report is significant in two other contexts. The first is its candid **[*617]** picture of conditions in the advertising world. Some large advertisers reported there was no longer any real need for the agencies. One advertising executive, although speaking mainly of television, said his firm worked directly with a production firm to make the ads, creative work being done either in house or by competing "boutiques". His company was fighting its "biggest agency to get on a fee system so they don't get richer than they already are. Trouble is the president of our firm and of the agency are close friends and the latter so far has fought a successful rear guard action." The same executive "couldn't care less whether TIME eliminates the agency commission except that perhaps it might hasten the demise of the system." Another function of the agency procuring space was being taken over by independent media buying services (IMBOs). The report recited numerous "indications that some big clients would like to see the agency commission system eliminated." The reason was that in many cases **[**38]** the client was getting ahead of the agency both in ability to create advertising and in knowledge of available media. As against this, the commission system kept costs in line with sales volume, and was convenient and easy to administer. A symposium in a media publication, attended by many elements of the trade, reported a host of different views about the 15% Commission. Several clients of Time were interviewed. One thought abolition of commissions was right in concept, wrong until the details of a new system were worked out. Another favored abolition but did not have much at stake since he already had his agencies on fees. Two airlines thought the time for abolition was not ripe since they already had so many problems on their hands. There was mixed reaction from the automobile industry. Expectably the agencies exhibited greater enthusiasm for maintenance of the present system. Competing magazines were equivocal; they were concerned about their position with the agencies although one conceded that "if a major, major client like Ford or General Motors said he wanted to order direct and pay his agencies in its own manner, the publication would probably go along."

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19. "(Plaintiff) now argues that Cities' participation in the conspiracy was obtained by threats of retaliation from the other defendants. While conceivably petitioner could have argued at the trial level that under such cases as Klor's (*Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741*) . . . and Parke, Davis (*United States v. Parke-Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505*) . . . acquiescence because of threats in an illegal scheme conceived and carried out by others for their own benefit makes the acquiescing party a member of an illegal combination, we decline to pass upon such a contention when presented for the first time in this Court." *391 U.S. at 280 n. 16, 88 S. Ct. at 1588*.

20. The precise instruction was:

TIME wants to eliminate the agency commission. What are the alternatives to this method of compensation? How can these alternatives be implemented?

This language suggests that at least when the inquiry began the publisher of Time considered the agency "commission" something against Time's interest, to which it was being held by others.

The second **[**39]** way in which Time's investigation was significant was that certain agencies did not content themselves with answering the questions they were asked but made it evident that the fears of reprisal by the agencies were real. While Time management was considering the report, Edward L. Bond, Jr., Chairman of Y&R wrote Bernard M. Auer, Executive Vice President of Time, on September 24, 1970, expressing concern over Time's considering a discontinuation of the 15% Agency commission. Although he recognized that "there are some advertisers who would like to see this policy changed", he thought any such move by Time "would appear to gradually erode the full-service agency concept." He added:

> It seems to us that a policy decision made by the leader in the industry can only increase the likelihood of putting magazines in a bid and ask situation. This will give everyone great concern as to the stability of magazines and the real determination of value received

language which a jury could take to be a veiled threat that cessation of the 15% Commission by magazines would accelerate the trend toward advertising on television at the expense of the printed word. Finally

> I hope you **[**40]** will review this subject once more in light of the effects on the full-service agency; in light of the effects on your sales in terms of both cost and morale; and in light of greater fluctuations of revenues that are likely to result from the apparent uncertainty of your rate structure.

In a memorandum to top management of Time dated October 2, 1970, Auer recounted a talk with Bond in which he had explained why Time felt it must "accept business from a company direct on a net basis" and "totally rejected the concept that the agencies were working for us and media departments were doing our selling for us." [21.] **[*618]** Bond "wanted to express his feelings that this could deteriorate into a very serious problem for him and other agencies." Auer said that Time would not make a public statement and hoped Y& R would not start a controversy in the trade press. Auer's memorandum also noted that Dan Seymour of JWT had called Andrew Heiskell of Time to ask if Time was going to announce that it would accept business on a direct basis; Heiskell denied any such intention. Despite the polite tone a reasonable juror could find that two of the country's largest agencies had joined in an **[**41]** effort to put pressure on Time to adhere to existing policies which had the effect of denying advertisers the right to deal directly with the media, pay their own costs, and receive an appropriate discount. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, suggests that this would be actionable not only against the maker of the threat but against a complying recipient.

In sum, a jury could have concluded from all that we have recited not to speak of the inferences it might have drawn from oral testimony by persons interviewed by Time or by officials of Time or the N.Y. Times [22.] that the conscious parallelism of the dual rate system was not the result of **[**42]** hundreds of unanimous individual decisions but rather was an agreement including many publishers who believed the system made it unduly expensive to advertise and who went along with it, insofar as they did, only because of sloth or fear of reprisal. We do not say, of course, that a jury would have so found only that it might rationally have done so.

IV.

What has been established up to this point is that a jury could have found there was a contract or conspiracy in restraint of trade by some agencies and some members of the media with respect to pricing policies in the period 1968-1972. [23.] Appellees say this still leaves Ambook a long way from home.

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21. Auer was surely right about this. The agency is the advertiser's agent, not the media's. It would be wholly improper for the agency to include in its charges to a client services as sales agent for the medium. Yet Bond could be taken as having more than implied that the agencies were doing exactly this.

22. We do not read the record as waiving any right of Ambook to call such persons. The limitation referred to above (p. 609) was on the specific issue of Ambook's relations with Schiff-Brown.

23. Appellant seemingly assumes that if an agreement for a dual pricing system existed, this would be a Per se violation of *§ 1*. Appellees, concentrating on the alleged absence of sufficient evidence of an agreement and the other points discussed in this section, did not argue whether such an agreement would constitute a Per se violation or would be subject to the rule of reason. Plaintiff made no claim that members of the media agreed among themselves to fix their card rates. The case seems more analogous to concerted refusal to deal. We note that recently there has been considerable questioning of the applicability of Per

[43]** The keystone of appellees' argument here is that Ambook did not deal with the 4A's or with any of the agency defendants but solely with Schiff-Brown. As indicated above, Schiff-Brown's relation to the 4A's was tangential at most; it surely was not a policy forming member. [24.] Schiff testified unequivocally that agreement or no agreement **[*619]** he would not have serviced the Ambook account for less than 15% Of the card rates. Any injury to Ambook's property and business must therefore come not from the dealings it had with Schiff-Brown but from the fact that except for the alleged illegal agreements, it would have been able to deal directly with Time, the N.Y. Times and other media, and have achieved substantial savings if given the same discount as the agencies or even a lesser discount if this would produce a smaller cost to the advertiser than the present system.

Appellees mount several lines of defense. They say in the first place that Ambook never sought recognition for a house **[**44]** agency that would have handled its advertising. For the N.Y. Times the answer is unavailing. A jury could have found that for the period up to February 18, 1970, such an offer would have been useless since until then the N.Y. Times would not recognize a house agency with less than three accounts. The standards laid down when that policy was abandoned were rather severe and there was no public announcement of the abandonment. The record does show that by April 9, 1973, the N.Y. Times recognized 35 house agencies but does not inform us how many such recognitions occurred during the period ended June 1, 1972. [25.] Time stands better in one respect, worse in another. It stands better in that it never had any such explicit "three-account" policy for qualification as a house agency as did the N.Y. Times. The record shows that by February 8, 1973, it had recognized 19 house agencies. [26.] It stands worse in that Ambook did make a request of Time for recognition as a house agency. This did not occur until March 1972, by which date Time may well have had ample reasons for refusing to accept Ambook's advertising at all. However, Time's stated reason for declining Ambook's request was: **[**45]**

> Direct advertisers cannot qualify for agency discount but must pay the card rates.

The media defendants contend also that Ambook was in no position to deliver advertising in a form that would enable it to realize economies if given the agency discount. They stress peculiar difficulties allegedly associated with advertising which seeks a response, often accompanied by money, as in the case of a book club, and claim that even many established agencies are unequipped or unwilling to undertake such work. Against this Mr. Lyman averred that, but for the 15% Requirement, Ambook "would have been able to hire more employees and **[**46]** more highly qualified employees if advertising services were performed within the company", or that he might also have hired an advertising consultant for a year. The Time report shows that many companies, although presumably larger than Ambook, are currently using a combination of in-house talent, outside agencies deemed particularly suitable for special promotions, and space buying services, as a substitute for the full-service agency. Indeed several such companies figure on the "house agency" lists of Time and the N.Y. Times to which we have referred above. So far as we can see, the district judge made no determination that Lyman's assertions were so outlandish

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se rules to certain types of such refusals. The thrust of the Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, has not gone unnoticed. See *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126* (2 Cir.) (en banc), Cert. denied, ***439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)***; *Gough v. Rossmoor Corp., 585 F.2d 381, 387* (9 Cir. 1978), Cert. denied, ***440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979)***; Sullivan, Antitrust § 90 (1977). Compare *Webb v. Utah Tour Brokers Ass'n, 568 F.2d 670, 675-76* (10 Cir. 1977); *Coughlin v. Capitol Cement Co., 571 F.2d 290, 300* (5 Cir. 1978). Much seems to turn on characterization of the alleged agreement as vertical or horizontal, no easy task in the present case, and one which we decline to undertake without the benefit of argument and prior decision below. A further turning away from Per se rules was recently evinced in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. We think the district judge would be well advised to take evidence on the subject of reasonableness if the defendants choose to offer it and to make appropriate findings.

[24.] See note 3 Supra.

[25.] The list does not describe the companies. While we can take notice that most of these are of a size dwarfing Ambook, e.g. Burlington Industries, Santa Fe Railway and Monsanto, it may or may not contain others where no such gross disparity existed.

[26.] These are even more predominantly large companies including the three mentioned in note 25 Supra than the N.Y. Times list.

as to be unworthy of belief by a jury, and, whatever our personal views may be as to Ambook's ability to handle its advertising functions for less than the 15% Commission, we perceive no fair basis for doing so.

It therefore appears to us to have been error to grant summary judgment in favor of Time and the N.Y. Times with respect to Ambook's claims against them for alleged losses in being forced to deal with them through an agent on the 15% Commission basis.

[*620] A separate question is whether it was nevertheless **[**47]** proper to enter summary judgment in favor of the 4A's and the three remaining agency defendants, see note 2 Supra, for damages allegedly suffered by Ambook in its dealing with Time and the N.Y. Times. Appellees argue that since Ambook did not deal with the 4A's or any of the agency defendants it cannot recover from them even if they were parties to an illegal conspiracy. Relying on Judge Adams' characteristically able opinion for a divided panel in *Mid-West Paper Products Company v. Continental Group, Inc., 596 F.2d 573* (3 Cir. 1979), appellees assert that Ambook has no standing to sue the agency defendants, since Schiff-Brown was not a member of the alleged conspiracy.

This case differs from Mid-West Paper in material respects. In that case plaintiff sought to recover damages for injuries sustained in dealing with nonconspiring manufacturers who were allegedly able to charge higher prices under the anticompetitive "umbrella" erected by defendant conspiring manufacturers. Recovery was sought from conspirators despite the lack of contact with any of them. Here Ambook has indisputably dealt with Time and the N.Y. Times. Plaintiff having dealt with these members of the alleged **[**48]** illegal conspiracy, all other members are jointly and severally liable for the damages Ambook sustained. See *State of Washington v. American Pipe & Construction Co., 280 F. Supp. 802, 804-05 (W.D.Wash.1968)*; *Wall Products Co. v. National Gypsum Co., 357 F. Supp. 832, 840 (N.D.Cal.1973)*; *Tondas v. Amateur Hockey Ass'n, 438 F. Supp. 310, 315 (W.D.N.Y.1977)*. A jury could have found that, pursuant to the conspiracy, Time and the N.Y. Times denied Ambook the opportunity of placing ads directly with appropriate discounts. The Time report is evidence that the agencies rather than the media were the prime movers behind maintenance of this dual rate system. As Judge Weinfeld has said, "the law is clear that ***HN8***[] one who participates in and furthers wrongful conduct may also be held liable with the other alleged wrongdoer." *Data Digests, Inc. v. Standard & Poor's Corp., 43 F.R.D. 386, 389 (S.D.N.Y.1967)*. [27.]

[49]** On the other hand, we think summary judgment was properly granted in favor of all defendants in respect of Ambook's dealings with media not named as defendants. Ambook conceded that it never sought in-house agency treatment from them (as it did of Time), and there is no evidence of record that such an effort would have been futile. One can guess that Ambook would not have received a warm welcome, but speculation of this sort does not suffice, particularly in light of the judge's repeated directions that Ambook must adduce evidence on this subject.

We regret having been obliged to pass on issues of possibly great consequence to the advertising industry in an action by a single advertiser, now out of business, and which comes before us on appeal from the grant of summary judgment to the defendants. However, it was the defendants (including the industry's trade association) who chose to pursue this procedural course, they have been ably represented by experienced counsel, and we cannot refuse to decide issues properly tendered to us.

The order denying class action status is affirmed. The grant of summary judgment is affirmed with respect to the Robinson-Patman Act claims, and with **[**50]** respect to any damages arising from Ambook's dealings with unnamed members of the media, but is reversed with respect to the other damage claim. [28.] The cause is remanded for further proceedings consistent with this opinion. No costs.

Dissent by: MOORE

[27.] We note the pendency in Congress of legislation that would allow contribution among defendants in civil price-fixing cases, see 48 L.W. 2045 (July 17, 1979), thereby repealing Pro tanto the common law rule of no contribution among intentional joint tortfeasors, *Restatement of Torts 2d § 886A(3)* (1979).

[28.] If Ambook should be awarded damages, consideration would have to be given to the effect of its receipt from Bates, see note 2 Supra.

Dissent

MOORE, Circuit Judge (dissenting):

[*621] I dissent.

In my opinion, this case presents the rather extraordinary situation of the majority resuscitating an alleged antitrust suit, brought by a plaintiff which concededly has "been out of business since mid-1972 and was in the process of liquidation". [1.] The trial judge having given the plaintiff every opportunity by depositions, discovery and affidavits to produce such proof as it might have had to support a claim, came to the conclusion that "(t)here is no evidence sufficient to permit a finding that any of the agency defendants (Young & Rubicam, BBDO, and J. Walter **[**51]** Thompson) was a party to a combination or conspiracy injuring the business or property of Ambook during the period 1968-72". *464 F. Supp. at 1145*. The same finding was made with respect to The New York Times and Time. Based on the trial court's finding that "(T)here is no evidence that the 4A's did anything during the damage period, or for many years prior to the damage period, to promote or maintain any phase of the alleged conspiracy. . . ." *464 F. Supp. at 1136*, it granted summary judgment for the defendants.

Since I believe that cases should be decided upon the facts presented to the trial court, I take issue with the decision of the majority which by its own declarations has, in my opinion, created hypothetical and speculative situations and then, based upon inferences from these hypotheses, prophesied a possible jury conclusion.

An illustration will suffice. "A jury **[**52]** could rationally conclude from the evidence here adduced that during the damage period substantially all advertising agencies and the publishing media pursued a plan whereby If a national advertiser approached a newspaper or magazine, he Would typically be told that If he were willing to deal through a recognized agency, the agent Would receive a 15% Deduction but that otherwise he would be charged the full card rate." (emphasis added). This despite the previous statement that "At least eight types of compensation between advertisers and agencies are now in effect, although the record does not show their relative frequency or much else about them." To me, although eight types of financial arrangements are conceded to exist (post-1956), the majority's assumption as to a jury's rational conclusion is pregnant with the belief that a contrary conclusion would be irrational. In contrast to the majority's assumptions, the trial court found not on the basis of assumptions but on the proof actually before it that:

> "Neither the documents nor any other evidence proposed by Ambook suggest that, following the consent decrees of 1956, there was any step taken by the 4A's or anyone else to **[**53]** prevent advertising agencies from making whatever compensation arrangements they wished with their clients. The use of fees and cost-plus arrangements was growing, and there is no evidence that the 4A's or anyone else was engaging in any kind of conspiratorial activity to put a stop to the growth of these different compensation methods.
>
> * * * There is no evidence that the 4A's did anything during the damage period, or for many years prior to the damage period, to promote or maintain any phase of the alleged conspiracy. This finding is crucial to the present case, since it means that the alleged promoter and leader of the conspiracy was not performing these functions during the period relevant to this lawsuit." *464 F. Supp. at 1136*.

As to burden of proof, the burden was on the plaintiff to prove a conspiracy. There was no duty on the part of any defendant to justify its business policy or practices in choosing as a matter of business judgment to pay a 15% Commission instead of resorting to any of the other methods of compensation previously mentioned. Yet the majority, in effect, places the burden on the defendants of justifying their business decision **[*622]** **[**54]** by

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[1.] The period of alleged damages was 1968-1972. The Delaware statute provides for a continuance with respect to unfinished litigation.

saying: "here the media offered no evidence to show what legitimate business advantage, save continuity and fear of reprisal, inhered in the dual rate system".

To its reliance upon "conscious parallelism" the majority adds its theory of coercion despite the fact that the trial judge found to the contrary.

The formation in 1970 of a committee to examine into the possible elimination of the agency commission instead of proving a conspiracy, in my opinion, proves the opposite. Using the majority's statement thereof: "A symposium in a media publication, attended by many elements of the trade, reported a host of different views about the 15% Commission". Clients of Time thought abolition right in concept; wrong until details of a new system were worked out. The reaction of the airlines and the automobile industry were mixed. Again, despite the fact that there was a wide divergence of views the antithesis of a conspiratorial agreement the majority not having attended the committee meetings nor having heard the discussions, chose to substitute their conclusion that a rational jury could have found that the committee acted "only because of sloth or fear of reprisal". After hearing **[**55]** Ambook and analyzing all the material Ambook was able to offer, the trial court found that: "The undisputed facts are that Time was making an independent re-examination of the 15% Commission"; that Time "consulted with representative advertising agencies with whom Time did business in normal course and advertisers who advertised in Time, to determine what their views would be on the possible discontinuance of the 15% Commission". *464 F. Supp. at 1144*.

In the field of injury to property, a hypothetical and highly speculative situation is all that Ambook has presented. It says "Ambook would have been able to hire more employees and more highly qualified employees if advertising services were performed within the company" or that he might also have hired an advertising consultant for a year. Again, no proof, merely speculative hypotheses.

A brief word concerning the majority's apologia. Some explanation was, of course, necessary to explain why a court of appeals should "pass on issues of possible great consequence to the advertising industry, in an action by a single advertiser, now out of business . . . ."

Any "regret" at "having been obliged" to pass on the issues is mollified **[**56]** by an apparent desire to have the federal courts and/or a jury of laymen dictate to the advertising and media businesses how in the courts' or juries' opinion they should conduct their business operations, despite the previous decree.

In my opinion, summary judgment was the correct procedure for the defendants to follow. *Rule 56(c) of the Federal Rules of Civil Procedure* is applicable to antitrust cases. The facts material to a decision are undisputed and have been set forth at length by the trial court. On appeal they should be sustained unless clearly erroneous. *Rule 52(a) F.R.Civ.P.*

Recent cases have been informative as to the role of summary judgment in antitrust cases. In *Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163 (7th Cir. 1978)* the motions for summary judgment were, as here, based on a substantial record assembled by discovery and affidavits, establishing beyond the mere allegations of the pleadings, what the plaintiff was and was not able to prove. Noting that "there is no requirement that judges exercise greater caution in granting summary judgment in these (antitrust) cases than in any other", the court affirmed the judgment in favor of the defendants **[**57]** with the following comment equally applicable here:

> "Indeed, the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also, (without intending any slur on plaintiff here), the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation, see *Poller, supra, 368* ***[*623]*** *U.S. at 474, 82 S. Ct. 486, 7 L. Ed. 2d 458* (Harlan, J. dissenting). (*Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1961)*.) The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way. Judge (now Chief Judge) Skelly Wright, in a libel case, *Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965 (1966)*, noted that:

" * * * Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, **[**58]** and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. * * * (*Id. 125 U.S.App.D.C. at 35, 365 F.2d at 968*.)' "

Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d at 1167.

In *First Nat. Bank v. Cities Service, 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*, the Supreme Court, mindful of the four cases cited by the majority here and upon which they and petitioners in Cities Service relied, affirmed in an antitrust case summary judgment in favor of the defendant.

The cardinal fallacy which I find permeates the opinion of the majority and leads to its conclusion is that it treats this case as if it were an appeal from the government's 1955 civil antitrust case which involved virtually the same issues as here presented. The 1956 consent decree dealt with the same problems now before us. The pre-1956 practices complained of were enjoined and the slate for all practical purposes was wiped clean.

The trial court found that "Ambook has specifically conceded that it has no evidence of conspiratorial activity by the 4A's during the period 1968-72, or at any time after 1960. There is no evidence that the 4A's did anything **[**59]** during the damage period, or for many years prior to the damage period, to promote or maintain any phase of the alleged conspiracy." *464 F. Supp. at 1136*. It was incumbent upon Ambook to come forward with proof of post-1956 violations. Many witnesses were deposed; scores of exhibits were introduced. A full-scale trial could not have been more exhaustive.

Having given Ambook every opportunity to submit any proof it desired in aid of its claim, the trial court concluded: "There is no evidence sufficient to permit a finding that any of the agency defendants was a party to a combination or conspiracy injuring the business or property of Ambook during the period 1968-72." *464 F. Supp. at 1145*. The same finding was made as to The New York Times and Time.

In this case I would subscribe to the words of the late Mr. Justice Harlan, joined by Mr. Justice Frankfurter, Mr. Justice Whittaker and Mr. Justice Stewart in his dissent in the five to four decision in *Poller v. Columbia Broadcasting, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*:

"As I see it, this is one of those cases, not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought **[**60]** to be made redressable by casting the affair in antitrust terms. I think that the antitrust laws do not fit this case, and that the courts below were quite correct in holding that the respondents were entitled to judgment as a matter of law." *368 U.S. at 474, 82 S. Ct. at 491*.

As in this case, the trial court had before it affidavits and depositions. The trial court in Poller had granted summary judgment in an antitrust case in favor of the defendants. I would also adopt Mr. Justice Harlan's apologia when he said

"I have gone into this matter at some length because in my opinion the Court's encouragement of this sort of antitrust "enforcement' does disservice to the healthy observance of these laws. I would affirm." *368 U.S. at 486, 82 S. Ct. at 498*.

I would find it difficult, if not impossible, to formulate a charge to a jury which would not be based upon groundless speculation hence I would affirm.

Essential Communications Systems, Inc. v. American Tel. & Tel. Co.

United States Court of Appeals for the Third Circuit

September 7, 1979, Argued ; October 30, 1979, Filed

No. 78-2521

Reporter

610 F.2d 1114 *; 1979 U.S. App. LEXIS 10842 **; 1979-2 Trade Cas. (CCH) P62,978; 46 Rad. Reg. 2d (P & F) 673

ESSENTIAL COMMUNICATIONS SYSTEMS, INC., Appellant v. AMERICAN TELEPHONE & TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY and NEW JERSEY BELL TELEPHONE COMPANY, Appellees

Subsequent History: [1]** As Amended November 5 and Nov. 13, 1979. Rehearing and Rehearing In Banc Denied November 23, 1979.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. (D.C. Civ. No. 700-73).

Disposition: Reversed and Remanded

Core Terms

tariff, regulation, antitrust, customers, exemption, carrier, anti trust law, telephone, file a tariff, telecommunications, injunctive relief, network, Clayton Act, initiated, rates, common carrier, railroads, district court, proceedings, damages, customer-supplied, competitors, provisions, antidiscrimination, Communications, consolidations, distributed

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Communications

HN1[] **Regulated Industries, Communications**

47 U.S.C.S. § 221(a) carries forward the Willis-Graham Act's, 42 Stat. 27 (1921), limited exemption from the Clayton Act, *15 U.S.C.S. §§ 15 et seq.*, for consolidations of local service properties.

Antitrust & Trade Law > Regulated Industries > Communications

HN2[] **Regulated Industries, Communications**

See *47 U.S.C.S. § 414 (1976)*.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Transportation, Common Carriers

15 U.S.C.S. § 7 gives a right of action to one who has been injured in his business or property.

Counsel: DAVID BERGER, ESQ. (Argued), H. LADDIE MONTAGUE, JR., ESQ., ROBERT SIMON BALTER, ESQ., Attorneys for Appellant, Of Counsel: BERGER & MONTAGUE, P.C., Philadelphia, Pa.

BERNARD M. HARTNETT, JR., ESQ., DONALD B. HEEB, ESQ., COPELAND G. BERTSCHE, ESQ., Newark, New Jersey, Attorneys for Appellee, New Jersey Bell Telephone Co., Of Counsel: HAROLD S. LEVY, ESQ., DONALD K. KING, ESQ., FRANK C. CHESTON, ESQ.

CLYDE A. SZUCH, ESQ., FREDERICK L. WHITMER, ESQ., PITNEY, HARDIN & KIPP, Morristown, New Jersey. GEORGE L. SAUNDERS, JR., ESQ. (Argued), C. JOHN BURESH, ESQ., SIDLEY & AUSTIN, Chicago, Illinois, Attorneys for Appellees, American Telephone and Telegraph Company and Western Electric Company.

JOHN H. SHENEFIELD, Assistant Attorney General, BARRY GROSSMAN, ESQ., RON M. LANDSMAN, ESQ. (Argued), Attorneys, Department of Justice, Washington, D.C., Attorneys for United States as Amicus Curiae.

Judges: Before: SEITZ, Chief Judge and GIBBONS and HIGGINBOTHAM, **[**2]** Circuit Judges

Opinion by: GIBBONS

Opinion

[*1115] OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This is an appeal from an order dismissing a private treble damage action and a request for injunctive relief brought under sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26 (1976)*, on the ground that the conduct alleged in the complaint was exempt from antitrust scrutiny because it occurred in an industry and an area subject to regulation by the Federal Communications Commission (FCC). We reverse.

I. PLEADINGS AND PROCEEDINGS IN THE DISTRICT COURT

The plaintiff is Essential Communications, Inc. (Essential), a corporation engaged in the distribution of telephone station equipment for use at telephone customers' premises. The defendants are American Telephone and Telegraph Company (AT&T), the parent corporation of the Bell System, which comprises the largest telephone communications system in the United States, Western Electric Company (WECo.), AT&T's equipment manufacturing subsidiary, and New Jersey Bell Telephone Company (NJ Bell), one of AT&T's operating subsidiaries.

On May 17, 1973, Essential filed a complaint charging AT&T, WECo. and NJ Bell with violations **[**3]** of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2 (1976)*, in **[*1116]** that they sought to exclude from the market for telephone terminal equipment a device, called a Code-a-Phone, distributed by Essential. The complaint alleges that prior to November 1, 1968, the Bell System maintained a monopoly in the distribution, installation and service of telephone terminal equipment, by virtue of filed tariffs which prohibited customers from attaching to the Bell System station equipment obtained from any source other than Bell. On that date the decision of the Federal

Communications Commission (FCC) in *Carterfone* [1] became effective, which according to the complaint, opened up the telephone terminal equipment market to competition and which encouraged Essential to commence distributing, installing and servicing that equipment. Among the equipment distributed by Essential is the Code-a-Phone, manufactured by Ford Industries, Inc., and supplied by Ford both to Essential and to NJ Bell. This device, when electrically connected to a telephone customer's telephone line automatically answers, transfers and records incoming calls. Thus Essential and NJ Bell allegedly became competitors **[**4]** in the distribution, installation and service of Code-a-Phones. However, following the *Carterfone* decision the defendants, in an effort to hinder Essential's competition, filed with the FCC a new tariff which required customers of the Bell Systems to lease from Bell an interface device called a protective connecting arrangement (PCA) before they would be allowed to connect Essential's equipment to the Bell System network. The PCA is alleged to be unnecessary for the protection of the network since the Ford Code-a-Phones distributed by Essential were identical with those distributed by NJ Bell, and no such device is required for the latter. It is also charged that NJ Bell unreasonably delayed in furnishing PCAs to Essential's customers, and caused service difficulties for those customers by improperly installing and servicing PCAs. The complaint seeks treble damages and unspecified injunctive relief.

[5]** On October 3, 1973, by consent of the parties, the district court action was stayed so that the New Jersey Public Utilities Commission might consider the propriety of the PCA tariff. However, in 1974, the FCC asserted exclusive jurisdiction over regulation of the interconnection of customer-provided terminal equipment. When FCC jurisdiction was sustained by the Fourth Circuit Court of Appeals, [2] the New Jersey Public Utilities Commission concluded that it lacked jurisdiction to consider the validity of the PCA tariff, and the district court stay was revoked.

On August 1, 1977, the defendants moved to dismiss the complaint because the activity complained of, being subject to regulation by **[**6]** the FCC, was impliedly exempt from the antitrust laws. Finding in the Federal Communications Act of 1934, 47 U.S.C. § 151-606 (1976), an intention to repeal the antitrust laws in areas in which the FCC has exercised its regulatory authority, the district court granted the motion. [3] Thereafter, the court denied as untimely a motion to amend the complaint by adding an allegation that the defendants had committed a fraud upon the FCC by inducing the agency not to suspend the PCA tariff. This appeal followed.

II. EXEMPTION BY VIRTUE OF FEDERAL LAW

As will be developed herein, this appeal presents no issue of express statutory exemption from the antitrust laws. It involves, rather, the alleged incompatibility between the procompetitive policies of the antitrust laws and the pervasive scheme of regulation for the industry. Because the scheme of regulation varies from statute to statute, and the competitive situation varies **[*1117]** **[**7]** from industry to industry, there is no general doctrine of antitrust exemption for regulated industries. In some cases, the agency charged with regulation is also explicitly charged with the responsibility for maintaining competition, [4] and in others, as here, there is no such specific statutory delegation. In some industries, the economic desirability of maintaining a natural monopoly in the service being rendered precludes competition and instead substitutes pervasive regulation, while in others there is room for both competition in and regulation of the service. [5] Thus the extent to which antitrust enforcement is consistent with

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[1] *In re Use of the Carterfone Device, 13 F.C.C.2d 420*, *reconsideration denied, 14 F.C.C.2d 571 (1968)*.

[2] *In re Telerent Leasing Corp., 45 F.C.C.2d 204 (1974) aff'd sub nom. North Carolina Util. Comm'n. v. FCC, 537 F.2d 787* (4th Cir.), *cert. denied,* ***429 U.S. 1027, 50 L. Ed. 2d 631, 97 S. Ct. 651, 97 S. Ct. 652 (1976)***, *reconsideration denied, 552 F.2d 1036* (4th Cir.), *cert. denied,* ***434 U.S. 874 (1977)***.

[3] The district court's opinion is reported at *446 F. Supp. 1090 (D.N.J. 1978)*.

[4] *See, e.g., Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 368, 34 L. Ed. 2d 577, 93 S. Ct. 647 (1973)* (Civil Aeronautics Board expressly required to consider competition); *Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963)* (CAB statutory framework specifically refers to competitive power).

[5] *Compare United States v. Nat'l Ass'n Sec. Dealers, 422 U.S. 694, 730, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)* (immunity inferred from pervasiveness) *with United States v. R.C.A., 358 U.S. 334, 339-463, 3 L. Ed. 2d 354, 79 S. Ct. 457 (1959)*

governmental regulation varies from industry to industry. The Sherman Act, embodying as it does a preference for competition, has been since its enactment almost an economic constitution for our complex national economy. [6] **[**9]** A fair approach in the accommodation between the seemingly disparate goals of regulation and competition should be to assume that competition, and thus ***antitrust law***, does operate unless clearly displaced. [7] In determining whether ***antitrust law*** has been displaced, the starting point must be the statute under which the industry in question **[**8]** is regulated, in this case the Federal Communications Act of 1934, *47 U.S.C. §§ 151-609 (1976)*. [8]

[10]** A. *The Federal Regulatory Scheme for Telecommunications*

The first venture of the federal government into the regulation of telecommunications was *section 7* of the Mann-Elkins Act of 1910, ch. 309, *§ 7*, 36 Stat. 539 (1910), which added telephone and telegraph companies to the list of common carriers subject to the jurisdiction of the Interstate Commerce Commission (ICC). [9] **[**12]** That venture, however, hardly subjected the telecommunications industry to pervasive regulation. Indeed, prior to 1910 no federal regulation of common carriers could be so described. The Interstate Commerce Act of 1887 had required that railroads publish and file with the ICC rates that were just and reasonable, and prohibited certain discriminations. *See* Interstate Commerce Act, ch. 104, *§§ 1*, **[*1118]** *2*, *3*, *6*, 24 Stat. 379 (1887) Tariffs were generated solely by the carriers, and the role of the ICC was limited essentially to the effectuation of consumer protection and the antidiscrimination policy which were the chief purposes of the legislation. *Id.* In the Elkins Act of 1903, ch. 708, 32 Stat. 847 (1903), and the Hepburn Act of 1906, ch. 3591, 34 Stat. 584 (1906), the ICC was given more extensive **[**11]** tariff authority, including the authority to set aside tariffs and to fix maximum rates. [10] When the Mann-Elkins Act made telecommunications companies common carriers, it imposed upon them the obligation to provide service on request at just and reasonable rates, without unjust discrimination or undue preference. [11] They were made subject, in other words, to the basic consumer protection and antidiscrimination policy of the 1887 Act. The ICC was given jurisdiction to enforce these obligations. [12] But while the Mann-Elkins Act continued and

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(approval by FCC of exchange of television stations under license jurisdiction of the Communications Act of 1934 did not foreclose civil action by government under § 4 of Sherman Act) and *Cain v. Air Cargo, Inc., 599 F.2d 316 (9th Cir. 1979)* (no implied antitrust immunity despite approval of CAB).

[6] *See* *Carnation Co. v. Pacific Westboard Conference, 383 U.S. 213, 218, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966)* (antitrust laws fundamental national economic policy).

[7] *See* *United States v. Nat'l Ass'n Sec. Dealers, 422 U.S. at 719-20* (implied immunity disfavored and antitrust and regulatory statutes should be reconsidered unless clear repugnancy); *Gordon v. New York Stock Exchange, 422 U.S. 659, 682-83, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)* (implied repeal is not favored and not casually allowed); *Silver v. New York Stock Exchange, 373 U.S. 341, 357, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)* (preference to "reconciles the operation of both statutory schemes with one another rather than holding one completely ousted."); *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*.

[8] *See* *United States v. Borden Co., 308 U.S. 188, 198-99, 84 L. Ed. 181, 60 S. Ct. 182 (1939)* (looking to legislative history to determine whether statutory schemes repugnant); *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 352, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. Intent to imply immunity can be manifested by Congress in different ways, for example, through legislative history, *United States v. Nat'l Ass'n Sec. Dealers, 422 U.S. at 726* (looking to Congress' intent), "plain repugnancy between antitrust and regulatory provisions," *United States v. Philadelphia Nat'l Bank, 374 U.S. at 351*, or "pervasiveness" of the regulation, *United States v. Nat'l Ass'n Sec. Dealers 422 U.S. at 730*. The mere fact of federal regulation is not sufficient to imply immunity. *See* *Cantor v. Detroit Edison Co., 428 U.S. 579, 597 n.36, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*.

[9] Mann-Elkins Act of 1910, ch. 309, *§ 7*, 36 Stat. 545 (1910).

[10] *See* Hepburn Act of 1906, ch. 3591, § 4, 34 stat. 584 (1906).

[11] *See* Mann-Elkins Act *§§ 7*, *12*, ch. 309, 36 Stat. 539 (1910).

enlarged the ICC tariff jurisdiction over railroads, it did not subject telecommunications companies to the broadened ICC tariff regulatory jurisdiction. [13] Even the existence of broadened ICC tariff regulatory jurisdiction over railroads was not, as of 1912, deemed to exempt railroads from the antitrust laws. [14] A fortiori the less regulated telecommunications companies were not exempt. Finally, when Congress, in 1914, enacted the Clayton Act, it was made expressly applicable to all common carriers.

The Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920), substantially increased the already pervasive regulation of the railroad industry by the ICC. It also made express provision for the authorization of pooling and other anticompetitive provisions which might otherwise have violated the Sherman or Clayton Acts. **[**13]** [15] But the Transportation Act, except for a minor increase in ICC power to enforce the anti-rebate duty, [16] left the regulation of telecommunications common carriers virtually unchanged. [17] Thus under the aegis of the ICC, the competition principle was being curtailed in the railroad context in the interest of the economies thought to flow from the development of such natural monopolies, while the telecommunications companies remained fully subject to the antitrust laws.

Competition among telephone services in the same geographic area was, in the early part of the century, a fact of life. The enactment in 1914 of the Clayton Act's antimerger provisions [18] presented a serious obstacle to the rationalization of a national telephone network. The **[**14]** Willis-Graham Act addressed the problem of competing local telephone exchanges, presenting as it did the specter of waste and inconvenience from the duplication of facilities. *See* Willis-Graham Act of 1921, ch. 20, 42 Stat. 27 (1921) (current version at *47 U.S.C. § 221 (1976)*). That statute authorized the ICC to approve the consolidation of properties of telephone companies into single companies if such consolidation is "of advantage to the persons to whom service is to be rendered and in the public interest . . ." *Id.* (current version at *47 U.S.C. § 221(a)*). The **[*1119]** statute granted express immunity from the antitrust laws for such consolidations. *Id.*

Thus, as of 1921, the telecommunications industry was by federal law recognized as a common carrier, subject to the consumer protection and antidiscrimination features of the Interstate Commerce Act, and exempt from antitrust liability for consolidations **[**15]** of local competing service systems. It was, however, otherwise subject to the antitrust laws. Indeed, a government antitrust suit had in 1914 produced a consent decree against AT&T. [19] Aside from the ICC jurisdiction to enforce AT&T's obligation to provide service on request at just and reasonable rates without undue discrimination or undue preference, AT&T was free to determine its rates, its return on investment,

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[12] *See* Interstate Commerce Act, ch. 104, §§ 8, 9, 12, 13, 24 Stat. 379 (1887); Mann-Elkins Act of 1910, ch. 309, *§§ 12*, *13*, 36 Stat. 539 (1910).

[13] *See* *Western Union Tel. Co. v. Esteve Bros., 256 U.S. 566, 573, 65 L. Ed. 1094, 41 S. Ct. 584 (1921)* (all common carriers subject to antidiscrimination principle, but differences exist between railroads and telecommunications carriers as to relationship with ICC).

[14] *See, e.g.,* *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*; *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*.

[15] *See* Transportation Act of 1920, ch. 91, § 407, 41 Stat. 456 (1920).

[16] *See id.,* § 404, 41 Stat. 456.

[17] *See* H.R. Rep. No. 456, 66th Cong., 1st Sess. 11 (1919); *see also* H.R. Conf. Rep. No. 650, 66th Cong., 2d Sess. 64-65 (1920).

[18] Clayton Act, ch. 323, § 11, 38 Stat. 730 (1914) (current version at *15 U.S.C. § 21 (1976)*).

[19] United States v. American Tel. & Tel. Co., 1 Decrees & Judgments in Civil Federal Antitrust Cases 554 (D. Ore. 1914), *modified,* 1 Decrees & Judgments in Civil Federal Antitrust Cases 659 (D. Ore. 1914), 1 Decrees & Judgments in Civil Federal Antitrust Cases 572 (D. Ore. 1918), 1 Decrees & Judgments in Civil Federal Antitrust Cases 574 (D. Ore. 1922).

and its service obligation. Federal law did not even impose an obligation to interconnect with other communications common carriers. AT&T's local subsidiaries were, however, subject to regulation in other respects at the state level. This describes the state of telecommunications law when Congress passed the Federal Communications Act of 1934, *47 U.S.C. §§ 151-609 (1976)*.

[16]** Before we turn to the particulars of that Act, it is worthwhile noting the evolution of public utility regulation in the fifty years following the enactment in 1877 of the Interstate Commerce Act. The earliest, and perhaps still most common form of regulation, is the imposition on public utilities of the obligation to offer their services to all customers on a more or less equal basis. Ratemaking and the definition of service obligations were, absent discrimination, left in the hands of the carriers, subject to the forces of the marketplace, except for extreme abuses. The early ICC legislation took this form. Later, however, as natural monopolies came to be recognized, utility regulation took on a second aspect. In the absence of competition, government regulation both of service obligation and of rates was added to the earlier regulation of what, for want of a better term, can be called the antidiscrimination obligation. By the time of the passage of the Transportation Act of 1920, ICC regulation of railroads had evolved to such a stage that it included both aspects: enforcement of the antidiscrimination obligation, and detailed regulation of service obligations and rates. Telecommunications **[**17]** regulation, on the other hand, at least on the federal level, had not, prior to 1934, progressed beyond the first stage.

In 1934 Congress created the Federal Communications Commission (FCC), vesting it with all of the telecommunications jurisdiction theretofore vested in the ICC, and with additional new authority. At the same time it imposed certain new obligations on the industry. For the first time federal law imposed an obligation to interconnect or establish through routes with other common carriers. See *47 U.S.C. § 201(a) (1976)*. Many provisions of the 1934 Act were carried forward almost verbatim from the Mann-Elkins Act of 1910. [20] The 1934 Act also continued the previously applicable prohibition against unjust and unreasonable discriminations. [21]

[18]** As to tariffs, the 1934 Act continued the prior practice that tariffs be generated, at least in the first instance, by the carriers. *Section 203* of the Act required that they be filed with the FCC, *47 U.S.C. § 203(a)*, that the FCC and the public be given 30 days notice of any proposed change, *id.* *§ 203(b)*, and that no charge be demanded or collected, refunded or remitted, or any service rendered, except in accordance with a filed tariff. *Id.* *§ 203(c)*. This section does no more than carry forward the prior obligation **[*1120]** of telecommunications common carriers to avoid discriminations by adhering to filed tariffs. The FCC was, however, given two specific powers with respect to tariffs. In *section 204* it was authorized, either after a complaint or on its own initiative, to conduct a hearing concerning the lawfulness of a filed tariff, and pending the completion of that hearing, to suspend its operation for no more than three months. [22] If at the end of three months the hearing has not been completed, the carrier initiated tariff would go into effect. In *section 205(a)* the FCC was authorized, after the hearing, "to determine and prescribe what will be the just and **[**19]** reasonable charge . . . to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable to be thereafter followed. . . ." *47 U.S.C. § 205(a)*. Thus the tariff scheme of the 1934 Act carries forward the pre-existing power of the ICC to review carrier initiated tariffs, and to enforce the obligation of fair and reasonable charges. Possibly the scope of FCC authority to review and change carrier initiated tariffs is somewhat broader than that formerly held by the ICC, since it covers classifications, regulations, and practices. But for reasons to which we refer hereafter, any difference in the scope of the two authorities is not critical to the analysis of the antitrust exemption issue.

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[20] *Compare* Mann-Elkins Act of 1910, ch. 309, *§ 7*, 36 Stat. 539 ("just and reasonable" tariff requirement) with Communications Act of 1934, ch. 652, *§ 201*, 48 Stat. 1064 (1934) (current version at *47 U.S.C. § 201(b)*).

[21] *Compare* Mann-Elkins Act of 1910, ch. 309, *§§ 7*, *12*, 36 Stat. 539 (1910) with Communications Act of 1934, ch. 652, *§ 202*, 43 Stat. 1064 (1934) (current version at *47 U.S.C. § 202(a)*).

[22] *47 U.S.C. § 204*, *as amended,* Pub. L. No. 94-376, *§ 2*, 90 Stat. 1080 (1976) (increasing period of suspension to five months).

Two other provisions of the 1934 Act bear on the exemption issue. The first is ***HN1***[] *section 221(a)*, which carries forward the Willis-Graham Act's **[**20]** limited exemption from the Clayton Act for consolidations of local service properties. [23] The other is *section 414*, which provides:

> ***HN2***[] Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414 (1976). Finally, nothing in the 1934 Act expressly directs the FCC when exercising its *section 205(a)* authority, to take into account antitrust considerations, although undoubtedly they bear to some extent upon the fairness or reasonableness of the charges, classifications, regulations or practices of the carrier.

[21]** From the foregoing it appears that the 1934 Act, like the Interstate Commerce Act prior to its amendment by the Transportation Act of 1920, is designed essentially for the protection of telephone users in a rather limited way from discrimination in rates or service and from excess charges. Nothing in the Act suggests an intention on the part of Congress to regulate, or, indeed, to protect, equipment sellers or other competitors except insofar as they may also be customers for communication services. The Act does not impose on the telecommunications industry the kind of comprehensive regulation which, after 1920, the ICC exercised over the railroads. Moreover, the express exemption of the Willis-Graham Act carried forward in *section 221(a)*, and the preservation of other remedies in *section 414*, suggest, when read together, that no blanket exemption from ***antitrust law*** was intended. [24] We recognize, however, that a given **[*1121]** antitrust remedy might in specific instances present an actual or potential conflict with a duty imposed by the FCC in the exercise of its customer protective tariff jurisdiction. [25] Whether the instant claim presents such a conflict is the question to **[**22]** which we now turn.

[23]** B. *The Antitrust Claims*

Since the determination of a possible antitrust exemption turns, in our view, on conflict, actual or potential, between an obligation imposed by the 1934 Act and an antitrust remedy, analysis must necessarily be discrete. AT&T's primary obligation under the 1934 Act is to adhere, in its dealings with customers, to its filed tariffs. That primary obligationis the heart of public utility regulation because if carriers were free to depart from filed tariffs the prohibition against discrimination among customers could be evaded. However, the filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors in the equipment supply business; competitors are not the intended beneficiaries of that rule of public utility regulation. This distinction was recognized over fifty years ago by Justice Brandeis in the leading case of *Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*. In that case a railroad customer (shipper) sued for money damages under the antitrust laws alleging that the railroad tariffs filed with the ICC had been arrived at as a result of an unlawful conspiracy. **[**24]** Brandeis for a unanimous court sustained a demurrer to the complaint, observing:

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[23] *47 U.S.C. § 221(a) (1976)* (originally enacted as Willis-Graham Act of 1921, ch. 20, 42 Stat. 27 (1921); *see* 78 Cong. Rec. 8822 (May 15, 1934) (remarks of Sen. Dill, sponsor) (with regard to areas outside specific exemption, bill examined "line by line, to see that it covered so far as possible all the existing law that is in the statutes which we are proposing to repeal, and also to see that it did not seriously conflict.").

[24] *See* *United States v. Borden Co., 308 U.S. at 201* (express immunity and surrounding legislative history implies congressional intent that conduct not within exemption is subject to antitrust laws); *Cain v. Air Cargo, Inc., 599 F.2d 316 (9th Cir. 1979)*; *Mt. Hood States, Inc. v. Greyhound Corp., 555 F.2d 687, 691 (9th Cir. 1977)*, *cert. denied on this ground,* ***434 U.S. 1008***, *rev'd on other grounds,* *437 U.S. 322, 57 L. Ed. 2d 239, 98 S. Ct. 2370 (1978)*. Although the existence of a savings clause will not deter necessarily the implication of immunity, *see* *Pan Am. World Airways, Inc. v. United States, 371 U.S. at 321* (Brennan J. dissenting) (implied immunity in CAB statutory framework that specifically refers to competition), it does provide in this particular regulatory scheme an affirmative statutory basis for applying the antitrust laws.

[25] *See* *United States v. Nat'l Ass'n Sec. Dealers, 422 U.S. at 730-35* (immunity may be inferred if agency's exercise of authority is sufficiently pervasive to create actual or potential conflict).

> HN3[] Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . And they are not affected by the tort of a third party. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress -- prevention of unjust discrimination -- might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.

Id. at 163. Brandeis was dealing in 1922 with the interaction of a tariff scheme and an antitrust regime indistinguishable **[**25]** from the FCC tariff scheme and the antitrust regime now before us. If this suit were brought by Bell System customers for recovery of damages because the filed tariff imposed excess costs upon them, we would probably have to conclude that the filed tariff doctrine precluded treble damage recovery under section 4 of the Clayton Act. But the filed tariff doctrine does not confer immunity from antitrust liability generally. [26] Indeed in the *Keogh* case Brandeis observed:

> But under the Anti-trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by **[*1122]** injunction under § 4, and by forfeiture under § 6. That was settled by *United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540*, and *United States v. Joint Traffic Association, 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25*. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.

260 U.S. at 161-62.

[26]** In this case the plaintiff is not suing in the capacity of a customer for communications services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.

Arguably the claim for injunctive relief, which will, of course, operate prospectively, requires a different analysis than we have made respecting the claim for damages for past activities, although Justice Brandeis, in *Keogh,* apparently did not think so. As with the damage remedy, a discrete analysis is helpful. Under the 1934 Act two different kinds of tariffs may be involved. The first is a tariff initiated entirely by a carrier and filed pursuant to section 203. If an antitrust plaintiff establishes that such a tariff was devised for an anticompetitive purpose which cannot **[**27]** satisfy antitrust criteria, an injunction under section 16 of the Clayton Act could, it seems to us, require the filing of a new tariff, and the notice as required by section 203, without in any way impinging upon the jurisdiction of the FCC. That agency's jurisdiction attaches under sections 204 and 205 only after a carrier filing, and carriers under section 203 remain free to change their filed tariffs at any time on appropriate notice. If, on the other hand, the FCC has conducted an investigation and made an order under section 205, there may be a potential for conflict between the two regulatory regimes. Here, again, the distinction between customer plaintiffs and noncustomer plaintiffs is probably significant because of the interaction between the common carrier's duty to offer service to all who seek it

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[26] *See* *Sound, Inc. v. American Tel. & Tel. Co., 1979-2 Trade Cas. (CCH) P62,974* (S.D. Iowa, 1979); *MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. 1072, 1080-81, 1093 (N.D. Ill. 1978)* *aff'd sub nom.* *American Tel & Tel. Co. v. Grady, 594 F.2d 594*, *cert. denied,* ***American Tel. & Tel. Co. v. MCI Communications Corp., 440 U.S. 971, 99 S. Ct. 1533, 59 L. Ed. 2d 787 (1979)***, (neither congressional intent nor cases support a blanket immunity for communications carriers and interconnection should not be impliedly immune); *Jarvis v. American Tel. & Tel. Co., 1978-2 Trade Cases (CCH) P62,197 (D.C. 1978)*; *United States v. American Tel. & Tel. Co., 427 F. Supp. 57, 60 (D.D.C. 1976)*, *cert. denied,* ***434 U.S. 966, 54 L. Ed. 2d 452, 98 S. Ct. 507 (1977)***.

on reasonable terms and conditions and the antitrust considerations involved in permitting potential competitors in communication services to have access to the Bell System network. However, the federal courts, not the FCC, have the primary responsibility for the enforcement of the antitrust laws even in the customer access context. Thus abdication of the responsibility for examining **[**28]** the prospective operation of a *section 205* order ought not to be decided lightly. In this case, where the antitrust claim for prospective relief is advanced on behalf of an equipment supplier rather than a Bell System customer, undue deference to the agency may be even less appropriate, since customers, not equipment manufacturers, are the special responsibility of the FCC. Undoubtedly, the terms of a *section 205* order must be taken into account in determining whether the restraint of trade charged in the complaint is unlawful, and if so, what prospectiverelief is appropriate. But we do not think that the presence of a *section 205* order can wholly preclude a section 16 Clayton Act lawsuit; the mere potential for such an order is an a fortiori case. [27]

[29]** C. *The Commission's Tariff Activity*

With the foregoing principles in mind, we turn to the FCC tariff activity as it bears **[*1123]** upon this case. Prior to 1968 only AT&T initiated tariffs were on file, and those flatly prohibited communications service customers from connecting electrically to Bell System lines any equipment not obtained from it. [28] In 1965 Thomas F. Carter filed a suit in the Northern District of Texas under the antitrust laws seeking damages and injunctive relief from AT&T and others because they would not permit Bell System customers to use his Carterfone device. The district court denied preliminary injunctive relief pending a determination by the FCC of the validity of the Bell System tariff, and the Fifth Circuit affirmed that denial. *Carter v. American Tel. & Tel. Co., 250 F. Supp. 188, 192* (N.D. Tex.), *aff'd, 365 F.2d 486 (5th Cir. 1966)*, *cert. denied, 385 U.S. 1008, 17 L. Ed. 2d 546, 87 S. Ct. 714 (1967)*. Then, for the first time, the FCC began an investigation, pursuant to *sections 204* and *205*, of the legality under the 1934 Act of the prohibition against connection of equipment obtained from other sources. In *In re Use of the* ***[**30]*** *Carterfone Device, 13 F.C.C.2d 420*, *reconsideration denied, 14 F.C.C.2d 571 (1968)*, the FCC determined that the tariff was unreasonable within the meaning of *section 201(b)* of the Act, and requested the submission of new tariffs which would permit the use of other source equipment by customers, but would not adversely affect the telephone company's operations or the network's utility for others. In the proceedings before the FCC, AT&T maintained that it was essential to the integrity of the communications network that no electrical connection be made to it of equipment which its operating companies or manufacturing subsidiary had not examined and supplied. The 1968 FCC order rejected that contention, 13 F.C.C.2d at 423, 424, while recognizing that integrity of the network was a legitimate concern. *Id.* at 425. In response to the FCC invitation, AT&T filed a new tariff permitting Bell System customers to protect their own equipment if they used carrier-supplied PCAs. The FCC was uncertain about the necessity for use of PCAs for the protection of the network, but in the absence of technical information it permitted the tariff to become effective without ruling explicitly on **[**31]** its legality. [29] Thus customers were required to lease PCAs from Bell System operating companies if they wanted to use their own telephone station equipment.

Between 1969 and 1972 the FCC conducted formal proceedings to assist in evaluation of the technical issues relating to the impact on network integrity of customer-owned equipment. On June 14, 1972, it instituted a Notice of Inquiry and Proposed Rulemaking aimed at determining the best approach to the problem. [30] The proceedings

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[27] *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913, 918-19 (9th Cir. 1975)* (Clayton Act proviso barring private injunction suit against common carriers regulated by ICC did not bar private injunction suit against telephone company regulated by FCC) *on remand, 449 F. Supp. 1158, 1164-69 (D.C. Hawaii 1978)*; *MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. at 1100-02* (Communications Act does not provide exclusive remedies), *aff'd sub nom., American Tel. & Tel. Co. v. Grady, 594 F.2d 594*, *cert. denied,* ***American Tel. & Tel. v. MCI Communications Corp., 440 U.S. 971, 99 S. Ct. 1533, 59 L. Ed. 2d 787 (1979)***.

[28] Tariff F.C.C. No. 132 PB.7, B.24 (filed April 16, 1957), superseded by Tariff F.C.C. No. 263 P2.6.1, 2.6.9 (filed January 2, 1968) (corresponding paragraphs substantially the same).

[29] *In re* American Tel. & Tel. Co., "Foreign Attachment" *Tariff Revisions, 15 F.C.C.2d 605, 610, 611 (1968)*, *reconsideration denied, 18 F.C.C.2d 871, 874 (1969)* (Tariff Nos. 259, 260, 263).

continued for several years. On November 7, 1975, two and one-half years after the filing of Essential's complaint in the district court, the **[**32]** FCC proposed a registration program for customer-supplied equipment. [31] That regulation permits direct attachment of customer-supplied equipment if the PCA or equipment is so registered with the FCC. Non-registered equipment may be attached only through Bell System PCAs.

Thus the FCC **[**33]** activity which the defendants claim to be preemptive here is divided into three stages. Prior to the FCC decision in *Carterfone* in 1968 there was on file a carrier initiated tariff prohibiting any use **[*1124]** of customer-supplied equipment. Since Essential was not in business during that period, that tariff bears on the issue of antitrust exemption only peripherally, if at all. Between 1968 and 1975 there was on file a carrier initiated tariff, filed in response to the *Carterfone* decision, permitting use of customer-supplied equipment only in conjunction with the use of Bell System PCAs. This is the period during which Essential allegedly suffered an injury to its business or property. Therefore, it is relevant to the viability of the section 4 Clayton Act claim. However, since the tariff that was in effect during the 1968-1975 period is no longer in effect, it will have no bearing upon the availability of prospective injunctive relief under section 16 of the Clayton Act. Finally, the post-1975 tariff, in effect today, may bear upon the scope of prospective injunctive relief sought under section 16.

The claim for money damages with respect to the 1968-1975 tariff is **[**34]** by a noncustomer. Therefore, it does not run afoul of the previously discussed binding effect, that exists between AT&T and its customers, of filed tariffs. Moreover, because the FCC never *required* the filing of the tariff in the form presented, no issue is presented of action taken under compulsion of law. [32]

Similarly no issue is presented of FCC approval. The FCC never approved the 1968-1975 tariff. Instead of holding a hearing immediately after the filing as permitted by the Act, the FCC told AT&T to file a tariff subject to later approval or disapproval in accordance with certain independent studies commissioned by the agency. In effect, the FCC suspended its judgment pending further study. We do not feel that this course of conduct rises to the level of agency approval that might require implied immunity. Postponement of action by the agency cannot be construed an approval **[**35]** requiring a court to refrain from enforcing the antitrust laws, especially where, as here, the agency ultimately declared the defendant's interim conduct improper. Thus we find no basis for the conclusion that the enforcement of section 4 of the Clayton Act in the form of money damages would present a conflict with the policies of the 1934 Act.

As to the claim under section 16 for injunctive relief, we hold that its dismissal on the pleadings cannot be affirmed. It is impossible to tell whether Essential could prove facts entitling it to injunctive relief. If injunctive relief were directed at NJ Bell's marketing and service activities, while refraining from alteration of the tariff imposed by the FCC in 1975, there would be no conflict between the tariff and the injunction. Moreover, while as between AT&T and its customers the FCC has the final word in service classifications, we are not prepared to hold, at the pleadings stage of an antitrust suit, that the FCC's tariff took insufficient account of third party competitive interests and ought to be modified. The separate question of whether a court before which a section 16 antitrust claim is pending is the appropriate forum for **[**36]** the consideration of such third party interests, or whether instead, for prospective relief from the operation of a tariff, Essential should be required to intervene in the FCC proceedings, exhaust administrative remedies, and then seek judicial review under *28 U.S.C. § 2342(1) (1976)* and *47 U.S.C. § 402 (1976)*, is one which need not be answered at this time. Any injunction which may be granted might be narrow enough that that question will not arise. We hold only that the plaintiff could under the complaint prove some state

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[30] *See* In re *Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS, 35 F.C.C.2d 539 (1972)*.

[31] 40 Fed. Reg. 53,022 (1975), *codified at* 47 C.F.R. § 68 (1978). *See In re Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS, First Report and Order (Registration Decision), 56 F.C.C.2d 593, 614-622 (1975)*, *on reconsideration, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 (1976)*, *Second Report and Order, 58 F.C.C.2d 736 (1976)*, *on reconsideration, 61 F.C.C.2d 396, 64 F.C.C.2d 1058*, *aff'd sub nom. North Carolina Util. Comm'n v. FCC, 552 F.2d 1036, 1056* (4th Cir.), *cert. denied,* ***434 U.S. 874, 54 L. Ed. 2d 154, 98 S. Ct. 222, 98 S. Ct. 223 (1977)***.

[32] *Cf. Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* (compulsion under state law implies immunity).

of facts which might warrant injunctive relief under the antitrust laws, and that the complaint should not have been dismissed on the ground that the FCC tariffs made the defendants' activities exempt from antitrust scrutiny.

To the extent that the district court decisions in *Phonetele, Inc. v. American Tel. & Tel. Co., 435 F. Supp. 207 (C.D. Cal. 1977)*, *appeal docketed* No. 77-3877 (9th Cir. Dec. 14, **[*1125]** 1977); *DASA Corp. v. General Tel. Co., 1977-2 Trade Cas. (CCH) P61,610 (C.D. Cal. 1977)*, *appeal docketed,* No. 77-2936 (9th Cir. Aug. 23, 1977) *(Phonotele* and *DASA* argued May 18, 1979); *Monitor Business Machines, Inc. v. American* ***[**37]*** *Tel. & Tel. Co., 1978-1 Trade Cases P62,030 (C.D. Cal. 1978)*, and *Western Elec. Co. v. Milgo Elec. Corp., 1978-1 Trade Cas. (CCH)P61,960 (S.D. Fla. 1976)*, *appeal dismissed, 568 F.2d 1203* (5th Cir.) *cert. denied, 439 U.S. 865 (1978)*, reach different conclusions as to exemption, we find them unpersuasive.

III. EXEMPTION BY VIRTUE OF STATE LAW

In Part II we have disposed of the ground on which the district court relied in dismissing the complaint. The defendants urge as a separate ground for affirmance that the PCA tariff, and its predecessor prohibition of customer-supplied equipment, merely paralleled the service obligations imposed upon it by state law. They rely particularly upon decisions in *Quick Action Collection Co. v. New York Tel. Co.,* [1920D] Pub. U. Rep. (PUR) 137, 143-44 (N.J. Bd. Pub. Util. Comm'rs), and *In re New Jersey Bell Tel. Co.,* 100 Pub. U. Rep. (PUR) 124, 127 (N.J. Bd. Pub. Util. Comm'rs 1953), which upheld the provisions of state tariff filings prohibiting connection of customer-owned equipment. Under the *Parker v. Brown* rule, they contend, these state law tariffs confer antitrust exemption.

There are several difficulties with **[**38]** this argument. The first is that the typical state regulatory scheme is essentially no different than that of the 1934 Act. It permits carriers to initiate tariffs, requires them to adhere strictly thereto in dealing with their customers, and permits their revision, in the interest of the customers, by a state regulatory agency. [33] The analysis which we made with respect to any conflict between federal ***antitrust law*** and state utility regulation in Part II is equally applicable here. A second, and we think insurmountable objection, is the holding in *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)* that the provisions of utility initiated tariff filings do not furnish a predicate for a *Parker v. Brown* exemption from antitrust claims by competitors injured as a result of compliance with the tariffs. The court's analysis in *Cantor* is entirely consistent with that which we made in Part II.

Finally, **[**39]** it is not at all clear that state law has any role in determining whether the Bell System could exclude customer-supplied equipment from attachment to its network. In the period between 1968 and 1975, while the FCC was investigating the technical ramifications of the PCA tariff, seventeen different state utility commissions undertook investigations of the same subject matter. This proliferation of possibly conflicting regulatory activity led the FCC to assert primacy in authority over the terms and conditions governing connection of customer-supplied equipment to the national network. [34] **[**40]** That ruling was challenged by a state regulatory commission, but was affirmed by a divided court. [35] As we noted above, the New Jersey Public Utilities Commission, following the *Telerent* holding, declined to pass upon the validity of the PCA tariff. We need not in this case decide whether the FCC authority totally preempts state authority in the field, as the Fourth Circuit majority held, for even if there is room for state tariff regulation there is no room for a *Parker v. Brown* immunity from antitrust liability.

IV. CONCLUSION

Our rejection of the claim of antitrust exemption requires that the judgment appealed from be reversed and the case remanded for further proceedings on the merits. Our discussion of the antitrust issues does not, of course, suggest that the conduct **[*1126]** complained of would, if proved, necessarily be found to have violated either *section 1* or

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[33] *See* N.J. Stat. An. §§ 48:2-1 to 72, 48:3-1 to 7.13 (West 1969).

[34] *In re Telerent Leasing Corp., 45 F.C.C.2d 204 (1974)*.

[35] North Carolina Util. Comm'n v. FCC, 537F.2d 787 (4th Cir.), *cert. denied,* ***429 U.S. 1027, 50 L. Ed. 2d 631, 97 S. Ct. 651, 97 S. Ct. 652 (1976)***, *reconsideration denied, 552 F.2d 1036* (4th Cir.), *cert. denied,* ***434 U.S. 874 (1977)***.

section 2 of the Sherman Act. We hold only that neither the FCC nor the state tariff regulatory schemes provide a basis for an implied exemption from those laws.

End of Document

Perington Wholesale, Inc. v. Burger King Corp.

United States Court of Appeals for the Tenth Circuit

March 13, 1979, Argued ; October 31, 1979, Decided

No. 77-1877

Reporter

631 F.2d 1369 *; 1979 U.S. App. LEXIS 10828 **; 1979-2 Trade Cas. (CCH) P62,986; 28 Fed. R. Serv. 2d (Callaghan) 1027

Perington Wholesale, Inc. v. Burger King Corp., Davmor Industries, Inc., and Carpenter Paper Co.

Subsequent History: [1]** Supplemental Opinion on Rehearing January 14, 1980.Rehearing Denied February 20, 1980.

Core Terms

monopolize, allegations, restaurants, products, conspiracy, logoed, Sherman Act, termination, notice of appeal, conspired, cups, lessening, supplying, cancellation, competitors, tying product, Clayton Act, franchisees, antitrust, relevant market, pleadings, commerce, supplier, motion to dismiss, summary judgment, fair notice, trial judge, paper cup, competes, asserts

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

HN1[] **Defenses, Demurrers & Objections, Defects of Form**

If an opposing party cannot formulate a responsive pleading because the factual allegations are too sparse, it is entitled to move for a more definite statement. Fed. R. Civ. P. 12(e).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

The trial court must conclude beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief before the pleadings can be dismissed under Fed. R. Civ. P. 12(b)(6).

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Complaints, Requirements for Complaint**

All the rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] Pleadings, Rule Application & Interpretation

The complaint must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Business & Corporate Law > Distributorships & Franchises > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN5[] Remedies, Damages

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, does not necessarily prohibit a conspiracy to substitute a new distributor for an existing one. Competition, the ward of the Sherman Act, may not suffer by such a substitution, and may in fact be enhanced. If, however, the substitution is motivated by a desire to damage a competitor or put it out of business, or the result is to substantially lessen competition, the Sherman Act is violated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

HN6[] Exclusive & Reciprocal Dealing, Requirements Contracts

An exclusive supply agreement entails a commitment by a buyer to deal only with a particular seller. A requirements contract is functionally the same if it commits the buyer to acquire all the products it needs from the seller. The agreement need not specifically require the buyer to forego other supply sources if the practical effect is the same.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN7[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A complaining trader must allege and prove that a particular arrangement unreasonably restricts the opportunities of the seller's competitors to market their product. The actual dollar amount of the total trade is not important in these dealership cases, rather it is the nature and tendency of the agreement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

HN8[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Section 3 of the Clayton Act, *15 U.S.C.S. § 14*, prohibits an exclusive dealing arrangement when its effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > 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

HN9[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

To prove a violation of *§ 3* of the Clayton Act, *15 U.S.C.S. § 14*, a plaintiff must show the exclusive dealing arrangement has or probably will foreclose competition in a substantial share of a line of commerce.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

HN10[] **Scope, Monopolization Offenses**

To show a cause of action based upon the *§ 2*, Sherman Act, *15 U.S.C.S. § 2*, offense of attempting to monopolize, a plaintiff must sufficiently allege the defendant's specific intent to monopolize and the dangerous probability that the attempt would result in a monopoly. This latter requirement entails showing the relevant market and the power of the defendant in it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN11[] **Monopolies & Monopolization, Attempts to Monopolize**

The gravamen of an offense involving monopolization is the power of the defendant in the market in which it competes. The mere fact that a company exerts control within its own vertical framework through trademarks or otherwise does not speak to the question of power in its own market.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN12[] **Scope, Monopolization Offenses**

Conspiring to monopolize is a separate offense under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, requiring less in the way of proof than the other *§ 2* offenses. In this context, a plaintiff need show defendants' specific intent to monopolize any part of interstate commerce. The market power in a "relevant market" need not be proved.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

Sections 1 and *2* of the Sherman Act, *15 U.S.C.S. §§1*,*2*, overlap in part and also supplement each other. *Section 1* can be said to be directed in the main to devices or conduct that destroy competition; *§ 2* prohibits the anticompetitive result described as monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN14[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Although the offense of conspiring to monopolize appears to address the means by which competition is harmed, the gravamen of that offense is the intent to achieve the unlawful result. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful.

Civil Procedure > Appeals > Notice of Appeal

HN15[] **Appeals, Notice of Appeal**

To perfect an appeal, a party must file a notice of appeal that shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. *Fed. R. App. P. 3(c)*.

Counsel: Martin Zerobnick, Denver, Colo. (Robert G. Weiss, Denver, Colo., with him on brief), of Brenman, Sobol, Baum, Zerobnick, Epstein, Zuckerman & Lutz, P. C., Denver, Colo., for plaintiff-appellant.

R. Brooke Jackson, Denver, Colo. (Harry L. Hobson, Denver, Colo. with him on brief), of Holland & Hart, Denver, Colo., for defendants-appellees, Burger King Corporation and Davmor Industries, Inc.

Judges: Before DOYLE, McKAY and LOGAN, Circuit Judges.

Opinion by: LOGAN

Opinion

[*1370] This appeal arises out of a private antitrust suit brought by Perington Wholesale, Inc. (Perington), against Burger King Corporation (Burger King), Davmor Industries, Inc. (Davmor), and Carpenter Paper Company (Carpenter). Among other claims, Perington asserts that defendants conspired to restrain trade and conspired or attempted to monopolize in violation of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and utilized a tying arrangement in violation of the Sherman Act, *15 U.S.C. § 1*, and the Clayton Act, *15 U.S.C. § 14*. Early in the proceedings the trial judge granted Carpenter's *Fed.R.Civ.P. 12(b)(6)* motion to dismiss for **[**2]** failure to state a claim against it, finding the complaint insufficiently alleged Carpenter's participation in a conspiracy. The judge later granted Burger King's and Davmor's *Fed.R.Civ.P. 56(b)* motion for partial summary judgment on the tying claims, and at the same time issued a final order dismissing the entire action, including any remaining Sherman and Clayton Act claims. [1.]

Perington challenges on appeal the propriety of the judge's disposition of the federal antitrust contentions, arguing that its complaint sufficiently stated claims for relief, [2.] and that summary judgment should not have been granted on the tying claims.

[3]** **[*1371]** The factual allegations in Perington's complaint, as amended, which we assume to be true for purposes of considering the propriety of the dismissal for failure to state recognizable claims, are as follows. Perington is engaged in the business of supplying food and nonfood products to restaurants in Colorado and Wyoming. Burger King both franchises and operates fast food restaurants in that trade area and elsewhere. Perington entered into a contract with Davmor by which Davmor agreed to sell "paper products, promotional items, condiments and frozen foods" to Perington for distribution and resale to Burger King restaurants that chose to deal with Perington. Davmor, a wholly-owned subsidiary of Burger King, operated a nationwide commissary system for supplying Burger King restaurants with goods meeting Burger King quality standards. Although Davmor supplied

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[1.] In this Final Order of Dismissal, filed August 23, 1977, in which the judge dismissed all other claims against those defendants, apparently on his own motion, express reference was made only to the monopoly claims, but we will treat the order as also a dismissal of the conspiracy claims against Burger King and Davmor under *Fed.R.Civ.P. 12(b)(6)*.

[2.] Davmor and Burger King argue that the *Fed.R.Civ.P. 12(b)(6)* dismissal of the claims against Carpenter is not properly before this court, that order allegedly having become final before the trial court's final order of dismissal. Carpenter did not make an appearance in this appeal, although it was properly served with notice of appeal. We conclude Perington may challenge that order. In multiparty actions such as this, unless the trial judge expressly directs entry of a final judgment as to less than all the parties in accordance with the requirements of *Fed.R.Civ.P. 54(b)*, the order does not become final until entry of judgment adjudicating all the claims, rights and liabilities of all the parties. *Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363, 1364 (10th Cir. 1977)*; *Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974)*. Since the trial judge did not make such an entry, the order was not final until the final order of dismissal from which Perington appeals. An appeal from a final judgment draws into question all nonfinal orders preceding it. *Herron v. Rozelle, 480 F.2d 282, 285 (10th Cir. 1973)*; 9 Moore's Federal Practice P 203.18 (2d ed. 1975). The notice of appeal was not misleading and the docketing statement filed according to *Tenth Cir. R. 8* fairly apprised the parties, including Carpenter, of the issues to be argued. Therefore, we conclude the questioned matters are properly before this court.

directly restaurants in many areas of the country, it was unable to do so in Colorado. Perington's services were therefore engaged to fill this void.

The agreement, as implemented by Davmor, required that any products bearing the Burger King trademark, service mark or private label (logoed products) sold by Perington **[**4]** be acquired from Davmor, which was the exclusive source of some logoed products and the prime, though not only, source of other such items. The agreement did not impose a similar requirement concerning nonlogoed products available from Davmor. The agreement was terminable by either party for any reason.

Thereafter, Perington bought from Davmor most of the logoed products it needed for resale, but filled its needs for logoed paper cups from a different supplier. This supplier, unnamed in the complaint, was authorized by Burger King to market paper cups bearing the logo. These were known as "Solo" brand cups; Davmor supplied "Sweetheart" cups.

Notwithstanding a letter from Davmor calling to Perington's attention its breach of the exclusive supply provision, Perington continued to supply the restaurants with Solo brand cups, which it apparently acquired at a lower price than Davmor would sell Sweetheart cups. Davmor then cancelled the agreement, and Burger King wrote a letter to at least some of the restaurants notifying them that Perington had been terminated, giving reasons for the termination which Perington asserts were untrue and libelous. Thereafter, Carpenter became Davmor's **[**5]** new distributor for paper products. Due to the termination of the agreement, Perington was unable to sell any products to Burger King restaurants. (Copies of the agreement, the cancellation letter and the Burger King letter to some of its franchisees or outlets were attached to the complaint).

I

Sufficiency of Complaint to Withstand Motion to Dismiss

The essential function of a complaint under modern pleading is twofold to give opposing parties fair notice of the basis of the claim against them so they may respond to the complaint, and to apprise the court of sufficient allegations to allow it to conclude, if the allegations are proved, that the claimant has a legal right to relief. ***HN1***[] Thus, if an opposing party cannot formulate a responsive pleading because the factual allegations are too sparse, it is entitled to move for a more definite statement. *Fed.R.Civ.P. **[*1372]** 12(e)*. ***HN2***[] On the other hand, the trial court must conclude "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" before the pleadings can be dismissed under *Rule 12(b)(6)*. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 **[**6]** (1957)*.

A. Sufficiency to Give Fair Notice of Basis of Claim

Perington's original complaint made the conspiracy assertion in the following language: "Plaintiff is informed and believes, and upon information and belief alleges that defendants conspired to cancel (the agreement)." Davmor and Burger King answered, but Carpenter filed a *Rule 12(b)(6)* motion to dismiss, arguing that the allegation of its participation in the conspiracy was conclusory and therefore insufficient to state a claim for relief. The trial judge granted Carpenter's motion and gave Perington twenty days to amend the complaint in order to properly allege Carpenter's participation.

The amended complaint, filed on July 18, 1975, contained an additional count, asserted "against Carpenter Paper Company, only." Perington's allegations in that count, again asserted upon information and belief, essentially restated the allegation of the original complaint; no substance was added. [3.]

[7]** The trial judge then granted Carpenter's renewed motion to dismiss on the ground that

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[3.] Because we have concluded that the amendment added nothing to the original complaint, we need not deal with Davmor's and Burger King's contention that the additional count's reference to Carpenter "only" somehow requires a different result concerning the allegations against them.

> (t)he Amendment to the Complaint does not specify in any manner the facts with respect to Carpenter's conduct which would make it a part of that conspiracy or combination.
> The Court also observes that this action has been pending since November 26, 1974, when the Complaint was filed; that the granting of the Motion to Dismiss previously provided for an amendment; that the plaintiff has had an adequate opportunity to develop the facts, if there are any facts, to establish liability of this defendant, and has failed to do so.

In this case it cannot be said that defendants did not have fair notice of Perington's claims, or that beyond doubt the plaintiff would be unable to prove the claim of conspiracy. The conduct complained of termination of the distributorship is adequately specified, and the allegation of conspiracy related to that conduct. Nothing in the complaint negates the claim of conspiracy. Whether the allegation is called conclusory, as it is, or factual, as it is also, is not determinative. *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 74 S. Ct. 452, 98* ***[**8]*** *L. Ed. 618 (1954)*.

Moreover, pleading on "information and belief" in appropriate circumstances fits well with the spirit of the rules. We agree with *Carroll v. Morrison Hotel Corp., 149 F.2d 404 (7th Cir. 1945)*, which reasoned that although the Rules do not specifically provide for such pleading,

> *Rule 8(f)* states that "All pleadings shall be so construed as to do substantial justice"; consequently to refuse to give credence to them on defendants' motion to dismiss would be opposed to the spirit of the Rules. Furthermore, Rule 11 provides that the signature of an attorney to the pleading is a certificate that "to the best of his knowledge, information, and belief" there appears to be good ground to support the pleading; so the concept of "information and belief" is recognized under the Rules, and there appears to be no good reason why such pleading is not permissible, as in the instant case, where the matters are peculiarly within the knowledge of the defendants.

149 F.2d at 406. Cf. *Bertucelli v. Carreras, 467 F.2d 214, 215 n.4 (9th Cir. 1972)* (information was not peculiarly within the knowledge of defendants). See 5 C. Wright & A. Miller, Federal Practice & Procedure: **[**9]** Civil **[*1373]** § 1224 (1969). In antitrust actions such as this, "where the proof is in the hands of the alleged conspirators," *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*, allowing such pleading when the conduct complained of is otherwise fairly noticed seems appropriate. As noted by the Supreme Court in Conley, which involved an assertion that specific facts must be pleaded,

> ***HN3***[] All the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of *Rule 8(f)* that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice **[**10]** of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

355 U.S. at 47-48, 78 S. Ct. at 103 (footnotes omitted). Therefore, we hold the allegations gave fair notice of the basis of the claim sufficient to withstand the motion to dismiss. [4.]

[4.] Defendants would make much of the fact that Perington conducted no discovery, although it allegedly had ample opportunity to develop facts to show in detail the nature of the alleged violations. While we do not condone Perington's dilatory conduct of the litigation, we cannot agree that failure to discover, when the complaint is otherwise adequate, justifies dismissal for failure to state a claim for relief. If a party has had ample opportunity to discover, yet has not, the opposing party may move for summary judgment under *Rule 56* and thereby put the claimant to its proof on the merits. *Natrona Service, Inc. v. Continental Oil Co., 598*

[11]** B. Sufficiency to Show Legal Right to Relief

Perington pleaded that defendants conspired to terminate the agreement and replace Perington with Carpenter, and that the arrangement as enforced resulted in a substantial lessening of competition in the market for logoed cups, restrained trade, and conspired or attempted to monopolize the right to supply Burger King franchises. Sections 1 and 2 of the Sherman Act and sections 2 and 3 of the Clayton Act, as well as the Colorado ***antitrust law***, were cited without labeling particular acts as violations of specific sections. It is not necessary, of course, that the particular theory or law under which recovery is sought be pleaded, nor are the dimensions of a lawsuit determined by the pleadings. *Misco Leasing, Inc. v. Keller, 490 F.2d 545, 548 (10th Cir. 1974)*. ***HN4***[] But the complaint must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief. See *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. The question, therefore, is whether the facts alleged would support a right to relief cognizable under the statutes invoked by Perington.

1. *Section 1* of the Sherman **[**12]** Act

Section 1 of the Sherman Act, *15 U.S.C. § 1*, ***HN5***[] does not necessarily prohibit a conspiracy to substitute a new distributor for an existing one. E. g., *Craig v. Sun Oil Co., 515 F.2d 221 (10th Cir. 1975)*, cert. denied, *429 U.S. 829, 97 S. Ct. 88, 50 L. Ed. 2d 92 (1976)*. Competition, the ward of the Sherman Act, may not suffer by such a substitution, and may in fact be enhanced. See *Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214-15 (9th Cir. 1970)*, cert. denied, *401 U.S. 939, 91 S. Ct. 934, 28 L. Ed. 2d 219* ***[*1374]*** *(1971)*. If, however, the substitution is motivated by a desire to damage Perington or put it out of business, or the result is to substantially lessen competition, the Sherman Act is violated. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)*, cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*; *Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963)*, cert. denied, *385 U.S. 976, 87 S. Ct. 507, 17 L. Ed. 2d 438 (1966)*; *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283* (6th Cir.), cert. denied, *375 U.S. 922, 84 S. Ct. 267, 11 L. Ed. 2d 166 (1963)*; *Englander Motors, Inc. v.* ***[**13]*** *Ford Motor Co., 267 F.2d 11 (6th Cir. 1959)*.

The original complaint asserts a conspiracy to cancel the agreement, and because of the cancellation Perington was unable to sell to Burger King franchisees and outlets. The amended complaint recites the conspiracy to terminate, and that the "purpose and intended effect was to restrain and prevent further activity" by Perington in the relevant market, and the activity was "an attempt to monopolize the right to supply Burger King franchises and retail stores." But it also asserts Davmor demanded that Perington buy Sweetheart paper cups from it, instead of the Solo brand cups it was acquiring elsewhere, and that the reason for cancelling the agreement was Perington's refusal to comply with that demand.

We do not construe the complaint to allege a primary motivation to damage Perington, or to put it out of business as a competitor of Carpenter or Davmor. Rather, the reasonable construction is that the termination was motivated by Davmor's desire to increase its share of the relevant market for paper cups. So viewed, the complaint must stand or fall upon whether there are factual allegations that if proved tend to show an actual lessening **[**14]** of competition, a restraint of trade.

The complaint describes an exclusive supply agreement which was cancelled for allegedly anticompetitive motives. ***HN6***[] An exclusive supply agreement entails a commitment by a buyer to deal only with a particular seller. A requirements contract is functionally the same if it commits the buyer to acquire all the products it needs from the seller. L. Sullivan, Handbook of the Law of Antitrust § 163 (1977). The agreement need not specifically require the buyer to forego other supply sources if the practical effect is the same. Cf. *United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457, 42 S. Ct. 363, 66 L. Ed. 708 (1922)* (Clayton Act, *section 3* case). The antitrust vice of these arrangements is the foreclosure of part of the market in which the seller competes by taking away the freedom of the buyer to choose from the products of competing traders in the seller's market. See *United States v. Columbia Steel Co., 334 U.S. 495, 524, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)*. Because these arrangements may

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F.2d 1294 (10th Cir. 1979). See also *First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Modern Home Inst., Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102 (2d Cir. 1975)*.

actually enhance competition, however, they are not deemed per se illegal. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333, 81 S. Ct. **[**15]** 623, 5 L. Ed. 2d 580 (1961)*. ***HN7***[] Thus, a complaining trader must allege and prove that a particular arrangement unreasonably restricts the opportunities of the seller's competitors to market their product. *United States v. Columbia Steel Co., 334 U.S. 495, 524, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)*. The actual dollar amount of the total trade is not important in these dealership cases, rather it is the nature and tendency of the agreement. *Perryton Wholesale, Inc. v. Pioneer Distrib. Co., 353 F.2d 618, 622 (10th Cir. 1965)*; *New Home Appliance Center, Inc. v. Thompson, 250 F.2d 881, 884 (10th Cir. 1957)*.

A problem with the instant complaint is that while it asserts Perington was foreclosed from selling apparently anything, including Solo cups, to Burger King restaurants, the wholesale agreement attached to the complaint expressly states that it is nonexclusive and that "no franchisee of Burger King corporation is required to purchase any item whatsoever from Wholesaler." Further, Perington's complaint alleges Burger King gave "untrue, unjustified and libelous per se " reasons to its restaurants for the cancellation.

The competition being lessened by the defendants' actions, if any, **[**16]** must be in the paper cup market, or perhaps in all supplies of which Davmor was not the sole licensee **[*1375]** under the Burger King logo policy. Thus, if the restaurants are free to purchase from any wholesaler there is no lessening of competition cognizable under the antitrust laws, although Perington may have a tort claim for libel.

We read these complaints liberally, however, as indicated in *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Despite the tort allegation, a reasonable inference from the complaint, as amplified by its exhibits, is that the trade practice, if not a tacit requirement imposed by Burger King and/or Davmor, is that all Burger King outlets and franchisees buy all their logoed supplies from only one supplier, i. e. one in the position Perington occupied. The Burger King letter (Exhibit C) supports that inference by stating "Even though some of you had expressed no reason or desire to change purveyors . . . I hope that you realize that this decision was made because Carpenter Paper Company will give better service and prices than you are experiencing with Perington." Thus, if coercion is exercised by Davmor and Burger King to freeze **[**17]** out other suppliers, then there could be a substantial lessening of competition in the market for supplying the restaurants. But if the restaurant managers are free to deal with Perington and others, on all items not available exclusively through Davmor, then there would not be a lessening of competition in violation of the antitrust laws.

We hold the complaint states a cause of action under *section 1* of the Sherman Act. Perhaps Burger King, or its subsidiary Davmor, could supply all logoed paper cups and other items to its outlets and franchisees without violation of the antitrust laws. But once independent businesses are employed in its distribution structure, it cannot accede to the demands of one competitor-distributor to lessen competition in that entity's market. *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)*. If Carpenter is a knowing participant in an exclusive dealing contract having that effect, it would be liable. The fact Perington had itself signed such an agreement would not preclude it from suing on the antitrust violation. See *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed.* **[**18]** *2d 982 (1968)*.

2. *Section 3* of the Clayton Act [5.]

Section 3 of the Clayton Act, *15 U.S.C. § 14*, ***HN8***[] prohibits an exclusive dealing arrangement when its effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *Section 3* is designed to catch in its net those arrangements that if left unchecked probably would blossom into actual restraints violating *section 1* of the *Sherman Act. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 42 S. Ct. 360, 66 L. Ed. 653 (1922)*. ***HN9***[] To prove a violation of *section 3*, a plaintiff must show the exclusive dealing arrangement has or probably will foreclose competition in a substantial share **[**19]** of a line of commerce. *Tampa*

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5. Even though Perington's complaint pursued only the theory of a tying arrangement violating this statute, we must examine the complaint to determine if the allegations support relief on any possible theory. See *Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967)*; 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1357 (1969).

Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961); *Standard Oil Co. v. United States, 337 U.S. 293, 314, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*.

Thus the same analysis discussed above in connection with *section 1* of Sherman Act supports a claim under *section 3* of the Clayton Act. Perington's allegations, liberally construed, correspond with the requirements established by the Supreme Court in Tampa Electric for proving a *section 3* case. See *365 U.S. at 327-35, 81 S. Ct. 623*. The line of commerce the market for supplying Burger King logoed cups is identified; the relevant market area of effective competition is suggested to be Wyoming and Colorado; a substantial share of the competition in that market was or probably would be foreclosed if the Burger King restaurants are required to buy only Davmor's products. We cannot conclude that without doubt Perington would be unable to prove a *section 3* violation against the three defendants.

[*1376] 3. *Section 2* of the Sherman Act

a. Attempt to Monopolize

In its complaint, as amended, Perington asserts that defendants attempted to monopolize the "right to supply **[**20]** Burger King franchises and retail stores," in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2*. We interpret this to mean an attempt to monopolize the market for all items food and nonfood, logoed and nonlogoed purchased by the Burger King restaurants located in the Wyoming and Colorado trade area. In its Final Order of Dismissal, without elaboration, the trial judge dismissed these claims as conclusory and insufficient to state a claim upon which relief could be granted. We conclude that concerning Burger King and Carpenter the complaint does fail; concerning Davmor, this claim for relief was sufficiently alleged.

HN10[] To show a cause of action based upon the *section 2* offense of attempting to monopolize, a plaintiff must sufficiently allege the defendant's specific intent to monopolize and the dangerous probability that the attempt would result in a monopoly. *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 791* (10th Cir.), cert. denied, *434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977)*. This latter requirement entails showing the relevant market and the power of the defendant in it. *E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 306 (10th Cir. 1975)*, **[**21]** cert. denied, *425 U.S. 907, 96 S. Ct. 1501, 47 L. Ed. 2d 758 (1976)*.

The relevant allegations against Davmor in this context are essentially the same as those relating to the *section 1* theory discussed above. Having concluded that Perington's allegations show a claim sufficient to survive a challenge to the pleading that competition in the Burger King restaurant market may be substantially lessened by Davmor's device of cancellation of Perington for not buying the logoed "Sweetheart" cups, the question here is whether Perington's allegations show a dangerous probability that Davmor would thereby acquire monopoly power in the market for supplying all items to Burger King restaurants.

Perington's complaint alleges that Davmor is the exclusive source for many of the market's products and a prime source for others, and thus dominates the relevant market. As discussed above, the allegation that upon termination Perington was eliminated completely from the market, in context with the letter of Burger King to its franchisees attached as an exhibit, supports a reasonable inference, albeit not compelled, that Davmor's use of the device resulted in the complete exclusion of Davmor's competitors **[**22]** from the relevant market. In view of Davmor's alleged dominant position, the complaint sufficiently alleges the dangerous probability that monopoly power would result, and we cannot say beyond doubt that Perington would be unable to show the specific intent to monopolize.

The "attempt to monopolize" claim against Burger King, however, was properly dismissed; the issue here is different from that concerning Davmor. ***HN11***[] The gravamen of an offense involving monopolization is the power of the defendant in the market in which it competes. See generally L. Sullivan, Handbook of the Law of Antitrust §§ 12-21 (1976). The mere fact that a company exerts control within its own vertical framework through trademarks or otherwise does not speak to the question of power in its own market. See *United States v. Du Pont De Nemours Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Burger King competes in the fast-food industry and Perington's allegations do not address that market at all. Accordingly, the claim against Burger King was properly dismissed.

For similar reasons, the claim against Carpenter is insufficient. The complaint shows on its face that Carpenter does not compete **[**23]** in the market in which Davmor operates, for it acts as a direct supplier, not an intermediate supplier. We cannot conclude under these circumstances that Carpenter could have monopolized the market for all goods used by Burger King restaurants.

b. Conspiracy to Monopolize

The remaining Sherman Act question is whether the allegations support a **[*1377]** claim that defendants conspired to monopolize the market for all goods used by Burger King restaurants. [6] ***HN12***[] Conspiring to monopolize is a separate offense under *section 2*, requiring less in the way of proof than the other *section 2* offenses. In this context, a plaintiff need show defendants' specific intent to monopolize "any part" of interstate commerce. *Salco Corp. v. General Motors Corp., Buick Div., 517 F.2d 567, 576 (10th Cir. 1975)*. The market power in a "relevant market" need not be proved. Id. Perington's complaint alleges intent; it also specifies the targeted part of interstate commerce to be the market for supplying the restaurants located in the Colorado and Wyoming trade area. The issue presented here is whether traders oriented vertically to each other can be found in violation of *section 2* by conspiring to monopolize **[**24]** one horizontal market intersecting the vertical arrangement. That is, although Burger King and Carpenter were not attempting to exclude their competitors, does their complicity in Davmor's efforts to exclude its competitors support a possible finding of a conspiracy to monopolize any part of interstate commerce? Under the circumstances of this case, we believe it does.

The literal words of the statute do not supply an obvious answer to this issue; a conspiracy aimed at "any part" of interstate commerce is prohibited, however, thus suggesting one horizontal market in which at least one coconspirator competes suffices. On the other hand, it also refers to conspiring "to monopolize," suggesting that each coconspirator must intend exclusion of its own competitors, i. e., a purely horizontal conspiracy.

HN13[] It has long been recognized that **[**25]** *sections 1* and *2* of the Sherman Act overlap in part and also supplement each other. *Standard Oil Co. v. United States, 221 U.S. 1, 59-62, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. *Section 1* can be said to be directed in the main to devices or conduct that destroy competition; *section 2* prohibits the anticompetitive result described as monopolization. *American Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. ***HN14***[] Although the offense of conspiring to monopolize appears to address the means by which competition is harmed, the gravamen of that offense is the intent to achieve the unlawful result. "It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." *Id. at 809, 66 S. Ct. at 1139*.

The fact that Davmor's coconspirators competed in markets different from Davmor's market does not preclude finding a conspiracy to monopolize Davmor's market. It does, however, potentially impact upon whether Burger King and Carpenter had the specific intent to erect that monopoly because they would not benefit from the foreclosure of Davmor's competitors in the classical sense, i. e., there was no identity **[**26]** of competitors and hence no elimination of their competitors. Each arguably would benefit, however, from participating in Davmor's anticompetitive arrangement Carpenter as a direct supplier of Davmor products and Burger King as Davmor's parent corporation and thus arguably had reason to conspire with Davmor. This, of course, is an evidentiary question to be determined on the merits. At this stage of the proceedings, it is sufficient to conclude that the complaint supports a claim of conspiracy to monopolize against all three defendants.

II

The Tying Claim

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[6] Whether Perington's complaint asserts the claim of conspiring to monopolize is ambiguous, but in view of the liberal rules of pleading, we conclude it fairly raises this claim.

Perington's original complaint, inter alia, alleged an unlawful tying arrangement 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*. The alleged tied products were Sweetheart cups; no tying products were specified in the complaint, although the classic tying arrangement requires both a tying and a tied product. *Colorado Pump & Supply Co. v. Febco, 472 F.2d 637, 640* (10th Cir.), cert. denied, *411 U.S. 987, 93 S. Ct. 2274, 36 L. Ed. 2d 965 (1973)*.

[*1378] In an answer to interrogatories, Perington identified the tying product as "the right to sell to Burger **[**27]** King franchisees," but in its brief opposing defendants' *Fed.R.Civ.P. 56(b)* motion for partial summary judgment on these issues it shifted to the theory that the tying product was the right to use the Burger King logo. At a hearing before the trial judge, Perington was confronted with this Court's holding in *Redd v. Shell Oil Co., 524 F.2d 1054 (10th Cir. 1975)*, cert. denied, *425 U.S. 912, 96 S. Ct. 1508, 47 L. Ed. 2d 762 (1976)*, and abandoned its contention that the tying product was the right to use the Burger King logo. Instead, Perington argued that unspecified promotional products bearing the Burger King logo were the tying products. Perington contended that in order to acquire these products, allegedly available only from Davmor, it had to buy the tied product, Sweetheart cups, even though it could obtain suitable cups elsewhere. Because of the confusing changes in the theory of liability and because Perington could not identify the promotional products, the trial judge ordered Perington to supplement its complaint by specifically delineating the identity of the promotional products and the dates of offers conditioned on the tied product also being purchased.

Perington thereafter **[**28]** filed a second amended complaint setting forth seven specific items, noting that the list was only partial. Contrary to the court's order, the complaint did not identify when the items were conditionally offered to Perington. Defendants renewed the *Rule 56(b)* motion. Perington responded with a statement opposing the renewed motion and attached thereto the affidavit of Alton L. Perington, its President. The affidavit asserted the only facts known to Perington were that the promotional products were sold as part of promotions made after termination of the contract. The accompanying memorandum stated that information concerning promotions conducted "since" the contract's termination were peculiarly within the knowledge of defendants.

Thereafter, the trial court ordered final dismissal of Perington's tying claims, reasoning that items sold pursuant to promotions after the termination of the contract could not have been tying products. The court also noted the history of Perington's attempts to make a case of illegal tying and that it had been given more than an adequate opportunity to develop its case.

From our consideration of the record, as summarized above, we hold the trial **[**29]** court correctly granted defendants' motion for partial summary judgment. [7.] While summary judgments in antitrust litigation are to be used sparingly and are seldom justified. *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 74 S. Ct. 452, 98 L. Ed. 618 (1954)*, the circumstances of this case compel the conclusion that Perington failed to survive the challenge to the merits of its claim.

After considerable assistance by the trial court in identifying its theory, followed by an order that it specifically identify the tying products and when they were conditionally offered, Perington attempted to survive the challenge by claiming the necessary proof was in the hands of defendants. Perington, however, was **[**30]** ordered to supply information concerning offerings to it made before the termination of the contract, information that, under its final theory, had to be in its own possession. Put finally to its proof, Perington simply did not come forward. See *Natrona Service, Inc. v. Continental Oil Co.. 598 F.2d 1294 (10th Cir. 1979)*. We cannot accept Perington's desire "to get to a jury on the basis of the allegations in (its) complaint( ), coupled with the hope that something can be developed at trial in a way to support those allegations. . . ." *First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968)*.

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7. While the trial court treated the affidavit as "an additional amendment to the amended complaint, as amended," the order related to the *Rule 56(b)* motion and an evidentiary question. We therefore treat the affidavit as a matter outside of the pleadings and the order as one granting summary judgment.

[*1379] At the eleventh hour before oral argument of this appeal Perington submitted a supplemental brief raising the issue whether "the right to sell to Burger King franchisees" can be a tying product within the meaning of the antitrust laws. Because Perington explicitly abandoned this theory in response to a direct question by the trial court, we decline to consider this issue and express no opinion thereon.

The judgment is affirmed in part, reversed in part, and remanded with direction for further proceedings consistent herewith.

[31]** WILLIAM E. DOYLE, Circuit Judge, concurs in the opinion but in view of the remand for trial would not affirm the partial summary judgment on the tying claim.

ON REHEARING

In its petition for rehearing, Carpenter Paper Company called to our attention documents that were not before the Court when we determined that Perington had adequately raised in its appeal the propriety of the *Fed.R.Civ.P. 12(b)(6)* order dismissing Carpenter from the suit. Carpenter contends that Perington did not intend to appeal the *Rule 12(b)(6)* dismissal when the notice of appeal was filed. We granted rehearing, giving Perington Wholesale, Inc. an opportunity to answer Carpenter's arguments.

Carpenter contends the following evidence requires us to conclude Perington did not intend to appeal the dismissal of Carpenter from the lawsuit: it was not served with the notice of appeal, as inferentially supported by a letter from the clerk of the district court sent to counsel of the other parties concerning designation of the record on appeal; the notice of appeal listed only Burger King and Davmor in the caption; and the notice of appeal specified only appeal from "the final Order of Dismissal entered on the **[**32]** 23rd day of August, 1977." We disagree.

Our jurisdiction is limited to the judgment, order, or part thereof designated in the notice of appeal, *Scaramucci v. Dresser Industries, Inc., 427 F.2d 1309, 1318 (10th Cir. 1970)*, but the notice of appeal is not to be given a wooden interpretation. See *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Herron v. Rozelle, 480 F.2d 282, 285 (10th Cir. 1973)*. The question is whether the notice of appeal and subsequent appellate proceedings support the inference that at the time of filing the notice, appellant sought to appeal the unspecified order. *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Elfman Motors, Inc. v. Chrysler Corp., 567 F.2d 1252, 1254 (3d Cir. 1977)*. This is true even if the specified order appears unambiguous. *Vigil v. United States, 430 F.2d 1357 (10th Cir. 1970)*.

HN15[] To perfect an appeal, a party must file a notice of appeal that "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." *Fed.R.App.P. 3(c)*. Nothing in the rules requires a listing of the appellees; thus, **[**33]** it is not fatal that Carpenter did not appear in the caption of the notice of appeal.

The notice of appeal must be filed with the clerk of the district court within thirty days of the date of entry of the order of judgment appealed from. *28 U.S.C. § 2107*; *Fed.R.App.P. 4(a)*. The duty to serve the notice falls on the clerk of the district court, who failed to serve Carpenter. But this does not conclude the issue because *Fed.R.App.P. 3(d)* provides that the clerk's failure to serve the notice does not affect the validity of the appeal.

The designation in the notice of appeal of the order appealed from, quoted above, is at best ambiguous. The docketing statement, filed on October 26, 1977, pursuant to *Tenth Cir.R. 8*, did name Carpenter as an appellee and specified issues it would raise against Carpenter. This document and all motions and briefs thereafter filed in the appeal appear to have been mailed to Carpenter. The exhibits to Carpenter's petition for rehearing indicate that on February 9, 1978, it notified the Clerk of this Court of its objection to being treated as an appellee.

Appraising the above-stated objective facts, we see three possible inferences: that Perington **[**34]** always intended to appeal the **[*1380]** dismissal of Carpenter; that at the time Perington filed the notice of appeal it did not think of the order concerning Carpenter, but if it had, it would have intended to a appeal that order; or that Perington did not initially intend to appeal the order, but changed its mind before filing the docketing statement. We have no witching rod to divine Perington's subjective intent; and in a case like this we hold that the ambiguity should be resolved in favor of permitting the appeal to go forward. There is here no deception and prejudice to Carpenter. Since it did not receive the notice of appeal, Carpenter could not have been misled by the caption. The documents mailed to Carpenter fairly apprised it of the issues to be asserted against it with ample opportunity to prepare for the appeal. Carpenter could have filed with this Court a motion to dismiss for lack of jurisdiction pursuant to *Tenth Cir.R. 9* once it knew of Perington's intent to go forward against it, but did not.

The Clerk of this Court, in response to Carpenter's letter of February 9, 1978, instructed Carpenter's counsel to "do whatever the circumstances may warrant," i. e., **[**35]** to ignore the appeal at its peril. Carpenter, however, did not participate in the briefing and arguments on appeal, apparently based upon its view, which we reject, that no appeal was taken of the order dismissing it from the suit. Although Carpenter forfeited its right to be heard on the merits, this Court now chooses to grant Carpenter twenty days from the date of entry of this opinion to file a brief on the merits of its case, if it has contentions to make on the rulings decided against it. See *Fed.R.App.P. 3(a)*. The mandate against Carpenter will be withheld until the Court has considered any brief so filed.

There has also been filed herein a petition for rehearing by Perington with respect to those issues decided in our original opinion against it. That motion is denied by unanimous vote of the panel.

Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Asso.

United States District Court for the District of Kansas

November 7, 1979

No. 78-4094

Reporter

480 F. Supp. 640 *; 1979 U.S. Dist. LEXIS 8688 **; 1980-1 Trade Cas. (CCH) P63,125

Consolidated Farmers Mutual Insurance Co., et al. v. Anchor Savings Assn., et al.

Core Terms

mortgages, plaintiffs', antitrust, Sherman Act, hazard, secondary market, defendants', boycott, summary judgment, anti-competitive, insurance company, competitors, rating, supplier, concerted action, group boycott, conspiracy, concerted, anti trust law, rule of reason, manufacturer, customer, refusals, distributor, reinsurance, unilateral, originate, summary judgment motion, unreasonable restraint, restraint of trade

LexisNexis® Headnotes

Banking Law > ... > Banking & Finance > Regulators > US Federal Home Loan Bank System

Real Property Law > Financing > Secondary Mortgage Market > Federal National Mortgage Association

Real Property Law > Financing > Secondary Mortgage Market > General Overview

HN1[] **Regulators, US Federal Home Loan Bank System**

In *12 U.S.C.S. § 1719(a)*, the Federal National Mortgage Association is instructed: (1) to carry out the purposes set forth in *12 U.S.C.S. § 1716(a)* the operations of the corporation under *12 U.S.C.S. § 1719(a)* shall be confined, so far as practicable, to mortgages which are deemed by the corporation to be of such quality, type, and class as to meet, generally, the purchase standards imposed by private institutional mortgage investors.

Banking Law > ... > Banking & Finance > Regulators > US Federal Home Loan Bank System

Real Property Law > Financing > Secondary Mortgage Market > Federal Home Loan Mortgage Corporation

Real Property Law > Financing > Secondary Mortgage Market > General Overview

Real Property Law > Financing > Secondary Mortgage Market > Federal National Mortgage Association

HN2[] **Regulators, US Federal Home Loan Bank System**

Both the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation require that hazard insurance be provided by a company with at least a Class VI rating in Best's Insurance Reports.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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 > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Supporting Materials, Affidavits**

No summary judgment motion is lightly granted. Summary judgment is to be denied unless the moving party demonstrates entitlement to it beyond a reasonable doubt. The court must examine all the evidence in the light most favorable to the party opposing the motion. Affidavits are not a substitute for trial. Where different inferences can be drawn from conflicting affidavits and depositions, summary judgment should be denied.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Sherman Act > 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

HN4[] **Summary Judgment, Evidentiary Considerations**

Admonitions against the granting of summary judgment motions in an antitrust case are not warrants for every plaintiff who can draft an antitrust complaint, no matter how groundless or improbable its allegations, to force his claim to trial despite its deficient factual underpinnings. Where the court has permitted extensive discovery, and where the requirements of *Fed. R. Civ. P. 56* are satisfied, the court may properly grant a motion for summary judgment. Moreover, when that discovery has failed to reveal any evidence to support the plaintiffs' claims, and the record contains an overwhelming amount of evidence which contradicts the plaintiffs' conspiracy allegation and poses a variety of non-conspiratorial motives, for the defendants' acts, rooted in business judgment, the defendants are entitled to summary judgment. When it becomes plain that the allegedly unlawful acts do not exist, and the plaintiffs' claims are without merit, the court has a duty to grant summary judgment. Allegations which are "glib and conclusory" are insufficient to raise genuine issues of material fact once they have been specifically denied in sworn affidavits and depositions.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Evidence > ... > Testimony > Competency > Affirmations & Oaths

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN5[] **Supporting Materials, Affidavits**

Where the defendants have expressly denied by sworn testimony the plaintiffs' allegations of conspiracy to monopolize or restrain trade, it is up to the plaintiffs to produce significant probative evidence by affidavit or deposition demonstrating that a genuine issue of fact existed as to this element of the complaint, if summary judgment is to be avoided. Summary judgment cannot be defeated by the vague hope that something may turn up at trial.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN6[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, reads, in part, as follows: every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

In order to prevail on a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must show (1) concerted action, and (2) an unreasonable restraint of trade. Additionally, in order to establish federal jurisdiction, a plaintiff must show that the restraint in question has a sufficient effect upon interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] **Antitrust & Trade Law, Sherman Act**

In order to establish the existence of the "contract, combination, or conspiracy" referred to in *15 U.S.C.S. § 1*, a plaintiff must show: (1) two or more persons (2) acting in concert. The second requirement, concerted action, is usually defined as referring to a consensus or agreement by the parties to act together. The element of concerted action is especially critical to a *§ 1* claim. Essential to every *§ 1* offense is concert of action between separate business entities. It is axiomatic that unilateral activity by a single firm cannot be reached via this section.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Something more than mere acquiescence in the seller's offending policy would be required to support a finding of the existence of that agreement or understanding essential, in the absence of monopoly, to making out a violation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Parallel business activity does not itself constitute a violation of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Because parallel conduct in itself establishes nothing of legal significance, an antitrust plaintiff must rely upon the surrounding circumstances to establish the basis for an inference of concerted activity. Such surrounding circumstances must demonstrate two elements before concerted action may be inferred: (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 > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Claims**

If *§ 1* of the Sherman Act were to be read in the narrowest possible way, any commercial contract could be deemed to violate it. It is well-established, however, that the federal antitrust statutes are not intended and have not been construed to interfere with ordinary commercial practices in interstate commerce which are bona fide and not in restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

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 > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN13[] **Tying Arrangements, Defenses**

Various forms of trade restraints are "per se" violations of the Sherman Act. Certain arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition. Once the existence of such an arrangement has been established, no evidence of actual public injury is required, and no evidence of the reasonableness of defendant's conduct will be considered in justification. This rule of per se illegality has been applied thus far to horizontal and vertical price fixing agreements, division of markets between competitors, tying arrangements, and certain collective refusals to deal, or "group boycotts."

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN14[] **Practices Governed by Per Se Rule, Boycotts**

The courts have found boycotts to constitute per se Sherman Act violations only if they fit within one of three categories: (1) horizontal combinations to exclude competitors; (2) vertical combinations to exclude competitors; and (3) combinations designed to influence trade practices of boycott victims. When confronted with concerted refusals to deal that do not fit the classic "group boycott" pattern, the courts almost without exception have held the per se rule inapplicable.

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**

Per se treatment of business activity is not lightly invoked: 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. Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive.

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

HN16[] **Practices Governed by Per Se Rule, Boycotts**

The per se boycott rule is applicable only when the concerted action is specifically directed at third parties. The per se rule is not applicable when conduct only incidentally or indirectly causes a termination in trade relations with a third party.

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 "rule of reason" entails basically a weighing process: under the rule of reason, a restraint must be evaluated to determine whether it is significantly anti-competitive 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 "anti-competitive 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.

Antitrust & Trade Law > Sherman Act > General Overview

Banking Law > ... > Banking & Finance > Regulators > US Federal Home Loan Bank System

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN18[] **Antitrust & Trade Law, Sherman Act**

The standard applied by the Federal National Mortgage Association, which requires that hazard insurance be provided by a company with at least a Class VI rating in Best's Insurance Reports is reasonable. It serves a legitimate business interest and is therefore not offensive to the Sherman Act. So long as the actions are reasonable, they need not constitute the "least restrictive alternative" available.

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

Bad business judgment does not constitute a Sherman Act violation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN20[] Monopolies & Monopolization, Attempts to Monopolize

A company has the right to choose with whom it will deal and on what terms. In the absence of any purpose to create or maintain a monopoly, the Sherman 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.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN21[] Scope, Monopolization Offenses

15 U.S.C.S. § 2 prohibits the actions of those who monopolize, attempt to monopolize, or conspire to monopolize.

Counsel: [1]** L. M. Cornish, Jr., Glenn, Cornish, Leuenberger, Chartered, Topeka, Kan., Sheridan Morgan, Donald H. Loudon, Morris, Larson, King, Stamper & Bold, Kansas City, Mo., for plaintiffs Consolidated Farmers Mutual Insurance Co. and Kansas Mutual Insurance Co.

James R. Loftis, III, James W. Olson, Bergson, Borkland, Margolis & Adler, Washington, D. C., Leonard O. Thomas, Weeks, Thomas, Lysaught, Bingham & Mustain, Kansas City, Kan., Robert L. Hamann, Prairie Village, Kan., for defendant Anchor Savings Association.

James D. Waugh, Cosgrove, Webb & Oman, Topeka, Kan., John P. Arness, Jack McKay, David B. Waller, Hogan & Hartson, Washington, D. C., for defendant Federal National Mortgage Association.

Herbert H. Hopper, Wichita, Kan., for defendant Fidelity Investment Co.

Opinion by: ROGERS

Opinion

[*643] MEMORANDUM AND ORDER

INTRODUCTION

This is an antitrust action brought pursuant to *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and under unspecified sections of the Kansas antitrust laws contained in *K.S.A. 50-101 Et seq.*

Plaintiffs Consolidated Farmers Mutual Insurance Company and Kansas Mutual Insurance Company are two Kansas insurance companies which as part of their **[**2]** businesses sell real property hazard insurance.

Defendant Anchor Savings Association is a Kansas savings and loan association. Defendant Fidelity Investment Company is a Kansas mortgage banker. Defendant Federal National Mortgage Association nMA is a federally chartered, privately owned [1.] **[**3]** corporation which was created "to provide supplementary assistance to the secondary market for home mortgages by providing a degree of liquidity for mortgage investments." *12 U.S.C. § 1716(a)*. When the case began, a fourth defendant was the Federal Home Loan Mortgage Corporation (FHLMC), a quasi-public corporation authorized by Congress in *12 U.S.C. § 1451 Et seq.* to aid the secondary market. By order of September 8, 1978, this Court **[*644]** dismissed FHLMC from the action on grounds of statutory immunity. [2.]

A brief background is necessary to an understanding of the nature of the action. When a home is purchased the prospective homeowner frequently obtains a mortgage loan from a savings and loan institution or a bank. This is the "primary" mortgage market. Defendants Fidelity and Anchor are in the business of originating mortgages in the primary market. In order to gain funds to make additional loans, Fidelity and Anchor sell these mortgages to institutional investors and entities such as FHLMC and FNMA. When the originator of a mortgage attempts to transfer it, the "secondary" mortgage market is involved. In the secondary market, FNMA and FHLMC facilitate the transfer of mortgages from originators to institutional investors, in part by establishing some uniformity in the mortgage transaction so that the institutional investor will have a better idea of what it is purchasing. Congress intended that the federally sponsored secondary mortgage market should provide standardized mortgage instruments. J. Murray and **[**4]** H. Judy, Uniform Multifamily Mortgage Instruments, 33 Bus.Law. 2303, 2359 (1978).

Congress mandated that FHLMC and FNMA should follow certain guidelines to guarantee the quality of the mortgages handled. ***HN1***[] In *12 U.S.C. § 1719(a)*, FNMA is instructed:

> (1) To carry out the purposes set forth in paragraph (a) of *section 1716* of this title, the operations of the corporation under this section shall be confined, so far as practicable, to mortgages which are deemed by the corporation to be of such quality, type, and class as to meet, generally, the purchase standards imposed by private institutional mortgage investors. . . .

See also *12 U.S.C. § 1454(a)(1)*.

In order to meet the Congressional mandate, FNMA and FHLMC have established several standards relating to various aspects of the mortgages they purchase. One of these standards regards the hazard insurance covering the property which secures the mortgages purchased. ***HN2***[] Both FNMA and FHLMC require that such hazard insurance be provided by a company with at least a Class VI rating in Best's Insurance Reports. [3.] FNMA adopted

[1.] Both plaintiffs' complaint and this Court's order of September 8, 1978, mistakenly refer to FNMA as a "quasi-public" corporation. Prior to 1968, the federal government did own the preferred stock of FNMA. However, the Housing and Urban Development Act of 1968, *12 U.S.C. §§ 1716b*, *1717(a)(2)*, partitioned FNMA into the Government National Mortgage Association (GNMA), under the jurisdiction of the Department of Housing and Urban Development, and FNMA became a wholly private corporation serving a public purpose.

[2.] This dismissal order is now on appeal to the Tenth Circuit Court of Appeals.

this requirement in July, 1974. [4] In 1975, FNMA determined to accept mortgages covered by hazard insurance **[**5]** provided by companies which did not meet the appropriate standard but provided reinsurance certificates by companies which did.

Anchor, which for many years has had a similar requirement regarding the insurance policies for mortgages it created, changed its standard in 1978 from the higher Best's X rating **[**6]** to a Best's VI rating. Fidelity changed its standards in 1974 to the Class VI rating in light of the fact that the majority of its home loan production was originated for sale to either FNMA or GNMA.

A Class VI rating means that an insurance company has net resources of $ 1,500,000 to $ 2,500,000. Neither plaintiff is large enough to obtain a Best's Class VI rating. For that reason, unless they make suitable arrangements for reinsurance the plaintiffs are unable to provide hazard insurance coverage for property securing mortgages which defendants Anchor and Fidelity originate with the intent of selling to FNMA, GNMA, or FHLMC.

[*645] The plaintiffs claim that the Class VI requirement is "arbitrary and without foundation", and that its promulgation by FNMA and FHLMC and the other defendants' acts of honoring that requirement constitute a "combination and boycott" in violation of federal and state antitrust laws.

This action now comes before the Court upon the motions for summary judgment filed by remaining defendants FNMA, Anchor, and Fidelity.

DISCUSSION

The major issue presented by the pending summary judgment motions is whether plaintiffs have a viable claim under *Section **[**7]** 1* of the Sherman Act. Boiled down to basics, defendants' briefs argue that plaintiffs' *§ 1* cause of action is defective in three particulars: (1) plaintiffs cannot show concerted action; (2) plaintiffs cannot show an unreasonable restraint of trade; and (3) plaintiffs cannot show an impact upon interstate commerce.

Summary Judgment

Before discussing the legal issues presented by plaintiffs' antitrust claims, we take cognizance of the applicable procedural standards. It is familiar law that ***HN3***[] no summary judgment motion is lightly granted. Summary judgment is to be denied unless the moving party demonstrates entitlement to it beyond a reasonable doubt. *Madison v. Deseret Livestock Co., 574 F.2d 1027, 1037 (10th Cir. 1978)*; *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, 36 (10th Cir. 1975)*. The court must examine all the evidence in the light most favorable to the party opposing the motion. *Mogle v. Sevier County School Dist., 540 F.2d 478, 482 (10th Cir. 1976)* Cert. denied, *429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977)*; *Frey v. Frankel, 361 F.2d 437, 442 (10th Cir. 1966)*. Affidavits are not a substitute for trial. *Madison v. Deseret Livestock Co., supra, **[**8]** 574 F.2d at 1036*; *Eagle v. Louisiana Southern Life Ins. Co., 464 F.2d 607, 608 (10th Cir. 1972)*. Where different inferences can be drawn from conflicting affidavits and depositions, summary judgment should be denied. *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)*.

The Court is aware that precautions against hasty termination of a potentially meritorious action are especially crucial in the area of antitrust. *Poller v. C. B. S., Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. Nevertheless, summary judgment can be appropriate even in an antitrust action should the party opposing such a motion fail to respond to a legally sufficient motion supported by affidavits with a showing of specific facts demonstrating the existence of genuine issues of material fact for trial. *Stevens v. Barnard, 512 F.2d 866, 878*

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[3] The A.M. Best Company has issued reports on insurance companies since 1900. It is now the only major specialized insurance reporting and rating service in the United States. Best's provides two ratings. First is the "Financial Size Category" with which we are primarily concerned here. The second is the "Policyholders' Rating" which gives Best's opinion as to the relative permanence and safety of each company. Best's ratings are widely used in the mortgage field.

[4] Actually, in 1974 Best's "Financial Size Category" was rated alphabetically. Thus, FNMA and FHLMC adopted a BBB+ rating. In 1976 Best's converted from an alphabetical to a numerical system and Class VI became the appropriate rating.

(10th Cir. 1975); *Whitfield v. Gangas, 507 F.2d 880, 882 (10th Cir. 1974)*. Before granting motions for summary judgment in *Natrona Service, Inc. v. Continental Oil Co., 435 F. Supp. 99, 106-107 (D.Wyo.1977)*, *Aff'd 598 F.2d 1294 (10th Cir. 1979)*, Judge Brimmer of Wyoming wrote that ***HN4***[] admonitions against the granting of such motions **[**9]** in an antitrust case

> are not warrants "for every plaintiff who can draft an antitrust complaint, no matter how groundless or improbable its allegations, to force his claim to trial despite its deficient factual underpinnings. *Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1086-87 (M.D.Fla.1973)*. Where the Court has permitted extensive discovery, and where the requirements of *Rule 56, Federal Rules of Civil Procedure*, are satisfied, the Court may properly grant a motion for summary judgment. *Umdenstock v. American Mortgage and Inv. Co., 495 F.2d 589 (10th Cir. 1974)*. Moreover, when that discovery has failed to reveal any evidence to support the plaintiffs' claims, and the record contains an overwhelming amount of evidence which contradicts the plaintiffs' conspiracy allegation and poses a variety of non-conspiratorial motives, for the defendants' acts, rooted in business judgment, the defendants are entitled to summary judgment. *First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Semke v. Enid Auto Dealers' Ass'n, 456 F.2d 1361 (10th Cir.* ***[*646]*** *1972)*. When it becomes plain that the allegedly unlawful acts do not exist, **[**10]** and the plaintiffs' claims are without merit, the Court has a duty to grant summary judgment. *Capital Temporaries, Inc. v. Olsten Corp., 365 F. Supp. 888 (D.Conn.1973)*, *Aff'd, 506 F.2d 658 (2d Cir. 1974)*.
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> Allegations which are "glib and conclusory" are insufficient to raise genuine issues of material fact once they have been specifically denied in sworn affidavits and depositions. *Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n, 380 F. Supp. 1382 (D.Conn.1974)*. In addition, ***HN5***[] where the defendants have expressly denied by sworn testimony the plaintiffs' allegations of conspiracy to monopolize or restrain trade, "it (is) up to the plaintiffs to produce Significant probative evidence by affidavit or deposition demonstrating that a Genuine issue of fact existed as to this element of the complaint, if summary judgment is to be avoided." *Scranton Constr. Co. v. Litton Indus. Leasing Corp., 494 F.2d 778, 782 (5th Cir. 1974)*, Cert. denied, *419 U.S. 1105, 95 S. Ct. 774, 42 L. Ed. 2d 800 (1975)* (Emphasis added); *ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52 (9th Cir. 1975)*; Clark v. United Bank of Denver, supra.
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> Summary judgment cannot be defeated "by the **[**11]** vague hope that something may turn up at trial." *Perma Research and Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969)*. Where, as here, the plaintiffs have failed to turn up substantial evidence in support of their conspiracy theory, and the defendants have introduced extensive and substantial evidence negating the theory, it is unreasonable to assume a trial would provide the plaintiffs with any greater opportunity to prove their theory, especially when the most that can be hoped for is to discredit the defendants' witnesses at trial. Under these circumstances, no question of fact is presented. (*435 F. Supp. at 136-137*)

Judge O'Connor of this District made a similar statement in *Frackowiak v. Farmers Ins. Co., Inc., 411 F. Supp. 1309, 1319-1320 (D.Kan.1976)*:

> . . . this case represents an instance in which "injury resulting from normal business hazards is sought to be redressable by casting the affair in antitrust terms" that simply do not fit the case. *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 474, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458, 465 (1962)* (Harlan, J., dissenting). As recently as 1968, the United States Supreme Court rejected the suggestion **[**12]** that "*Rule 56(e)* should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations." *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569, 592 (1968)*. In that case, the Court held, "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to

> the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." Id.

This case has now been on file for 20 months. Much discovery in the form of depositions and interrogatories has been undertaken. Although plaintiffs protest that the pending motions are premature, they have not shown the Court that any discovery remains to be done as to Material issues of fact which are now unresolved. None of the areas in which plaintiffs now seek to delve **[**13]** is relevant to the material issues presented by the pending motions. Plaintiffs have had ample opportunity to partake in discovery as to the relevant issues, and the record compiled before the Court is quite clear.

A very strong blow to plaintiffs' prematurity argument is struck by defendants' willingness to concede virtually every factual **[*647]** allegation lodged by plaintiff, thus converting the dispute into one composed almost totally of issues of law rather than issues of fact. In its reply brief to plaintiffs' brief in opposition to the summary judgment motions, defendant Anchor wrote:

> . . . while Anchor disputes the ultimate, legal conclusions of combination and of unreasonable restraint argued by plaintiffs, and while many of plaintiffs' claims are ambiguous, inaccurate and unsupportable, for purposes of this motion, we do not dispute, to paraphrase plaintiffs' own memorandum in opposition: (1) that Anchor adopted a standard which led to the creation of a standard mortgage package to be produced within Kansas for sale in the secondary market (Plaintiffs' Opposition, p. 2); (2) that plaintiffs were excluded from the hazard insurance marketplace (assuming plaintiffs **[**14]** chose not to avail themselves of the reinsurance option which Anchor made available) by deliberate actions, i. e., requirements of defendants (Plaintiffs' Opposition, p. 2); (3) that the identical requirements as to a Best's rating were and are used by Anchor and the other defendants (Plaintiffs' Opposition, p. 3); (4) that the secondary market for mortgages is a vital part of Anchor's business (Plaintiffs' Opposition, p. 3); (5) that the circumstances or necessity for entry into the secondary market through sales to defendant, Federal National Mortgage Association dictated compliance or conformance with a standard for hazard insurance at least equal to that of FNMA (Plaintiffs' Opposition, p. 3); (6) that plaintiffs have been excluded from the marketplace of the creation of mortgages by Anchor so long as they do not meet Anchor's standard in order, among other reasons, for Anchor to make its goods (mortgages) attractive for buyers in the secondary market without regard to the individual quality of plaintiffs' product (insurance) which everyone agrees must be a part of the goods produced for the secondary market (Plaintiffs' Opposition, p. 3) (as noted Anchor would consider whether **[**15]** the secondary market standards were less than necessary to meet Anchor's needs and deemed it infeasible to review the management capabilities and financial stability of every insurance company with which its customers might do business; see the Affidavit in Support of Anchor's motion); (7) that mortgagors are denied access to mortgage financing by Anchor and Fidelity, unless they accede to the terms set by Anchor and Fidelity and thereby plaintiffs are denied a chance to compete for that hazard insurance which constitutes an integral part of the mortgage package of financing (assuming they choose not to avail themselves of the reinsurance option) (Plaintiffs' Opposition, p. 4); (8) that in a number of instances mortgagors have paid more of a premium for hazard insurance than would have been paid by purchasing insurance from one of the plaintiffs (Plaintiffs' Opposition, p. 5); (9) that it is a benefit to Anchor that Anchor is able to create an instrument which is salable in the secondary market to prospective purchasers throughout the country and this constitutes a major item of its business (Plaintiffs' Opposition, p. 5); and, (10) that Anchor had reason to exclude entities which **[**16]** did not meet its criteria, such as plaintiffs, from writing hazard insurance on mortgages created by Anchor (assuming plaintiffs chose not to avail themselves of the reinsurance option) because, among other reasons, such exclusions made Anchor's mortgages more salable in the secondary market. (Plaintiffs' Opposition, p. 5) (Doc. # 50, pp. 5-6)

Given the facts firmly established by previous discovery and the facts admitted by moving defendants, we conclude that the motions for summary judgment are ripe for disposition.

The question presented for our resolution is clear. FNMA buys mortgages on the secondary market. Rather than examine the financial situation of the thousands of insurance companies in this country which provide hazard insurance, FNMA established an objective standard, Best's Class VI **[*648]** rating, to identify acceptable hazard insurance carriers for the mortgages it purchases. A threshold size requirement was considered necessary, in part, to insure that coverage would be adequate if a major disaster occurred. In part because Anchor and Fidelity desire to sell the mortgages they originate to FNMA and FHLMC, they have also adopted the Class VI rating to **[**17]** make their mortgages more salable. These standards block plaintiffs out of the market, no matter how financially stable and well managed they may be. The legal issue is whether these facts establish an antitrust violation. We believe the answer is in the negative.

Sherman Act, *§ 1*

As mentioned previously, the major issue presented for our consideration is whether plaintiffs have a viable claim under ***HN6***[] *§ 1* of the Sherman Act, *15 U.S.C. § 1*, which reads, in pertinent part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

HN7[] In order to prevail on a *§ 1* claim, a plaintiff must show (1) concerted action, and (2) an unreasonable restraint of trade. *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*; *American Telephone & Telegraph Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1088 (S.D.Miss.1976)*, *Aff'd 579 F.2d 972 (5th Cir. 1978)*. Additionally, in order to establish federal jurisdiction, a plaintiff must show that the restraint in question has a sufficient effect upon interstate **[**18]** commerce. *Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-785, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*; *Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 743-745, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *United States v. Yellow Cab Co., 332 U.S. 218, 225, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*; *Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1324 (10th Cir. 1977)*. Defendants contend that plaintiffs' claims fall short in all three areas. We agree with defendants regarding the first two issues, and feel no need to discuss the close question of impact upon interstate commerce.

Concerted Action.

HN8[] In order to establish the existence of the "contract, combination, or conspiracy" referred to in *15 U.S.C. § 1*, a plaintiff must show:

> . . . (1) two or more persons (2) acting in concert. The second requirement, concerted action, is usually defined as referring to a consensus or agreement by the parties to act together. (16 J. Von Kalinowski, Business Organizations: Antitrust and Trade Regulations § 6.01(3), pp. 6-42 to 6-43 (1979))

The element of concerted action is, as noted above, especially critical to a *§ 1* claim. *Spectrofuge Corp. v. Beckman Instruments, Inc.,* ***[**19]*** *575 F.2d 256, 286 (5th Cir. 1978)* Cert. denied *440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979)*, emphasized:

> Essential to every *§ 1* offense is concert of action between separate business entities. It is axiomatic that unilateral activity by a single firm cannot be reached via this section.

See also *Card v. National Life Insurance Co., 603 F.2d 828, 834 (10th Cir. 1979)*; *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 916-917 (8th Cir. 1976)*; *Ford Motor Company v. Webster's Auto Sales, Inc., 361 F.2d 874, 878 (1st Cir. 1966)*.

The evidence in this case demonstrates that no concert of action occurred. The depositions and affidavits before the Court make it clear that defendants did not contract, combine, conspire, consult, or even communicate with one another regarding the adoption of the Best's Class VI rating requirement. Even plaintiffs have asserted that FNMA Unilaterally adopted the Class VI standard in 1974. Later, Anchor and Fidelity independently adopted the same standard. It is not disputed that Anchor and Fidelity were motivated, at least in part, by a perceived need to make the mortgages **[*649]** they originated more salable **[**20]** in the secondary market. [5.]

[5.] Anchor claims that its Class VI requirement is also based upon its desire to protect its shareholders and depositors, this being part of the reason why Anchor had an even higher rating requirement for many years prior to 1974.

That FNMA unilaterally established a standard to which Anchor and Fidelity later "acquiesced" does not establish concerted action within the meaning of the *Sherman Act. Frackowiak v. Farmers Ins. Co., Inc., supra, 411 F. Supp. at 1319*. Thus, in *Polytechnic Data Corp. v. Xerox Corp., 362 F. Supp. 1, 8 (N.D.Ill.1973)*, the court noted:

> Polytechnic has alleged that Xerox has combined with certain of its lessees who have "acquiesced" in the prohibition of the attachment of devices to its machines. . . . These charges do not contain the "collaborative element" of a combination or conspiracy required by the Sherman Act. Dart Drug Corp. v. Parke, Davis & Co., supra (120 U.S.App.D.C. 79, 344 F.2d 173 (D.C.Cir. 1965)).

And regarding a similar context **[**21]** it has been written:

> ***HN9***[] . . . something more than mere acquiescence in the seller's offending policy would be required to support a finding of the existence of that agreement or understanding essential, in the absence of monopoly, to making out a violation of the antitrust laws. (Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847, 859 (1955))

In light of the fact that all of the direct evidence, and it is substantial, points to a conclusion that no concerted activity occurred in this case, plaintiffs ask the Court to infer such activity from the parallel actions of the defendants. Plaintiffs ask this Court to infer more than is justified by the law or the facts of this case. Conscious parallelism alone does not establish a *§ 1* violation. In *United States v. CIBA-GEIGY Corp., 1976-1 Trade Cases, P 60,908*, pp. 68,935, 68,960 (D.N.J.1976), the court stated simply: ***HN10***[] "Parallel business activity does not itself constitute a violation of the Sherman Act," citing *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*. It has been written:

> Attempts to rely upon conscious parallelism to transform **[**22]** unilateral refusals into an allegedly collective refusal have generally been unsuccessful. (A.B.A., ***Antitrust Law*** Developments 16 (1975))

See also *First National Bank v. Cities Service, supra, 391 U.S. at 287, 88 S. Ct. 1575*; *Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 245 (10th Cir. 1976)* Cert. denied, *429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977)*; *Modern Home Institute, Inc. v. Hartford Acc. & Ind. Co., 513 F.2d 102, 110 (2d Cir. 1975)*; *Independent Iron Works, Inc. v. United States 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)*; *Weit v. Continental Illinois Nat. Bank & Trust Co., 467 F. Supp. 197, 210 (N.D.Ill.1978)*; *Hunt v. Mobil Oil Corp., 465 F. Supp. 195, 229 (S.D.N.Y.1978)*; *Raitport v. Chase Manhattan Capital Corp., 388 F. Supp. 1095, 1100 (S.D.N.Y.1975)*; Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655, 657-658 (1962).

HN11[] Because parallel conduct in itself establishes nothing of legal significance, an antitrust plaintiff must rely upon the surrounding circumstances to establish the basis for an inference of concerted **[**23]** activity. Such surrounding circumstances must demonstrate two elements before concerted action may be inferred:

> . . . two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior (are): (1) a showing of acts by defendants in contradiction of their own economic interests, *Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3rd Cir. 1961)*, Cert. denied, *369 U.S. 839, 82 S. Ct. 867, 7 L. Ed. 2d 843 (1962)*; and (2) satisfactory demonstration of a motivation to enter an agreement, *First Nat'l Bank v. Cities Service* ***[*650]*** *Co., 391 391 U.S. 287, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*. (*Venzie Corp. v. United States Mineral Prod. Co., Inc., 521 F.2d 1309, 1314 (3d Cir. 1975))*

See also *Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978)*; *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)*; A.B.A., Antitrust Developments, Supra at 35; Turner, Supra, 75 Harv.L.Rev. at 681.

Because all three moving defendants have a strong interest in requiring that the insurance company which provides hazard insurance **[**24]** for the property securing their mortgages is financially stable, it is certainly not "in contradiction of their own economic interests" for these defendants to establish a Class VI requirement. Nor has plaintiffs' evidence satisfactorily demonstrated a motive for defendants to enter into an agreement regarding such a requirement. Defendants are in no way economically involved in the markets in which plaintiffs compete and therefore have no motivation to wish plaintiffs good or ill.

In sum, the direct evidence in the record overwhelmingly establishes that defendants did not act in concert when they each established a Class VI requirement of hazard insurance companies. The doctrine of parallel activity does not provide a basis for a finding to the contrary. Therefore, a critical element in a *15 U.S.C. § 1* cause of action is missing in this case. Summary judgment could be granted on this basis alone, for it is clear that a mere unilateral refusal to deal does not constitute a Sherman Act violation.

Unreasonable Restraint of Trade.

Even if we were to assume for purposes of argument that the acquiescence of Anchor and Fidelity in the standards set by FNMA constituted the concerted **[**25]** action required by the Sherman Act, we still could not find that plaintiffs have shown a proper claim in this case. The mere fact of combination or conspiracy does not alone establish *§ 1* liability. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969)* Cert. denied, *396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*; *Natrona Service, Inc. v. Continental Oil Co., supra, 435 F. Supp. at 108*. Plaintiffs must also establish an "unreasonable restraint of trade."

Does defendants' conduct (assuming for argument that concerted activity has been shown) constitute an impermissible restraint of trade? It has been frequently noted that the wording of *§ 1* is so broad as to prohibit many kinds of perfectly normal business transactions:

> The Supreme Court has observed that ***HN12***[] if *Section 1* of the Sherman Act were to be read in the narrowest possible way, any commercial contract could be deemed to violate it. *United States v. Topco Associates, Inc., 405 U.S. 596, 606, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515, 524 (1972)*; *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683, 687 (1918)*. It is well-established, **[**26]** however, that the federal antitrust statutes were not intended and have not been construed to interfere with ordinary commercial practices in interstate commerce which are bona fide and not in restraint of trade. E. g., *Naifeh v. Ronson Art Metal Works, Inc., 218 F.2d 202 (10th Cir. 1954)*. (*Frackowiak v. Farmers Ins. Co., Inc., supra, 411 F. Supp. at 1316*)

See also *Associated Press v. United States, 326 U.S. 1, 23, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)* (Douglas, J., concurring); *Neeld v. National Hockey League, 594 F.2d 1297, 1298 (9th Cir. 1979)*; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 79*; *Mardirosian v. American Institute of Architects, 474 F. Supp. 628, 636 (D.D.C.1979)*.

Notwithstanding the broad wording of *§ 1*, the Supreme Court established early on that only "unreasonable" restraints of trade were prohibited by *§ 1*. *Standard Oil v. United States, supra.* The "rule of reason" remains the prevailing mode of analysis under *§ 1*. *Smith v. Pro Football, Inc., 193 U.S.App.D.C. 19, 24, 593 F.2d 1173, 1178 (D.C. Cir. 1979)*.

[*651] Due to the fact that application of the "rule of reason" test can be an arduous task, the courts **[**27]** have established a judicial shortcut by holding that ***HN13***[] various forms of trade restraints are "per se" violations of the Sherman Act. In *E. A. McQuade Tour, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 186 (5th Cir. 1972)*, Cert. denied, *409 U.S. 1109, 93 S. Ct. 912, 34 L. Ed. 2d 690 (1973)*, the court stated:

> Certain arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition. See *Northern Pacific Ry. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. Once the existence of such an arrangement has been established, no evidence of actual public injury is required, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961)*, and no evidence of the reasonableness of defendant's conduct will be considered in justification. See *Northern Pacific, supra.* This rule of Per se illegality has been applied thus

> far to horizontal and vertical price fixing agreements, division of markets between competitors, tying arrangements, and certain collective refusals to deal, or "group boycotts."

Group boycotts are a well **[**28]** established form of Per se violative activity (*United States v. General Motors Corp., 384 U.S. 127, 145-146, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-213, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *Fashion Originators' Guild v. F. T. C., 312 U.S. 457, 468, 61 S. Ct. 703, 85 L. Ed. 949 (1941))*, and it is within this exception to the "rule of reason" that plaintiffs attempt to categorize defendants' conduct. Perhaps the most critical question presented by the pending motions is whether defendants' conduct can be considered a group boycott deserving of Per se treatment.

Although group boycotts are generally considered Per se violations of the Sherman Act, certain conduct which is similar to a group boycott has been validated by the courts which have held either that the activity was not a boycott or that this type of boycott was not a Per se Sherman violation. Although the state of the law in this area is quite confused (*Cullum Elec. & Mechanical v. Mechanical Contractors, 436 F. Supp. 418, 428 (D.S.C.1976)* *Aff'd 569 F.2d 821 (4th Cir. 1978)*, Cert. denied *439 U.S. 910, 99 S. Ct. 277, 58 L. Ed. 2d 255*), we think ample authority **[**29]** exists for a finding that the activity asserted in this case is not a boycott of the type condemned Per se by the Sherman Act.

Regarding the definition of "boycott", the Supreme Court recently wrote in *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541, 98 S. Ct. 2923, 2930, 57 L. Ed. 2d 932 (1978)*:

> The 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, patronage or services from the target.

In the antitrust field, the "classic" group boycott has been defined as

> . . . 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. The group may accomplish its exclusionary purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them, or, in some cases, by refusing to deal with would-be competitors themselves. In each instance, however, The hallmark **[**30]** of the "group boycott" is the effort of competitors to "barricade themselves from competition at their own level." It is this purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott Per se rule. (emphasis added) (*Smith v. Pro Football, Inc., supra, 593 F.2d at 1178*)

See also Alpha-Sentura Business Services, Inc. v. Interbank Card Ass'n, 48 U.S.L.W. 2244 (D.Md. 9/11/79).

[*652] A recent analysis of the boycott law suggests that ***HN14***[] the courts have found boycotts to constitute Per se Sherman Act violations only if they fit within one of three categories: (1) horizontal combinations to exclude competitors; (2) vertical combinations to exclude competitors; and (3) combinations designed to influence trade practices of boycott victims. [6.] *Smith v. Pro Football, Inc., supra, 593 F.2d at 1178, n. 18*. See also *Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119, 124 (8th Cir. 1973)*; *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, supra, 467 F.2d at 186-187*; *West Texas Utilities Co. v. Texas Elec. Service, 470 F. Supp. 798, 816 (N.D.Tex.1979)* C. Hills (ed.), Antitrust Adviser 34 (2d ed. **[**31]** 1978), Annot., 41 A.L.R.Fed. 175 § 8 (1979). The Smith opinion went on to state that:

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6. To put this another way, in order for a boycott to constitute a Per se violation, it must have as its purpose either the exclusion of a competitor or some other anticompetitive goal. Alpha-Sentura Business Services, Inc. v. Interbank Card Ass'n, supra ; *Chastain v. American Telephone & Telegraph Co., 401 F. Supp. 151, 161 (D.D.C.1975)*; *Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 304 (D.Mass.1975)*.

> When confronted with concerted refusals to deal that do not fit the classic "group boycott" pattern, the courts almost without exception have held the Per se rule inapplicable. (593 F.2d at 1179, n. 22)

We believe the Per se rule inapplicable here because this case does not present activity that could be characterized as a boycott falling within one of the three categories listed above. Plaintiffs do not compete with defendants. The Class VI requirement in no way (either horizontally, vertically, **[**32]** or diagonally) excludes competitors from defendants' markets of competition. Nor can the Class VI requirement be said to be designed to "influence the trade practices" of the boycott victims, the plaintiffs. The Class VI requirement was not adopted by FNMA to alter plaintiffs' behavior in any fashion; rather, plaintiffs were simply beneath FNMA's notice when the standards were adopted. Absolutely no anti-competitive purpose appears to have been in any way related to the adoption of the Class VI requirement by defendants. [7.]

[33]** It is important to remember that ***HN15***[] Per se treatment of business activity is not lightly invoked:

> 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." (*Smith v. Pro Football, Inc., supra, 593 F.2d at 1181*)

Thus, in *Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, the Supreme Court said that "Per se rules of illegality are appropriate only when they relate to conduct that is Manifestly anti-competitive."

It cannot be said that conduct is manifestly anti-competitive where, as here, absolutely no anti-competitive intent or motive existed. 16J Von Kalinowski, Supra, at § 76.02, p. 76-11 ("Rule of reason boycotts are not inspired by anti-competitive motives.") Nor can manifestly anti-competitive conduct be found when the anti-competitive effect is, as here, merely incidental. *Neeld v. National **[**34]** Hockey League, supra, 594 F.2d at 1299-1300*; 16J Von Kalinowski, Supra § 76.04(2), p. 76-41. See also 16J Von Kalinowski at § 76.02(1), p. 76-15:

> **[*653]** ***HN16***[] The Per se boycott rule is applicable only when the concerted action is specifically directed at third parties. The Per se rule is not applicable when conduct only incidentally or indirectly causes a termination in trade relations with a third party.

Because the law is clear that Per se treatment is not appropriate for defendants' conduct, the most plaintiffs can argue for is application of the "rule of reason." ***HN17***[] The "rule of reason" entails basically a weighing process:

> Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anti-competitive 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 "anti-competitive evils" of the challenged practice must be carefully balanced against its "procompetitive **[**35]** virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition. (*Smith v. Pro Football, Inc., supra, 593 F.2d at 1183*)

Even were the "rule of reason" to be applied, plaintiffs must fail. On the one hand, plaintiffs have not demonstrated that the anti-competitive effects of the Class VI requirement would be significant at all in terms of the impact upon

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[7.] Plaintiffs claim that the Supreme Court's recent decision in *St. Paul Fire & Marine Ins. Co. v. Barry, supra, 438 U.S. at 531, 98 S. Ct. 2923*, substantially broadened the definition of boycott in the antitrust context. However, it appears that Barry merely held that a "boycott" includes at least the practice involved in that case, I. e., an agreement by which one company "induced its competitors to refuse to deal on any terms with its customers." *Smith v. Pro Football, Inc., supra, 593 F.2d at 1180, n. 22*. Such a factual situation is not present here. Further, Barry once again made it clear that not all concerted refusals to deal are Per se invalid. *Neeld v. National Hockey League, supra, 594 F.2d at 1298-1299 n. 3*.

the relevant market. This is especially so in light of the fact that plaintiffs have full access to the market if they merely use reinsurance certificates.

On the other hand, Congress has mandated that FNMA accept only mortgages which are "of such quality, type, and class" as to meet the standards of institutional investors. Further, FNMA is to promote uniformity in the field. Use of a standard governing hazard insurance promotes both those goals. Utilization of an objective standard is obviously necessary when one considers the tremendous volume of business being done in this area. In 1978, FNMA purchased 311,002 mortgages with an unpaid balance of $ 12,301,650,000. Anchor sold $ 16,478,360 worth of mortgages to FHLMC in 1978. Fidelity **[**36]** has approximately $ 140,000,000 in the mortgage portfolio which it services, about $ 62.8 million of this has been sold to FNMA or GNMA. With this volume of business, it is not feasible to adopt plaintiffs' suggestion that each insurance company be analyzed individually. This would be a costly and time-consuming process for there are over two hundred companies competing in the hazard insurance market in Kansas alone.

Plaintiffs claim that they are well-managed and therefore more sound financially than some companies larger in size. This may be true. However, if defendant FNMA reduced its standard to a smaller classification to include plaintiffs, or switched to reliance upon Best's "Policyholders' Rating", or made some other such adjustment, there would always be some other company which could sue making the same arguments which plaintiffs lodge in this case.

HN18[] The standard applied by defendants is reasonable. It serves a legitimate business interest and is therefore not offensive to the *Sherman Act. Neeld v. National Hockey League, supra, 594 F.2d at 1300*; *Polytechnic Data Corp. v. Xerox Corp., supra, 362 F. Supp. at 6, 8*; *Nankin Hospital v. Michigan Hospital Service, 361 F.* ***[**37]*** *Supp. 1199, 1207 (E.D.Mich.1973)*.

So long as the defendants' actions are reasonable, they need not constitute the "least restrictive alternative" available. *Foster v. Md., State Sav. & Loan Ass'n, 590 F.2d 928, 935 (D.C. Cir. 1978)*, Cert. denied, *439 U.S. 1071, 99 S. Ct. 842, 59 L. Ed. 2d 37 (1979)*; *American Motor Inns v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975)*; *Newberry v. Washington Post Co., 438 F. Supp. 470, 475 (D.D.C.1977)*.

We agree with defendants that plaintiffs' arguments reveal the fact that the real nub of plaintiffs' complaint is not an antitrust **[*654]** claim at all. Rather, plaintiffs simply feel that defendants have made a mistake in adopting a standard which precludes dealing with two such reliable companies as plaintiffs. Unfortunately for plaintiffs' position, ***HN19***[] bad business judgment does not constitute a Sherman Act violation. *Natrona Service, Inc. v. Continental Oil Co., supra, 435 F. Supp. at 110*. Plaintiffs' remedy is not to being an antitrust action, but to present their case to FNMA's board of directors. Plaintiffs stand in the shoes of any company which has lost an account. They need to send a salesman to attempt to get it back.

Upon **[**38]** contemplation, the Court concludes that the record in this case shows nothing more than unilateral refusals to deal which do not constitute Sherman Act violations. FNMA has chosen a Class VI requirement because it suits FNMA's need for a uniform, objective standard. Anchor and Fidelity have chosen the same requirement in part because it makes their product more attractive to potential purchasers. Defendants have chosen to deal with larger insurance companies. They have not chosen to deal with plaintiffs unless plaintiffs utilize reinsurance. These are independent decisions which defendants can make with impunity under the antitrust laws. It was established long ago that ***HN20***[] a company has the right to choose with whom it will deal and on what terms. In *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)*, the Supreme Court said:

> 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 **[**39]** the circumstances under which he will refuse to sell.

See also *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1030 (2d Cir. 1979)*; *Lamb's Patio Theatre v. Universal Film Exchanges, 582 F.2d 1068, 1070 (7th Cir. 1978)*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir. 1978)* Cert. denied, *439 U.S. 1104, 99 S. Ct. 883, 59 L. Ed. 2d 65*; *Anaya v. Las Cruces Sun News, 455 F.2d 670, 672 (10th Cir. 1972)*; *Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971)*; *Natrona Service, Inc. v. Continental Oil Co., supra, 435 F. Supp. at 108*; *Frackowiak v. Farmers Ins. Co., Inc., supra, 411 F. Supp. at 1317*.

The courts have upheld refusals to deal on a myriad of grounds. In A.B.A., ***Antitrust Law*** Developments, Supra at 22-23 (and Supp.), it was noted:

> Thus, individual refusals to deal have been upheld when based upon the failure of a distributor to live up to the supplier's preferred quality type image, when reliable security for payment has not been given or payments have not been made, when the refusal was based on a chronic history of customer complaints, when competitive products were sold by a customer at lower prices or lower prices were available from **[**40]** other suppliers, when a customer would not enter into a 5-year contract, when the "refusal was based on the supplier's belief that his company had been treated badly," when the refusal to deal was initiated because of a refusal by distributors to supply a newspaper with a list of its subscribers, when a manufacturer decided to choose his own distributor or establish his own exclusive outlet, when a coupler manufacturer's policy was to sell only to original equipment manufacturers or to subcontractors who manufactured components directly for them, and when the transfer from one distributor to another has been solicited by the new distributor, (w)hen a hospital did not meet an insurance company's standards designed to promote the public welfare, when the refusal was motivated by a supplier's decision to abandon a geographic market, when a supplier changed his policy and initiated a nationwide cutback in the number of dealers for its products, when a commercial loan was denied because of the applicant's inadequate financial resources and managerial qualifications, when a distributor provided inadequate sales performance in an **[*655]** area of primary responsibility, when a refusal **[**41]** to continue to supply market research data was intended to prevent the disclosure of proprietary trade secrets to a customer who had become a competitor, when a refusal was based on a curtailment of noncontractual customers during a period of shortage, and when a distributor engaged in misbranding activities. (footnotes omitted)

Defendants' actions in this case are as legal and reasonable as those just listed. It is not for this Court to substitute its judgment for the business judgment of defendants. Plaintiffs have been unable to present any authority which supports the positions they assert in any similar legal context. The cases which are factually similar to the case at hand are all in defendants' column.

A very similar case is *Shawver & Son, Inc. v. Oklahoma Gas & Electric Company, 463 F.2d 204 (10th Cir. 1972)*, in which an owner directed its general contractors not to hire a certain subcontractor in their work for the owner. The subcontractor brought an antitrust action. The 10th Circuit had no trouble affirming the trial court's decision to grant defendant's motion for summary judgment, stating:

> Case law interpreting antitrust statutes has established that in **[**42]** the absence of any purpose to create or maintain a monopoly, anti-trust laws do not restrict the right of any concern to deal with whom it pleases. *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919)*; *Naifeh v. Ronson Art Metal Works, 218 F.2d 202 (10th Cir. 1954)*. (*463 F.2d at 205*)

In *Kendall Elevator Co., Inc. v. LBC&W Associates of S.C., Inc., 350 F. Supp. 75 (D.S.C.1972)*, defendant prepared architectural specifications for a building which required that the elevator supplier should be a manufacturer of major components "or equal". Plaintiff installed elevators, but was not a manufacturer and was therefore precluded from meeting the specifications. The plaintiff's antitrust claim was rejected. The court stated:

> As a general rule, a unilateral refusal to do business does not violate the antitrust laws so long as there is no purpose to create or maintain a monopoly. . . .

> The manufacturer of a product may select his customers and has the right to refuse to deal with anyone so long as such refusal is not in furtherance of a restrictive trade practice. An architect certainly has the same right. (*350 F. Supp. at 78*)

In a similar **[**43]** case, *Security Fire Door Company v. County of Los Angeles, 484 F.2d 1028 (9th Cir. 1973)* a plaintiff claimed an antitrust conspiracy among a county, its architects, and the supplier of a dumbwaiter system because the specifications for a county hospital construction project allegedly excluded all competition. The court rejected plaintiff's claim, holding:

> Once a purchaser's choice of product has been exercised competition is, of course, at an end. However, a purchaser is free to choose the product he desires without rendering himself an antitrust conspirator. The proscription against restraint of trade in this context seeks only to assure that the choice of product has been made freely under circumstances where the play of competition has been available rather than in response to anti-competitive factors such as coercion on the part of the supplier or agreements between suppliers not to compete with each other. (*484 F.2d at 1030*)

Plaintiffs are free to attempt to persuade FNMA to adopt a Best's classification which would not exclude them. Plaintiffs do not allege that insurance companies with a Best's VI classification have influenced defendants to adopt a classification **[**44]** which would exclude plaintiffs. The fact that no competitor of plaintiffs is a defendant in this action and that defendants have absolutely no competitive interest in the markets in which plaintiffs compete serves to highlight the inappropriateness of an antitrust cause of action in this factual situation.

In summary, we believe that plaintiffs are misusing the antitrust statutes by attempting **[*656]** to apply them to conduct which is obviously permissible and not anti-competitive. No *§ 1* Sherman Act violation can be found upon the allegations and facts presented in this case.

Other Claims

Plaintiffs have also lodged a *§ 2* Sherman Act claim and state ***antitrust law*** claims.

As defendants point out, and plaintiffs tacitly concede, a *§ 2* Sherman Act claim is not even properly alleged in this case. ***HN21***[] *15 U.S.C. § 2* prohibits the actions of those who monopolize, attempt to monopolize, or conspire to monopolize. Plaintiffs do not and cannot contend that the adoption of a Class VI requirement by defendants was an attempt by any of them to gain a monopoly in its particular market.

Because plaintiffs cannot show either a *§ 1* or *§ 2* claim under the Sherman Act, any pendent claims **[**45]** that state antitrust laws have been violated should be dismissed. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*; *Prince v. Wallace, 568 F.2d 1176, 1178 (5th Cir. 1978)*; *Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 261 (9th Cir. 1977)*; *Stevens v. Rock Springs National Bank, 497 F.2d 307, 310 (10th Cir. 1974)*.

CONCLUSION

Upon consideration of the entire record, the Court has no difficulty in reaching the conclusion that the motions for summary judgment must be granted.

IT IS SO ORDERED.
